

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.18187 of 2015

Arising Out of PS.Case No. -74 Year- 2008 Thana -SAKARPUR District- DARBHANGA

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LAKSHMAN JHA SON OF LATE KAILU JHA RESIDENT OF
VILLAGE - MAHIYA, P.S. SAKATPUR, DISTRICT - DARBHANGA

.... PETITIONER/S

VERSUS

1. THE STATE OF BIHAR
2. BAIDYNATH SAHNI SON OF SRI RAJENDRA SAHNI,
RESIDENT OF VILLAGE - KAROTWA, P.S. KUSHESHWAR
ASTHAN, DISTRICT -DARBHANGA.

.... OPPOSITE PARTY/S

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Appearance:

For the Petitioner/s	:	Mr. Durga Nand Jha, Adv.
For the State	:	Mr. Ram Sumiran Rai APP
For the O. P. No.2	:	Mr. Prem Prakash Poddar, Adv.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

8 11-08-2015 Informant of Sakarpur P.S. Case No.74 of 2008

leading to Sessions Trial No.236 of 2013 (State Vs. Baidynath Sahni) has challenged order dated 01.09.2014 passed by Additional Sessions Judge, IVth, Samastipur discharging accused / opposite party no.2 in accordance with Section 227 of the Cr.P.C.

2. It has been submitted on behalf of petitioner that being an informant of the above referred case he is aggrieved by an order of discharge and on account thereof, he is legally competent to challenge the order impugned more particularly in the background of having acknowledgement of his status duly recognized by the Hon'ble Apex Court in a decision reported in

AIR 1980 SC 856.

3. It has further been submitted that learned lower court while discharging the opposite party no.2 / accused misjudged the requirement of Section 227 of the Cr.P.C. whereunder discharge of an accused is to be made. Consequent thereupon, the order impugned is bad, illegal, perverse and is fit to be set aside. To support the same, it has been submitted that instant case has been registered on account of kidnapping of Pooja Kumari @ Rita Kumari a minor. To support the same matriculation certificate was already placed before the learned lower court during course of taking of cognizance and the same is itself apparent therefrom. The accused had challenged the order of cognizance unsuccessfully. Therefore, before discharging the accused / opposite party no.2 the learned lower court should have gone through the order of cognizance wherefrom minority of girl was duly acknowledged on the basis of the matriculation certificate which has got edge over the medical report, relied upon by the learned lower court for the purpose of passing of impugned order. So submitted that order impugned is fit to be set aside.

4. At the other end, the learned counsel for the opposite party no.2 has submitted that victim was examined under Section 164 Cr.P.C. during course of investigation wherein she had stated



that she fallen in love with the opposite party no.2 and on account thereof, she eloped along with opposite party no.2, got married, indulged in marital relationship, became pregnant. Furthermore, she was medically examined and found to be major. As she was confined to remand home, Cr.W.J.C. No.390 of 2009 was filed on behalf of victim herself wherein her status as major has been accepted and in the aforesaid background petition for habeas corpus was allowed directing her release. Therefore, the order impugned did not attract any sort of inference.

5. The learned Additional Public Prosecutor fairly submitted that at the stage of 227 as well as 228 of the Cr.P.C. a prima facie case has to be taken note of.

6. Facts of the case in brief as is evident from the fardbeyan of petitioner / informant suggest disappearance of victim Pooja Kumari @ Rita Kumari on 08.11.2008 and for that he had suspected complicity of opposite party no.2. It is needless to say that during course of investigation victim was traced out her statement was recorded under Section 164 Cr.P.C. she was medically examined.

7. From her statement, it is apparent that she had shown inclination towards accused and further, disclosed to have discharged her marital obligation and on account thereof, was



pregnant. She had also disclosed that she wants to stay with her husband. From the medical report, it is apparent that she had been estimated aged about 19 years ± 1 . At that very moment a dispute arose over custody whereupon the learned lower court directed the victim to be kept at remand home. On account thereof, Cr.W.J.C. No.390 of 2009 (Annexure-B) was filed on her behalf and the same was allowed considering the age of the victim as opined after medical examination. It is also apparent that during course of cognizance, matriculation certificate was filed and after considering the same, cognizance of an offence punishable under section 366A, 376, 363 of the IPC was taken up against which Cr. Misc. 860 of 2010 was filed and the same was dismissed for non-prosecution and was never revived. (Annexure-6)

8. Though in practice the age of the victim is being ascertained by way of medical examination, however there happens to be no such provision available under the Cr.P.C. The aforesaid controversy has sailed up to the Hon'ble Apex Court and in *Jarnail Singh v. State of Haryana* reported in **2013 Cr.L.J. 3976** the aforesaid deficiency was perceived whereupon the Hon'ble Apex Court has invented the procedure for determination of age of the victim.

“19. In order to support his contention, that the prosecutrix was not a minor at the time of occurrence, learned counsel for the appellant

placed reliance on the judgment rendered in Sunil vs. State of Haryana, AIR 2010 SC 392. Ordinarily, we would have extracted the observations on which reliance was placed, but for reasons that would emerge from our conclusion, we consider it inappropriate to do so.

20. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

“12. Procedure to be followed in determination of Age.— (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board

or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a) (i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in subrule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it

would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.”

9. After going through the same it is apparent that medical examination should be the last resort in case there happens to be absence of other documents so detailed therein. On account of matriculation certificate, the medical examination

could not be considered at a first instance and on account thereof, putting reliance by the learned lower court identifying the victim to be major appears to be contrary to the mandate of law. Being minor, her consent has no identify in the eye of law as from certificate (Annexure-2) her date of birth is 20.09.1992.

10. Now comes the manner of consideration of the materials during course of consideration of the prayer in accordance with Section 227 Cr.P.C. The Hon'ble Apex Court in *State of Tamil Nadu by Ins. Of Police, Vigilance and Anti Corruption v. N. Suresh Rajan and others* reported in 2014 *CRI.L.J. 1444* has held:

“20. 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. Reference in this connection can be made to a recent decision of this Court in the case of **Sheoraj Singh Ahlawat & Ors. vs. State of Uttar Pradesh & Anr.**, AIR 2013 SC 52, in which, after analyzing various decisions on the point, this Court endorsed the following view taken in **Onkar Nath Mishra v. State (NCT of Delhi)**, (2008) 2 SCC 561:

“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 there from, 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.”

21. Now reverting to the decisions of this Court in the case **Sajjan Kumar (supra)** and **Dilawar Balu Kurane (supra)**, 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 can not 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 Sessions 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. 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 not repudiated, would warrant his conviction”. 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. 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 the case of ***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.”

11. On account thereof, as well as considering the order impugned within the frame work of legal principle as laid down by the Hon'ble Apex Court (Supra), it is apparent that order impugned did not justify its relevance. On account thereof, is set aside. Petition is allowed. However, it is made clear that during course of trial, the trial court would not found influenced by an observation made under instant order as the same has been passed relating to the order impugned.

(Aditya Kumar Trivedi, J.)

Patna High Court
Dated 11th day of Aug., 2015
Prakash Narayan

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