

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Decided on: 1st March, 2017

+ CRL.REV.P. 424/2016 & CrI.M.A. 9539/2016

SHYAM KUMAR

..... Petitioner

Represented by: Mr. Shivam Chowdhary, Adv.

versus

STATE (NCT OF DELHI)

..... Respondent

Represented by: Ms. Rajni Gupta, APP with
Insp. Raman Kumar, ATO/
Uttam Nagar with W/ASI
Sushma, PS Uttam Nagar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. By the present revision petition, the Petitioner seeks setting aside of the order dated 1st March, 2016 passed by the learned Additional Sessions Judge framing charge against the Petitioner under Sections 363/366A IPC, Section 109 IPC read with Section 376D IPC and Section 17 read with Section 6 of Protection of Children against Sexual Offences Act, 2012 (in short 'POCSO Act'). The prosecution case springs out of FIR No. 78/2015 registered at PS Uttam Nagar under Section 363 IPC lodged by the mother of the prosecutrix.

2. After the prosecutrix was recovered, her statement was recorded under Section 164 Cr.P.C. wherein she stated:-

"I like a boy named Shyam Kumar who has a fracture on his right leg and cannot walk properly. Earlier also, I had gone to his house four times but there was no physical relation between us.

Yesterday, on 17th January, 2015 at 7:30 A.M., I bunked my school and went to Shyam's house. When I told Shyam that I do not want to stay in my house, he said that I can stay in his house. Shyam's mother also admires me. Shyam called up Guddu, who is his friend, and told him that they need a place to stay at night. Till 7:30 P.M., we stayed at Shyam's house. After 7:30 P.M., we took an auto from Shyam's house and reached Nand Nagari. Thereafter, Shyam rang up his friend Guddu and called him there. But Guddu asked them to reach Bank Colony stand. Guddu came to Bank Colony stand and took us to the house of Sushil who was his friend. There Guddu told us to go upstairs. The entire night Shyam and I kept awake in the room upstairs as Sushil and Guddu were also present in that room and we did not trust them. In morning at 5:00 A.M., Guddu took the phone of Shyam and was not returning him in fun which annoyed Shyam but still the phone was not returned. Then Guddu and Shyam went to take the auto. Shyam repeatedly requested to take me along but Guddu did not agree and took Shyam along with him on bike. After 10 minutes, Guddu returned and told that after pushing Shyam he has returned. Then Sushil and Guddu, one by one, did wrong act with me. Wrong act means rape. Though I cried still they did not leave me. Then Guddu took me to Bank Colony stand on bike where Shyam Ji was sitting and waiting for me. There we took auto and after Guddu left and when Shyam inquired I told everything to Shyam. I also told him that I was bleeding and was having a lot of pain. Then we went to the house of Shyam. There my relatives were present and my mother started beating Shyam and blaming him even though he did not do anything with me. Wrong act with me was done by Sushil and Guddu. Guddu previously also raped a minor girl."

3. The ingredients of the offence of kidnapping punishable under Section 363 IPC were discussed by Supreme Court in the decision reported as AIR 1965 SC 942 S. Varadarajan v. State of Madras and the relevant extract of the report are:

"9. It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person.

The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian."

4. The prosecutrix in her statement recorded under Section 164 Cr.P.C. stated that she voluntarily went to the petitioner's house and thereafter they went to the house of a friend as they required a room for the night. Thus, the ingredients of offence punishable under Section 363 IPC are not made out. Hence there is no prima facie case made out against the petitioner for framing a charge for offence punishable under Section 363 IPC.

5. Section 366A IPC reads as under:-

"366A. procurement of minor girl.—Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine."

6. From the statement of the prosecutrix, it is evident that when the petitioner took her to the house of the friend to spend the night, it was neither with the intent nor knowledge that she will be forced or seduced to illicit

intercourse. Thus, on the statement of the prosecutrix itself, no prima facie case for framing of charge for offence punishable under Section 366A IPC also is made out against the petitioner.

7. Supreme Court in the decision reported as (2007) 15 SCC 670 Kulwant Singh alias Kulbansh Singh Vs. State of Bihar dealing with Section 109 IPC held that mere failure to prevent the commission of offence is not by itself an abetment of that offence. It was held-

“11. Section 109 IPC reads as follows:

“109. Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.—Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Illustrations

(a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in Section 161.

(b) A instigates B to give false evidence. B, in consequence of the instigation, commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(c) A and B conspire to poison Z. A in pursuance of the conspiracy, procures the poison and delivers it to B in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder."

12. Where a person aids and abets the perpetrator of a crime at the very time the crime is committed, he is a principal of the second degree and Section 109 applies. But mere failure to prevent the commission of an offence is not by itself an abetment of that offence. Considering the definition in Section 109 strictly, the instigation must have reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation. Section 109 is attracted even if the abettor is not present when the offence abetted is committed provided that he had instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to the conspiracy some act or illegal omission takes place or has intentionally induced the commission of an offence by an act or illegal omission. In the absence of direct involvement, conviction for abetment is not sustainable. (See Joseph Kurian v. State of Kerala[(1994) 6 SCC 535 : 1995 SCC (Cri) 20] .)"

8. In respect of offence punishable under Section 109 IPC read with Section 376D IPC, there is no allegation by the prosecutrix in her statement recorded under Section 164 Cr.P.C. that the petitioner abetted the offence or instigated the co-accused persons to commit rape upon the prosecutrix. As noted above by the Hon'ble Supreme Court, failure to prevent the offence cannot be held to be abetment of the offence. Thus, the charge directed to be framed against the petitioner for offence punishable under Section 109 IPC

read with Section 376D IPC is also liable to be set aside.

9. Learned APP for the State has strenuously argued that a prima facie case is made out against the petitioner for the offence punishable under Section 17 read with Section 6 of POCSO Act in view of the Explanation III to Section 16 POCSO Act. In other words, the issue is whether criminal liability can be fastened on the petitioner with the aid of Explanation III to Section 16 of POCSO Act which is akin to Section 107 IPC.

10. Section 16 of POCSO Act reads as under:

“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.

Explanation I.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact, which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that offence.

Explanation II.—Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Explanation III.—Whoever employ, harbours, receives or transports a child, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position, vulnerability or the giving or receiving of payments

or benefits to achieve the consent of a person having control over another person, for the purpose of any offence under this Act, is said to aid the doing of that act.”

11. Learned APP for the State laying emphasis on Explanation III to Section 16 of POCSO Act stated that the present case squarely falls within the aforesaid explanation and the prosecutrix, being in vulnerable situation due to her age, was not in a position to take a reasonable decision on her behalf. Thus, by taking the prosecutrix to the house of the friend and leaving her alone at the place in the morning would amount to abetment of offence punishable under Section 6 of the POCSO Act.

12. The conduct of the petitioner is reflected from the fact that he did not sleep the night prior to the alleged incident because the petitioner and the prosecutrix were uncomfortable with the co-accused persons who were also sitting in the same room and the petitioner was himself taking care of the prosecutrix. Thereafter, the phone of the petitioner was not with him so that he could call for a vehicle to leave the place. The act of petitioner in not taking the prosecutrix along with him to get an auto cannot be said to attract abetment of the offence punishable under Section 6 POCSO Act. Lack of due care and caution or not taking an intelligent decision cannot fasten criminal liability.

13. The word 'vulnerability' as mentioned in the Explanation III to Section 16 of POCSO Act cannot be read in isolation and has to read in the light of the words preceding and succeeding it. Despite the fact that the prosecutrix was vulnerable however the petitioner cannot be said to have received or transported the child, for the purpose of any offence under the POCSO Act. On the facts of the case, it cannot be held that a prima facie case for abetting

an offence punishable under Section 6 POCSO Act is made out against the petitioner. The act of the petitioner does not fall within the ambit of abetment as defined under Section 16 of POCSO Act.

14. In view of the discussion aforesaid, the impugned order dated 1st March, 2016 directing framing of charge against the petitioner for offences punishable under Sections 363/366A IPC, Section 109 read with Section 376D IPC and Section 17 read with Section 6 POCSO Act is hereby set aside.

15. Consequently, the petitioner is discharged of the offences aforesaid in FIR No. 78/2012 registered at PS Uttam Nagar.

16. Petition and application are disposed of.

(MUKTA GUPTA)
JUDGE

MARCH 01, 2017
‘v mittal’