

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1449/2018

**1.Kirti Kishore Chavan
2.Kishore Shantaram Chavan Applicants.**

VERSUS

**State of Maharashtra
(through Sr.Inspector of
Vile Parle Police Station) Respondents.**

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Mr.Shirish Gupte, Sr.Counsel, i/b Amol A. Patankar for the
applicants.

Mr. R.M.Pethe, APP for State.

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CORAM : A. M. BADAR, J.

DATE: 30TH JANUARY 2020.

ORAL JUDGMENT:

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

2. By this criminal application under Section 482 of the Criminal Procedure Code, accused No.1 Kirti Kishor Chavan and accused no.2 Kishor Shantaram Chavan are challenging order passed on 6.10.2018 by the learned Special Judge under Protection of Children from Sexual Offences Act, 2012 (to be referred to as 'POCSO Act' for the sake of brevity) and Additional Sessions Judge Dindoshi, Mumbai, rejecting their claim for discharge. These two accused persons alongwith the co-accused are sought to be charged for offences punishable under Section 363, 354, 370 of the Indian Penal Code as well as under Section 8 and 12 of the POCSO Act. So also, under Section 75 and 79 of the 'Juvenile Justice (Care and Protection of Children) Act, 2015 (to be referred as 'Juvenile Justice Act' for the sake of brevity).

3. Learned senior counsel by drawing my attention to the impugned order argued that the said order suffers from perversity in a sense that the material available on record was

never considered by the learned Special Judge for examining whether charge would be ground-less against applicants herein/original accused nos.1 and 2. Even charge-sheet was not perused in order to consider whether even prima facie ingredients of offences alleged against applicants herein are made out in order to enable the Court to frame the charge. In submissions of learned senior counsel for applicants, no offences as alleged are made out if sole version of first informant reflected in FIR is perused.

4. As against this, learned APP argued that statement of first informant makes out prima facie case which requires applicants herein to face the trial for alleged offences.

5. I have considered the submissions so advanced and also perused the charge-sheet placed on record by applicants/accused no.1.

6. At this juncture, as application is virtually for discharge of applicants herein, it is apposite to quote relevant portion of the judgment of the Apex Court in the matter of **State of Tamilnadu Vs. N.S. Rajan and Others, A.I.R. 1982 S.C. (SUPP) 1982** which 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 muoth 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 triete 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 I 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.”

7. It is thus, clear that, while examining application

for discharge moved by the accused, the court has to proceed with an assumption that materials brought on record by the prosecution are true and then to evaluate the entire materials including documents in order to find out whether such material discloses at least prima facie all ingredients constituting offences alleged against the accused.

8. Let us examine the case in hand in order to ascertain whether ingredients of offences punishable u/s 363, 354, 370 of the Indian Penal Code as well as those of Section 8 and 12 of the POCSO Act and of Section 75 and 79 of the Juvenile Justice Act are reflected from the material collected by the investigator and reflected from final report submitted to the court. Accused No.3 Munira Badol is the Aunt of first informant/victim female child. On 10.3.2016, applicant No.1 Kirti Chavan had lodged report at the Police Station Vile Parle Mumbai, which resulted in registration of crime No.62/2016 for the offence punishable us 363 of the Indian

Penal Code against unknown persons. Applicant/accused No.1 Kirti alleged in that FIR that on 12.3.2016, while working as maid servant, the victim female child had broken a show piece and therefore, she scolded the victim female child. Subsequently, the victim female child eloped from her house.

9. Charge-sheet revealed that the victim female child was ultimately traced out at the railway foot over bridge of Andheri railway station. On finding the victim female child, police recorded her statement on 22.3.2016. On the basis of this statement recorded in crime No.62 of 2016, registered at the instance of applicant no.1/accused no.1 Kirti Chavan, said first informant, her husband/applicant accused no.2 came to be arraigned as accused in the said crime. On conclusion of investigation, they both alongwith Munira Badol came to be charge-sheeted as indicated in previous paragraph of this judgment.

10. It is in the statement of the victim female child that she was working as a maid servant at the house of one lady. Subsequently, at the instance of her Aunt she started residing at the house of applicant for doing household work. As per complaint of the victim female child, she was required to work at the house of applicants from 7.00 a.m. in the morning. She was doing sundry household work with the applicants. The victim female child further stated that during the course of cleaning, if damage is caused to the household articles, the applicant/ accused no.1 used to beat her by pulling her hair and no food used to be provided to her. She further disclosed to the police that applicant/accused Kishor Chavan used to reside at Dubai, however, as and when he used to come to reside with applicant no.1 Kirti Chavan, he used to touch her cheeks, used to press her hands. She further disclosed that once applicant/accused Kishor Chavan asked her whether she is

undergoing menses and started pressing her hands. He used to touch her frequently. The victim female child further stated that as she used to be detained by accused no.1 /Kirti Chvan by locking the house. When opportunity was available she eloped from the house on 10.3.2016. On that day she was scolded by applicant/accused Kirti Chavan due to breaking of a show piece. She further stated that applicant/accused Kirti Chavan did not allow her to speak with her Aunt. This is entire material according to the prosecution case against both the applicants/ accused persons. Now let us examine whether this material satisfies at least prima facie ingredients of offences alleged against both the applicants. Section 363 of the Indian Penal Code, provides for punishment for kidnapping. Section 361 of the Indian Penal Code deals with kidnapping from lawful guardianship. Whosoever or entices any minor under 18 years of age female is said to have committed this offence which is punishable u/s 363 of the Indian Penal Code. In case in hand, ingredients

either taking or enticing are not satisfied so far as both the accused are concerned. Section 370 of the Indian Penal Code prescribes punishment for trafficking of a person. So far as this offence is concerned, prosecution is required to demonstrate that the victim female child had been recruited by accused persons for the purpose of exploitation by practicing fraud or deception or by inducement including the giving or receiving of payments or benefits for achieving consent of any person having control over such recruited person. Statement of victim female child reveals that she joined company of both applicants/accused person on the say of her Aunt who is also accused in this case. Apart from this, she has not stated anything in respect of offence punishable under Section 370 of the Indian Penal Code. Unfortunately, as the Aunt of the victim female child is also being prosecuted as accused there is not even prima facie material for inferring that the victim female child had been recruited for the purpose of exploitation by practicing fraud

or deception or by inducing a person having control over her.

11. Section 354 of the Indian Penal Code deals with assault or criminal force to woman with intent to outrage her modesty. Requirement of this section is use of criminal force or assault with intention to outrage modesty of a woman. Averments in F.I.R. so far as applicant/accused Kirti Chavan is concerned, does not satisfy this criteria as the overt acts committed by her can not be said to have been committed for outraging modesty of victim female child. However, so far as accused Kishore Chavan is concerned, there is enough material to prima facie infer commission of this offence by him for putting him to the trial.

12. Section 8 and 12 of the POCSO Act deals with punishment for sexual assault and sexual harassment. Section 7 defines sexual assault. Touching the person of female child with sexual intent makes out offence of sexual

assault. Sexual harassment is said to be caused to the child, if a person utters any word or makes any sound or exhibit any object or part of body with intention that such word or sound shall be heard or such gesture shall be seen by the child. There is no material to infer commission of these offences by applicant Kirti Kishor Chavan. However, act of questioning the victim female child as to whether she is undergoing menses, touching her inappropriately and that too frequently, certainly constitute sufficient material to proceed against applicant no.2 /accused Kishore Shantaram Chavan for these offences.

13. What remains now is offences u/s 75 and 79 of the Juvenile Justice Act. As per provisions of Section 75 of the Juvenile Justice Act, if a person having actual charge of or control over, a child, or wilfully neglects the child or causes or procures the child to be assaulted, abandoned, abused, then offence of cruelty to a child is said to have been made

out. Ostensibly engaging a child and keeping such child in bondage makes out offence u/s 79 of the Juvenile Justice Act. Victim female child used to be detained by the accused at their house for the purpose of getting work done from her and therefore, it can not be said that there is no material to proceed against accused for these offences.

14. In the light of foregoing discussion, it is obvious that the learned Special Judge, has not considered application for discharge in proper perspective by examining material collected by the investigator. Therefore, petition needs to be allowed partly and as such I proceed to pass following order.

ORDER

- i) Criminal application is partly allowed.
- ii) Both the applicants are discharged from offences punishable under Section 363, 370 of the Indian Penal Code.
- ii) Applicant/accused Kirti Kishor Chavan is discharged

from the offences punishable u/s 354 of the Indian Penal Code as well as for offence punishable u/s 8 and 12 of the POCSO Act.

iii) Claim of both applicants/accused for discharge from offence punishable u/s 75 and 79 of the Juvenile Justice (Care and Protection of Children) Act, 2015 is rejected.

iv) Similarly, claim of applicant/accused Kishor Shantaram Chavan for discharge from offences punishable u/s 354 of the Indian Penal Code as well as from Section 8 and 12 of the PCOSO Act also stands rejected.

v) Rule is made absolute in above terms.

vi) Needless to mention that observations made in this order are prima facie in nature and shall not have bearing on trial.

(A. M. BADAR, J.)