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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

REVISION APPLICATION NO. 233 OF 2015

Deepak Yashwant Ghusekar & Anr.

..Applicants

Vs

The State of Maharashtra .

..Respondent

Mr. Kuldeep Patil for Applicants.

Mr. A.R. Patil, APP for State.

CORAM : A.S.GADKARI, J.

DATE : 1st October 2018.

P.C.:

1] By the present Revision, the applicants have questioned the correctness, legality and propriety of the Order dated 23.3.2015 passed below Exhibit-43 under section 227 of Cr. P.C. by the learned Additional Sessions Judge, Vasai in Special Case No.44 of 2014, rejecting their application for discharge.

2] Heard Mr. Patil, the learned counsel appearing for the applicants and the learned APP for State. Perused the record.

3] The applicants are the original accused Nos.8 and 9 in crime No.95 of 2014 registered with Arnala Sagari Police Station for the offence

under sections 376, 376(D), 366(A), 506 of the Indian Penal Code, and sections 4 and 8 of the Protection of Children From Sexual Offences Act (POCSO) and under sections 3, 4, 5, 7(1)(A) of the Prevention of Immoral Trafficking Act, 1956 (PITA).

4] The prosecutrix was aged about 16 years on the date of alleged offence and in consonance with the provisions of Section 228(A) of the Indian Penal Code and under Section 33(7) of the Protection of Children From Sexual Offences Act (POCSO Act), the detailed narration of the facts mentioned in the first information report, statement of victim girl and other related statements disclosing her identity are hereby avoided.

5] It is the prosecution case that, the co-accused namely Ms. Arina is the cousin sister of prosecutrix/victim girl. Ms. Arina lured induced and forced the prosecutrix to indulge into a vocation of prostitution and to have sexual relations with other accused persons. The said co-accused Ms. Arina received monetary consideration for the same from other accused persons. It is further prosecution case that, the prosecutrix who was minor at the relevant time was forced to indulge into the said activity. That on a particular date, the applicants in a lodge at Ganeshpuri committed forcible sexual intercourse with the prosecutrix. Due to constant sexual exploitation

at the behest of Ms. Arina, the prosecutrix got fed up and ultimately approached the police with her grievance.

6] The learned counsel for the applicants submitted that, in the first information report dated 16.7.2014 the prosecutrix has simply named the applicants as “two friends of Dipesh” and the specific identity of the applicants is not mentioned therein. That the test identification parade of the applications is not conducted by the Investigating Officer and therefore there is ambiguity about identification of the applicants. That there are material contradictions which can be assessed from the statements of other witnesses with respect to the alleged date of incident, as the prosecutrix in the first information report has given the date of her first disclosure of alleged incident as 9.7.2014 and the witness who are corroborating the version of prosecutrix have stated the some other date and therefore the benefit of the same be given to the applicants and they may be discharged from the offences.

Per contra, the learned APP pointed out the material available on record and submitted that considering the same, prima facie case is made out of rejection of application under section 227 of Cr. P.C.

7] It is a fact on record that, in the first information report the

prosecutrix has stated that, on the date of incident they stayed in the lodge at Ganeshpuri, District Thane for three days and 'two friends' of Dipesh had committed sexual assault on her. However, the record indicates that in the supplementary statement of the prosecutrix recorded on 22.7.2014 she has categorically mentioned the names of the applicants as the persons who had committed sexual assault on her in the said lodge at Ganeshpuri in the April 2014. It is further stated that, the co-accused Ms.Arina Simran forced her to do the said act and accepted money in lieu of it.

8] A useful reference can be made to the decision of the Hon'ble Supreme Court in the case of *Union of India Vs. Prafulla Kumar Samal*, reported in AIR 1979 SC 366. It is necessary and useful to refer to paragraph 10 of the said judgment which reads as under:-

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) *The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.*

(4) *That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roaming enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial”.*

The Supreme Court in the case of *R.S. Nayak vs. A.R. Antulay and Anr.* reported in AIR 1986 SC 2045, while dealing with the provisions of Sections 227, 239 and 245 of Cr.P.C., in unequivocal terms in Para 44 has held as under:-

“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 police report are dealt with in Section 245. The three sections contain some what different provisions in regard to discharge of the accused. Under Section 227, the trial Judge is required to discharge the accused if he 'considers that there is not sufficient ground for proceeding against the accused.' Obligation to discharge the accused under Section 239 arises 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 unrebutted, would warrant his conviction". It is a fact that Sections 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. 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."

A further reliance can also usefully be placed on the decision of the Supreme Court in the case of *State of Maharashtra Vs. Soma Nath Thapa* reported in (1996) 4 SCC 659 wherein, the Supreme Court has held that, if there is ground for presuming that the accused has committed the offence, it can be said that, a prima facie case has been made out against the accused. It has been further held that even if the Court finds that the accused might have committed an offence, it can frame charge. The

Supreme Court has further clarified in the said case that at the stage of framing of charge probative value of the statements cannot be gone into.

The Supreme Court in the case of *Palvinder Singh Vs. Balwinder Singh and others reported in (2008) 14 SCC 504* while dealing with the provisions of Section 227 of Cr.P.C., in para 13 has held that, the charges can also be framed on the basis of strong suspicion. That marshaling and appreciation of evidence is not in the domain of the Court at that point of time.

Thus, it is clear that the Supreme Court in its various decisions has held that while considering the application for discharge the Court has to take into consideration the *prima facie* case as made out by the Complainant/prosecution.

9] In the present case, even if the corroborative piece of evidence i.e. the statements of other witnesses who have mentioned that on a particular day they saw accused persons in company of the 'girls' is not taken into consideration, at this stage, the statement given by the prosecutrix/victim girl is sufficient to show the complicity and involvement of the applicants in the present crime.

10] In view of the ratio laid down by the Honourable Supreme Court, at this stage it is difficult to accept that, there is no material at all against the applicants to frame charge against them. In other words, there is sufficient material on record to proceed against the applicants to frame charge.

11] In view of the above, I find no merits in the Revision and is accordingly rejected.

(A.S.GADKARI, J.)