

Serial No. 06
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. M.C. No. 25 of 2023 in
Crl. A. No. 16 of 2019

Date of Decision: 17.05.2023

The Investigation Officer,
Women Police Station

Vs.

Shri. Iaraplang Umdor

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. R. Gurung, GA with
Ms. A. Thungwa, GA
Ms. S. Shyam, GA

For the Respondent(s) : Mr. N.M. Mansuri, Adv. with
Mr. S. Syngkon, Adv.

ORDER (ORAL)

1. The case of the appellant is that in a case under the POCSO Act, 2012, wherein the respondent was facing trial being charged for committing an offence under Sections 3(a)/4 of the said Act read with Section 506 IPC, the matter had proceeded to the stage of recording of evidence of the prosecution's witnesses before the Special (POCSO) Court at Shillong.

2. The learned Special Judge at the stage of recording of evidence of the prosecution's witnesses, on the appearance of the complainant and the alleged victim girl, has recorded their evidence as PWs-1 and 2 respectively. This was done on a date fixed for the same, that is, 18.07.2019 where the Special P.P. and the Defence Counsel were present to conduct such examination.

3. In course of examination of the two witnesses mentioned above, the deposition of the said witnesses were not supportive of the prosecution's story and on the prayer of the learned Special P.P, they were declared as hostile witnesses and were accordingly cross-examined.

4. After the evidence of the two witnesses was recorded, the learned Special Judge on the basis of the contents thereof has come to the conclusion that PW-2, the mother of PW-1, has filed a false and fabricated FIR implicating the accused/respondent herein in a case of sexual assault which is a very serious charge. As from the evidence recorded, it is found that whatever allegations made against the accused/respondent was not for an offence of commission of sexual assault on the minor girl, but only because the complainant was angry with the accused/respondent since he has uttered slang and curse words

against her and her minor daughter. Accordingly, the learned Special Judge has discharged the accused/respondent from all liabilities in the case and he was set free from custody.

5. The appellant being aggrieved and dissatisfied with the said impugned order dated 18.07.2019, has accordingly approached this Court with an appeal under Section 378 Cr.P.C. with a prayer for setting aside and to quash the said impugned order.

6. It may be pointed out that the appellant while filing the appeal has failed to file an accompanying application for leave to file the appeal and on being allowed by this Court to do so, has filed the said application for grant of leave to appeal vide this misc. case.

7. In course of hearing of the said application for grant of leave to appeal, the respondent has raised the issue of maintainability of this appeal on the ground that the impugned order was not an order of acquittal but one of discharge of the accused/respondent and as such, if aggrieved by the said impugned order, the proper course would be by way of a revision petition but not an appeal and as such, this appeal is not maintainable.

8. Heard Mr. N.M. Mansuri, learned counsel for the respondent who has submitted that a reading of the impugned order would show that the Trial Court after the recording of the evidence of the complainant and the survivor in the case, has come to the conclusion that no case is made out against the accused/respondent herein and has accordingly discharged the accused/respondent from all liabilities in the case.

9. This, according to the learned counsel is a case of discharge and not acquittal as the provision of Section 232 Cr.P.C. has not been fully complied with since it is clearly stipulated that only after the evidence of all the prosecution's witnesses have been recorded and the accused examined, that is, under Section 313 Cr.P.C. and the argument of the parties heard, that the court can either acquit or convict the accused, which is not the case herein.

10. The learned counsel then went on to submit that in such a scenario, there could not have been any scope for any appeal against the impugned order, but perhaps a revision may lie against the same.

11. Per contra, Mr. R. Gurung, learned GA, speaking for the appellant has maintained that the impugned order passed was one of an acquittal and not discharge. In this regard, the provision of Section 227

Cr.P.C. was referred to, to show that at this stage, the court is called upon to consider the charges against the accused and on perusal of the materials on record and after hearing the parties, if the court finds that no charges has been made out against the accused, the accused will be discharged.

12. However, if the court finds that there is some element of truth in the charges against the accused, then after the stage under Section 227, the court under Section 228 of the Code shall frame charge(s) against the accused and trial will thereafter proceed by examination of witnesses etc.

13. In this case, the court has, upon consideration of charges, accordingly framed the charges against the accused/respondent. Therefore, it is incumbent upon the court to proceed for examination of the prosecution's witnesses and on conclusion thereof, to examine the accused and after hearing the parties, if in the findings of the court no case is made out against the accused, he can be accordingly acquitted. But this procedure was not followed by the learned Trial Judge, inasmuch as only two witnesses were examined, that is, the complainant and the survivor and no further witnesses were examined which includes the eye-witness to the incident and the medical

examiner who has drawn up the medical report. Even the accused/respondent was also not yet examined after the examination of the two prosecution's witnesses was recorded. Therefore without fully complying with the provisions as contained in Chapter XVIII of the Code the impugned order was passed, discharging the accused/respondent which is not permissible in law, submits the learned GA.

14. The learned GA has reiterated that the impugned order passed was not one of discharge as that stage was already over under Section 227, the Trial Court has therefore exercised the option of acquittal under the circumstances and as such, the impugned order is appealable.

15. In response to the argument raised by the learned GA, the learned counsel for the respondent has submitted that for an accused to be discharged, the same can be affected at any stage of the proceedings. In this regard, the case of ***Baburao Hari Pawar v. State of Maharashtra: (1987) CriLJ 584*** was referred to, wherein in a similar case, the Hon'ble Bombay High Court at para 15 of the same has observed as follows:

“15. The learned Public Prosecutor also urged that the trial had reached the stage of evidence, when accused 1 had filed an application for discharge. He also submitted that the learned

trial Judge has rightly rejected the application on the ground of delay. This submission is only to be mentioned for being rejected. The accused is entitled to ask for the discharge from the prosecution at any stage and there is no time limit for filing such an application. Delay even can be overlooked because a right to ask for discharge is always available to an accused at any stage of a trial. ...”

16. This Court on consideration of the submission made, the facts of the case being noted in the preceding paragraphs, what is required to be determined is whether vide the impugned order dated 18.07.2019 the respondent has been discharged or acquitted and whether due and proper process was followed by the Trial Court.

17. The learned counsel for the respondent has sought to impress upon this Court that after the recording of the evidence of PW-1 and PW-2, the survivor and her mother, who is the complainant, based on the contents of such deposition, the Trial Court applying its judicious mind had thought it fit to discharge the accused from all liabilities in the case at that juncture, presumably on the premise that continuation of the proceedings would not result in any positive outcome as regard the prosecution's case and would only prejudiced the liberty of the accused/respondent who may be subject to a long and protracted trial.

18. It is also the submission of the learned counsel that the Trial Court by discharging the accused/respondent at that point of time is

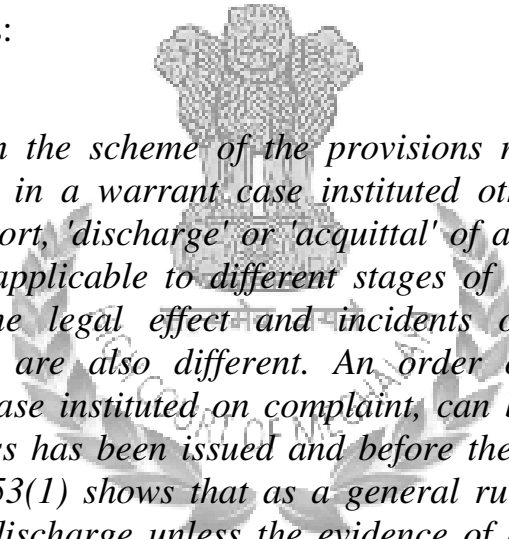
permissible, since it is the right of an accused to be considered for discharge and to be eventually discharged at any point of time in a criminal proceeding. The authority relied upon in this regard is the case of Baburao Hari Pawar (supra).

19. The learned GA, on the other hand, has maintained that the accused/respondent has not been discharged from the case since discharge of an accused has to be only under the provision of Section 227 of the Code and that too, after the court has taken into account the evidence on record to come to such a finding. After the court has come to a finding that an accused cannot be discharged under Section 227, charges are accordingly framed under Section 228 and therefore, if an accused is to be dropped from the proceedings after this stage, it can only be by way of an acquittal as is contemplated under Section 232, but not by 'discharge'.

20. This Court find substance in the argument of the learned GA and without reiterating on what has been submitted as regard the application and import of Section 227 and 228 read with Section 232 of the Code of Criminal Procedure, is of the opinion that in the procedure of trial of an accused under the said Code, once the stage to discharge the accused under Section 277 is over, the court is to proceed

for framing of charge under Section 228. There is no subsequent stage at which the accused can be discharged. What is left is either for the accused to be convicted or acquitted.

21. The dispute between the parties raised at this initial stage can safely be answered by a reference to the case of ***Ratilal Bhanji Mithani v. State of Maharashtra & Ors.*** (1979) 2 SCC 179, wherein a three-judge bench of the Hon'ble Supreme Court has at para 27 and 28 held as follows:



“27. From the scheme of the provisions noticed above it is clear that in a warrant case instituted otherwise than on a police report, 'discharge' or 'acquittal' of accused are distinct concepts applicable to different stages of the proceedings in Court. The legal effect and incidents of 'discharge' and 'acquittal' are also different. An order of discharge in a warrant case instituted on complaint, can be made only after the process has been issued and before the charge is framed. Section 253(1) shows that as a general rule there can be no order of discharge unless the evidence of all the prosecution witnesses has been taken and the Magistrate considers for reasons to be recorded, in the light of the evidence, that no case has been made out. Sub-section (2) which authorises the Magistrate to discharge the accused at any previous stage of the case if he considers the charge to be groundless, is an exception to that rule. A discharge without considering the evidence taken is illegal. If a prima facie case is made out the Magistrate must proceed under Section 254 and frame charge against the accused. Section 254 shows that a charge can be framed if after taking evidence or at any previous stage, the Magistrate, thinks that there is ground for presuming that the accused has committed an offence triable as a warrant case.

28. Once a charge is framed, the Magistrate has no power under Section 227 or any other provision of the Code to cancel the charge, and reverse the proceedings to the stage of Section 253 and discharge the accused. The trial in a warrant case starts with the framing of charge; prior to it, the proceedings are only an inquiry. After the framing of the charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial in the manner provided in Sections 254 to 258 to a logical end. Once a charge is framed in a warrant case, instituted either on complaint or a police report, the Magistrate has no power under the Code to discharge the accused, and thereafter, he can either acquit or convict the accused unless he decides to proceed under Section 349 and 562 of the Code of 1898 (which correspond to Sections 325 and 360 of the Code of 1973)."

22. There is no need to proceed further but for this Court to hold that the proposition espoused in the case of Ratilal (supra) would squarely cover the issue raised herein and accordingly, it can be concluded that the impugned order is not an order of discharge of the accused/respondent but one of acquittal and as such, is an appealable order.

23. The authority cited by the respondent is found to be not applicable to the facts and circumstances of this case.

24. Consequently, this Court find that the instant appeal is maintainable and further this Court would upon due consideration, allow the prayer of the appellant for leave to appeal.

25. The parties shall thereafter proceed for the hearing of the appeal on merits.

26. CrI. M.C. No. 25 of 2023 is accordingly disposed of.

Judge

Meghalaya
17.05.2023
"Tiprilynti-PS"

