

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

REVISION APPLICATION NO.333 OF 2014

1. Asit Khagendranath Mitra,
Aged : 60 years, Occ. Retired,
R/o.B/9, Swapnali Apartment,
Dattavadi, Shirgaon Road,
Badalapur (E), Dist. Thane.
2. Beli Asit Mitra,
Aged : 50 years, Occ. Housewife,
R/o.B/9, Swapnali Apartment,
Dattavadi, Shirgaon Road,
Badalapur (E), Dist. Thane. ... **Applicants**

V/s.

1. The State of Maharashtra
(At the instance of Borivali
Police Station, Mumbai in
C.R.No.234/13).
2. Ms.Vinita Nirmal Trivedi,
Aged : 26 years, Occu. Service,
R/o. Sun Ville, Plot No.157,
Gorai II, A.A.C. No.50, Borivali
West, Mumbai – 400092. ... **Respondents**

.....

Mr.Raja Thakre i/b. Shreeram Shirsat, Advocate for the Applicants.
Ms.Devki R.Sahu i/b. R.R.Varma, Advocate for the Respondent
No.2.

Mr.S.V.Gavand, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 7th NOVEMBER 2017.

ORAL JUDGMENT :

1 Petitioners Asit and Beli are parents of accused No.1 Avishek Asit Mitra and they are also arraigned as accused Nos.2 and 3 in Sessions Case No.202 of 2013 arising out of Crime No.234 of 2013 for offences punishable under Sections 376, 312, 420 read with Section 34 of the Indian Penal Code (hereinafter referred to as 'IPC' for the sake of brevity). These offences came to be registered on the basis of a report lodged by the prosecutrix on 18/05/2013 with Police Station, Borivali after due inquiry of her earlier complaint by the police authority. The prosecutrix is an adult lady aged about 26 years and she was working as Assistant Manager with Grand Hyatt Hotel at Mumbai. Both revision petitioners applied for discharge by moving an application Exhibit 3 before the learned Additional Sessions Judge, Mumbai and after hearing the parties, by the impugned Order dated 12/09/2014, the learned Additional Sessions Judge, Mumbai was pleased to reject the said application. Feeling aggrieved by rejection of their application for discharge, both revision petitioners/accused Nos.2 and 3 have filed the instant revision petition.

2 At the outset, let us put on record the reasons recorded by the learned Additional Sessions Judge, Mumbai for rejecting the application for discharge filed by parents of accused No.1 Avishek Asit Mitra. The learned Additional Sessions Judge observed that involvement of parents of accused No.1 Avishek in the Crime in question is there because accused No.1 Avishek went on giving promise to the complainant i.e. the First Informant that he will convince his parents and after their consent he will perform the marriage. It is further observed by the Court below that accused No.1 Avishek informed the complainant i.e. the First Informant that his father is at Lucknow and he will return on Sunday i.e. on 30/12/2012. Accused No.1 Asit further informed that he will keep his father present at Borivali Police Station where they will take the decision. The learned Court below further observed that by taking name of his parents accused No.1 Asit went on keeping sexual intercourse with the complainant i.e. the First Informant. These are the only reasons recorded by the learned Additional Sessions Judge while rejecting the application for discharge moved by the revision petitioners claiming discharge from the Sessions Case pertaining to Section 376, 312, 420 read with Section 34 of the IPC.

3 It is well settled that revisional jurisdiction is an extraordinary jurisdiction, which is required to be exercised rarely when there is glaring defect of procedure or manifest error on the

point of law resulting in miscarriage of justice. If perversity in the impugned order is pointed out by bringing to the notice of the Court that relevant material was not considered or if it is noticed that irrelevant material favourably considered and relied for passing the impugned Order, then exercise of revisional jurisdiction is justified.

4 Let us now examine the charge-sheet in order to ascertain case of the prosecution against the accused persons. Following accused are arraigned in Sessions Case No.202 of 2013 by the prosecuting agency :

- (a) Avishek Asit Mitra
- (b) Asit Khagendranath Mitra (revision petitioner No.1), and
- (c) Beli Asit Mitra (revision Petitioner No.2)

Undisputedly, accused No.2 Asit and accused No.3 Beli are father and mother of accused No.1 Avishek.

5 Considering the nature of allegations, case of the prosecution rests on version of the prosecutrix. Her first version in respect of the incident is found in the complaint made by her to the Deputy Commissioner of Police of Borivali Range (Record page 118) which is a part of the charge-sheet. In this complaint, the prosecutrix averred that she is working as an Assistant Manager with Hotel Grand Hyatt and accused No.1 Avishek is doing the work of Audit in the said Hotel. On the pretext of loving her, he

has cheated her and by promising to marry her, he had committed sexual intercourse with her. The prosecutrix in this complaint further averred that she became pregnant and she was constrained to abort the foetus. At that time, accused No.1 Avishek accepted his guilt and insisted her to forget everything and to marry somebody else. Perusal of this first version of the prosecutrix does not show that she had made any allegations against present revision petitioners/accused No.2 Asit and accused No.3 Beli. This complaint was received by the Deputy Commissioner of Police on 20/12/2012. It was then entrusted for inquiry to Shyam Parulekar, Police Inspector.

6 The charge-sheet contains a letter dated 06/01/2013 signed by the prosecutrix as well as Avishek and addressed to said Shyam Parulekar, PI. By this letter, the prosecutrix as well as Avishek had informed inquiry officer Mr.Parulekar that they are withdrawing the said complaint.

7 The charge-sheet further contains a letter dated 18/01/2013 written by accused No.1 Avishek to inquiry officer Shri.Parulekar wherein he has stated reasons for not marrying the prosecutrix. He informed that he was scared as to how his family will react to the situation and whether they will accept his relation with the prosecutrix. This shows that the son was apprehending disapproval of his parents i.e. the revision petitioners to his relations with the prosecutrix.

8 After the preliminary inquiry in the matter, it is seen that ultimately the prosecutrix lodged a detail report in the matter on 18/05/2013, which has resulted in registration of the Crime No.234 of 2013 under Sections 376, 312, 420 read with Section 34 of the IPC. After completion of investigation, charge-sheet against accused persons came to be filed by Borivali Police Station, Mumbai, which has resulted in registration of Sessions Case bearing No.202 of 2013. Column No.16 of the charge-sheet contains brief facts of the prosecution case. The charge-sheet shows that, according to the prosecution case, accused No.1 Avishek committed rape on the prosecutrix by developing friendly relations which ultimately matured into love relations with her and allured her with promise of marriage and repeatedly indulged in sexual relations with her. When the prosecutrix became pregnant, without her consent, her foetus came to be aborted. It is further averred by the prosecutrix that at the police station, accused persons gave a written guarantee of marriage to the prosecutrix and subsequently, on the pretext of mismatched horoscope cheated the prosecutrix.

9 It is thus clear that, according to the prosecution case, so far as present revision petitioners i.e. parents of accused No.1 Avishek are concerned, the charge sought to be levelled against them by the prosecutrix is that of cheating. The factual premise for levelling this charge is to the effect that at police station they both as well as their son i.e. accused No.1 Asit indulged in

conspiracy, gave a written assurance of marriage to the prosecutrix and cheated her. It is, therefore, really not necessary to consider what the prosecutrix has stated about her allegations in respect of rape and abortion as those are solely directed against accused No.1 Avishek. Suffice to state that as per version of the prosecutrix, while doing work as co-worker with the prosecutrix, accused No.1 Avishek developed intimacy with her, assured to marry her by stating that he loves her very much and then indulged in sexual relations with her. So far as present petitioners are concerned the prosecutrix in her report has referred to the complaint lodged by her on 20/12/2012 with the Deputy Commissioner of Police, Mumbai, which is extensively referred to by me in the foregoing paragraphs. The prosecutrix further averred that in pursuant to that complaint, the Inquiry Officer Mr.Parulekar had called accused No.1 Avishek. Accordingly, accused No.1 Avishek and his mother i.e. accused No.3 Beli came to Police Station Borivali. At that time, accused No.1 Avishek had accepted the facts stated by the prosecutrix, but had refused to marry her. The prosecutrix further stated in her FIR that when she indulged in dialogue with accused No.1 Avishek, on instructions, of this Inquiry Officer Mr.Parulekar, accused No.1 Avishek told her that his father is at Lucknow and his father (i.e. the revision petitioner no.1) will return on 30/12/2012. After return of his father, he will bring his father to Borivali Police Station and then decision regarding their marriage would be taken. The prosecutrix

further stated that till 30/12/2012 she waited for the reply of accused No.1 Avishek as well as reply from his parents, but she was kept waiting and, therefore, she became assured of the fact that accused No.1 Avishek had indulged in sexual relation with her by cheating her and had aborted her foetus against her consent. Except this, the prosecutrix has not stated anything against present revision petitioners i.e. parents of accused No.1 Avishek.

10 Section 415 of the IPC contains a definition of the offence of cheating. It reads thus :

415. Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

11 Section 417 prescribes punishment for cheating. The prosecution has not invoked provisions of Section 417 while filing the charge-sheet, but it has invoked Section 420 of the IPC against present revision petitioners by taking aid of Section 34 of the IPC. Section 420 of the IPC read thus :

420. Cheating and dishonestly inducing delivery of property.—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Bare perusal of this provision makes it clear that the same is not attracted to the case in hand. There is no averment regarding dishonest inducement to the prosecutrix by the accused persons to deliver any property or to make alter or destroy a valuable security or anything which is signed or sealed and capable of being converted into a valuable security. Therefore, both revision petitioners cannot be directed to answer the charge for the offence punishable under Section 420 read with Section 34 of the IPC as sought to be levelled by the prosecuting agency. There is no iota of evidence against them in this regard.

12 Let us therefore assume that the prosecutrix intended to charge both revision petitioners for the offence of cheating as defined under Section 415 of the IPC and made punishable under Section 417 of the IPC. For making out an offence of cheating, the prosecution is required to establish that :

- (a) there was fraudulent dishonest inducement by a person by deceiving him;
- (b) the person so deceived was intentionally induced to do or omit to do anything which he or she would not do or omit if he or she were not so deceived.
- (c) the act of omission should be one which caused or likely to cause damage or harm to the persons induced in body, mind or reputation;

13 In the case in hand, perusal of the charge-sheet does not show that both revision petitioners/accused Nos.2 and 3 have fraudulently or dishonestly induced the prosecutrix by deceiving her in order to secure the end result of compelling her to do or omit to do anything which she would not have done or omitted to do, if she was not so deceived. Pre-FIR inquiry conducted by Police Inspector Mr.Parulekar in pursuant to the complaint lodged by the prosecutrix against accused No.1 Avishek on 20/12/2012 does not demonstrate any iota of evidence against both revision petitioners/accused Nos.2 and 3 in order to infer cheating by them to the prosecutrix. It does not contain any representation made to the prosecutrix by both of them which was false to the knowledge of both revision petitioners when it was made to her. Similarly, it is not seen that any such representation was made for intentionally inducing the prosecutrix to do or omit to do anything which she would not have done or omitted had she not been so

deceived. Even if the facts are taken on their face value then also it is seen that in fact, the revision petitioners attempted to bring the matter to the logical end by solemnizing marriage of their son accused No.1 with the prosecutrix, but subsequently, mismatch of the horoscope could not bring the desired result. Merely because of this subsequent happenings, the revision petitioners cannot be directed to stand for the charge as sought to be levelled by the prosecutrix.

14 So far as other penal Sections sought to be invoked by the prosecution in the instant case are concerned, undisputedly, they are not attracted against the present revision petitioners.

15 The law relating to discharge is succinctly explained by the Honourable Apex Court in the matter of ***State of Tamil Nadu v. N.Suresh Rajan & Anr.*** reported in **2014 (11) SCC 709**. The relevant portion of that Judgment needs reproduction and it reads 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 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.” ” .

16 Despite minute perusal of the entire charge-sheet, I am unable to find out any evidence against the present revision petitioners/accused Nos.2 and 3 nor I could find any material which may create grave suspicion against them in order to seek their explanation by asking them to answer the charge. Thus, there is no material to proceed against both accused persons i.e.

revision petitioners and resultantly the revision petition needs to be allowed. The learned Court below has failed to consider and examine the material sought to be pressed into service against accused persons in the case in hand and to appreciate it in proper perspective. The learned Court below made use of irrelevant material for rejecting the application for discharge. Hence, the impugned Order rejecting the application for discharge suffers from perversity and illegality. Resultantly, the foregoing discussion requires me to pass the following order :

- (i) The revision petition is allowed.
- (ii) The impugned Order dated 12th September 2014 passed below Exh.3 in Session Case No.202 of 2013 by the learned Additional Sessions Judge, Mumbai is quashed and set aside.
- (iii) The application at Exh.3 moved by the present revision/accused No.2 namely Asit Khagendranath Mitra, and accused No.3 Beli Asit Mitra is allowed and they are discharged from the Sessions Case No.202 of 2013.
- (iv) Their bail bond stands cancelled.

16 Needless to mention that interim order, if any, stands merged in the final order of disposal of the revision petition.

(A.M.BADAR J.)