

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.208 OF 2017

VAIBHAV ASHOK DESAI

)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA & ANR.)...RESPONDENTS

Mr.M.K.Kocharekar i/b. Ms.Prabha Badadare, Advocate for the Applicant.

Ms.P.P.Shinde, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 2nd NOVEMBER 2017

P.C. :

1 Heard. Rule. Rule heard forthwith by consent of the parties.

The revision petitioner / accused no.4, by this revision petition is challenging the order the order dated 27th February 2017 passed by the learned Additional Sessions Judge-1, Nashik, on an application Exhibit 13, by which the present revision petitioner /accused no.4 had claimed discharge from Sessions Case No.282 of 2016, arising out of Crime No.5 of 2015 registered

with Nashik Taluka Police Station for offences punishable under Sections 376(2)(i)(j)(n), 366, 363 read with Section 34 of the Indian Penal Code (IPC) as well as under Sections 4 and 17 of the Protection of Children from Sexual Offences Act (POCSO Act).

2 Heard the learned advocate appearing for the revision petitioner/accused no.4 as well as the learned APP appearing for the State. The learned APP supported the impugned order rejecting the application for discharge by contending that revision petitioner /accused no.4 has committed the offence punishable under Section 17 of the POCSO Act by intentionally aiding accused no.1 Vijay Sadhu Aher in committing the offence of penetrative sexual intercourse with the minor female victim. He had provided place for residence to accused no.1 Vijay Aher and therefore, Vijay Aher was in a position to commit penetrative sexual assault on the minor female victim.

3 I have carefully considered the rival submissions and also perused the entire charge-sheet.

4 The crime in question came to be registered on the basis of report lodged by father of the minor female victim on 31st January 2015. In his First Information Report (FIR), the informant / father has averred that on 29th January 2015 his minor female daughter, who at the relevant time was aged about 15 years, had left the home with her sister-in-law Leena and sister Jagruti for going to school. In the evening hours, he came to know that the minor female victim did not attend school nor returned home. Hence, he lodged the report with Nashik Taluka Police Station.

5 During the course of investigation of this crime, it was revealed that minor female victim of the crime in question sought help of Matunga Police station and then came to Nashik Taluka Police Station with police personnels from Matunga Police station. That is how, her statement came to be recorded by the Investigator on 30th May 2016. Resultantly, though initially the offence was registered under Section 363 of the IPC, subsequently, Sections 341, 506, 366, 376(2)(i)(j)(n) read with Section 34 of the IPC and under Sections 4, 6, 12 and 17 of the POCSO Act were

added to the case diary of the crime in question. On completion of investigation, the charge-sheet came to be filed against in all four accused persons. Accused no.1 is Vijay Sadhu Aher, who allegedly kidnapped the minor female victim and committed penetrative sexual assault on her. Accused no.2 Nitin Pingale, accused no.3 Abhishek Jadhav and accused no.4 i.e. present revision petitioner Vaibhav Desai are said to have abetted accused no.1 Vijay Aher in commission of the crime in question by him.

6 Considering the nature of offence alleged against the present revision petitioner/accused no.4, fate of the prosecution case hinges on version of minor female victim of the crime in question. Let us, therefore, examine, what she has stated to the investigator in order to ascertain whether her version atleast prima facie reflects commission of offence alleged against the present revision petitioner/accused no.4. Statement of the minor female victim goes to show that she was having love affair with accused no.1 Vijay Aher. As this fact came to the knowledge of her parents, her parents changed her school. She further stated to

police in her statement under Section 161 of the Code of Criminal Procedure that on 29th January 2015, accused no.1 Vijay Aher kidnapped her by threatening her. She, therefore, sat on his motorcycle and accompanied him to Nashik Road Railway Station. There, they stayed at the house of a friend of accused no.1 Vijay Aher for two days. On the third day, as per version of the minor female victim, she, accompanied by accused no.1 Vijay Aher, went to Jalgaon. Thereafter, the couple went to Mumbai. From Mumbai, the minor female victim accompanied by accused no.1 Vijay Aher went to Navsari. Then, as stated by the minor female victim, the couple returned to Mumbai. Accused no.1 Vijay Aher then made her to wear a mangalsutra. Statement of minor female victim then goes to show that they went to Mira Road, Mumbai, and searched for vacancies by reading newspaper. Accused no.1 Vijay Aher found that there were vacancies with Sai Care Center, MTNL Road. As stated by the minor female victim, then she as well as accused no.1 Vijay Aher went to Sai Care Center, which appears to be a hospital owned by Dr.Vishwas Desai. As stated by the minor female victim, there both of them appeared for

interview, which was taken by a person named Vandana Deshpande. Both of them were recruited as employees of Sai Care Center, as they successfully passed the interview. The minor female victim of the crime in question stated that she was entrusted with the work of caretaker of Sai Care Center, whereas accused no.1 Vijay Aher was entrusted with the work of driver as well as caretaker of Sai Care Center. As stated by the minor female victim, their employer judged their suitability for the work for a period of 15 days and thereafter he made arrangement for their separate residence at the terrace of the building of Sai Care Center. As per version of the minor female victim, present revision petitioner/accused no.4 Vaibhav Desai is brother of Dr.Vishwas Desai, who appears to be owner of Sai Care Center. Accused no.4 Vaibhav Desai, according to the statement of minor female victim, used to take care of Sai Care Center. She stated that, it was accused no.4 Vaibhav Desai, who had made arrangement for their separate residence at the terrace of the building. The minor female victim further averred that, at the terrace of the building, accused no.1 Vijay Aher had indulged in penetrative sexual assault

on her.

7 The statement of the minor female victim further shows that subsequently, she along with accused no.1 Vijay Aher left the job of Sai Care Center on 20th May 2016 because of quarrel with one Asavari Paradkar. Thereafter, they took room on rent, but their landlord demanded marriage certificate from them. Therefore, they left the room and returned to Nashik, where they stayed with mother of one Sandeep Sonawane. Subsequently, she returned to Mumbai, as accused no.1 Vijay Aher deserted her. She, then, contacted Matunga Police Station, and thereafter returned to Nashik Taluka Police Station to lodge the report.

 This is what the entire case of the prosecution is, against accused persons.

8 Section 17 of the POCSO Act deals with punishment for abetment and it reads thus :

“17 Punishment for abetment : Whoever abets any offence under this Act, if the act abetted is committed in consequence of the abet-

ment, shall be punished with punishment provided for that offence.”

Section 16 of the POCSO Act defines “abetment of an offence” under the said Act. It reads thus :

“16 Abetment of an offence: A person abets an offence, who—

First - Instigates any person to do that offence;
or

Secondly — Engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that offence; or

Thirdly — Intentionally aids, by any act or illegal omission, the doing of that offence.”

Bare perusal of provisions of Section 16 of the POCSO Act goes to show that, abetment, as defined therein, requires mensrea. If the entire statement of the prosecutrix is taken and accepted as it is, then also, one cannot accept that there was an intentional aid or instigation by the present revision petitioner/accused no.4 Vaibhav Desai to accused no.1 Vijay Aher to commit the act of offence.

9 Law regarding discharge is succinctly explained by the Hon'ble Apex Court in the matter of **State of Tamil Nadu vs. N. Suresh Rajan & Ors.**¹. The relevant observations read thus :

“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 mouth piece 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

1 (2014) 11 Supreme Court Cases 709

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 and Ors. v. State of Uttar Pradesh and Anr., AIR 2013 SC 52 : (2012 AIR SCW 6171), 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 : (AIR 2008 SC (Supp) 204 : 2008 AIR SCW 96):

“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.” ” .

10 The net result of the foregoing discussion requires me to hold that the case in hand is not even a case for suspicion against the present revision petitioner/accused no.4 Vaibhav Desai for commission of the offence alleged against him, leave apart strong suspicion coupled with some evidence against him. He, therefore, cannot be required to undergo ordeal of the trial for the offence alleged against him.

11 It is well settled that revisional jurisdiction is required to be exercised in rarest of rare case, when it is shown that the impugned order suffers from perversity or procedural illegality resulting in miscarriage of justice. Facing a criminal trial is not an enjoyable experience, particularly when there are no grounds for proceeding against the accused. Perusal of the impugned order shows that the learned Additional Sessions Judge has taken into consideration irrelevant material, which is, infact, not even borne out from the record, for rejecting the application for discharge. The impugned order rejecting discharge suffers from surmises and conjectures. The learned Additional Sessions Judge has held that the present revision petitioner/accused no.4, who was brother of Dr.Vishwas Desai, ought to have made enquiries with the minor female victim and accused no.1 Vijay Aher, regarding their relationship. The learned Additional Sessions Judge ought to have considered that the minor female victim or accused no.1 Vijay Aher were not interviewed by accused no.4 Vaibhav Desai for providing an employment to them with Sai Care Center. They were interviewed by Vandana Deshpande. There is no iota of

evidence to show that the present revision petitioner / accused no.4 was knowing that the prosecutrix is a minor child and the main accused had kidnapped her. They both appeared for interview independently before somebody else and that is how they were recruited by the employer, who appears to be somebody else. The entire material collected by the Investigator does not show any evidence in respect of commission of the alleged offence by the present revision petitioner/accused no.4. Therefore the order :

ORDER

- i) The revision petition is allowed.
- ii) The impugned order dated 27th February 2017 passed below Exhibit 13 is quashed and set aside.
- iii) The application at Exhibit 13 moved by revision petitioner/accused no.4 Vaibhav Desai for discharge is allowed and he is discharged from Sessions Case No.282 of 2016.
- iv) The revision petition is accordingly disposed of.

(A. M. BADAR, J.)