

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.1048 OF 2020

Udaynath Tirkey .. Petitioner
v/s.
The State of Maharashtra & Anr. .. Respondents

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Mr. Rajeev Kumar, for the Petitioner.

Ms. S.D. Shinde, APP, for Respondent State.

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CORAM: NITIN JAMDAR &
SARANG V. KOTWAL JJ.

DATE : 21 OCTOBER 2021.

P.C:-

By this petition, the Petitioner is seeking to quash and set aside FIR No.0027 of 2018 of Nhava Sheva Police Station, Navi Mumbai and further charge sheet proceedings before Hon'ble District Judge-2 and Additional Sessions Judge, Panvel, District Raigad, vide criminal proceedings of Case No.350 of 2019.

2. The father of the survivor child, aged 4, has filed the FIR on 29 March 2018 under Section 376 of Indian Penal Code and Section 4 and 8 of Protection of Children from Sexual Offences (POSCO) Act, 2012. The gist of the FIR is as follows:-

The complainant is the father of the victim girl and the accused is the neighbour of the complainant. When victim was playing at her home, the complainant's wife saw blood on child's underwear. On 20 March 2018, the complainant and his wife visited a hospital and one doctor informed that child had urine infection. Complainant again visited the doctor and who asked to visit one Dr. Manjusha. Dr. Manjusha informed complainant's wife that child's hymen was ruptured. Later, wife of the complainant, the mother, asked her daughter about the incident. The child stated that when she visited the house of the accused to see newborn baby in between 18 March 2018 to 19 March 2018, when baby was sleeping and no one was present in room, the accused sexually abused the prosecutrix. Child started crying; at that time, wife of the accused Nilesh entered the room and saw the said act. She shouted at the accused. Nilesh's wife gave sweets to the child and dropped her at her place.

3. The Petitioner has joined Respondent No.2, the Assistant Commandant of CISF Unit, as party Respondent and to the father of the survivor child, the Informant. It is the case of the Petitioner that the Respondent, at whose instance the father of the child was working as a constable, has filed the false FIR against the Petitioner, who is also working as a constable. Firstly, for establishing this position, evidence will have to be assessed and led. At this stage, considering the provisions of the Act in the nature of burden proof, we can only

observe that the contention that merely at the say of some other officer the informant would not put the life and reputation of his own child at peril. This cannot be a ground to quash the FIR.

4. The second ground that was argued before us that the FIR has been lodged on the premise that there is no tear in the hymen as recorded and the medical evidence attached to the charge sheet, which is contrary to the assertions made in the FIR. The learned Counsel has relied upon the endorsement in the medical papers by the Deputy Chief Medical Officer of J.N.P.T. and also the statement of Dr. Manjusha Pramod Nichat. In the FIR, the Informant has stated that the child was psysiologically upset and when she was taken to the hospital and examined by the Gynecologist Dr. Manjusha, the hymen was torn. Dr. Manjusha has not stated that there is no tear, but asked questions as regards riding a bicycle or pencil and thereafter, asked test to be taken. More importantly, this interaction led questioning the child and upon questioning, the child told the name of the Petitioner and the sexual act committed by him. At this stage, it is unwarranted to discredit the statement of the child given to her parents. The child was examined before the Judicial Magistrate and has given statement under Section 164 of Cr.P.C. implicating the Petitioner. Whether it is trustworthy or otherwise, in the light of the evidence sought to be pointed out by the Petitioner, is a matter of trial. In the light of this position, no case is made out for interference and to quash the FIR.

The case cannot be considered as rarest of rare case and does not fall within the parameters laid down by the case of *M/s. Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra*¹. The learned Counsel for the Petitioner has relied upon the cases of *Vineet Kumar & Ors. vs. State of U.P. & Anr.*² and *Prashant Bharti vs. State of NCT of Delhi*³. We take note that none of these decisions arise from the provisions of the POSCO Act, which we have pointed out earlier as a different scheme of burden of proof.

5. We may also note that we had indicated to the learned Counsel for the Petitioner to approach the Court to avail of the statutory remedy of discharge of its own merits, however, the learned Counsel for the Petitioner proceeded to address us on merits.

6. This petition is, accordingly, rejected.

(SARANG V. KOTWAL, J.)

(NITIN JAMDAR, J.)

1 AIR 2021 Supreme Court 1918

2 Criminal Appeal No.577 of 2017 dated 31.3.2017 (Reportable)

3 Criminal Appeal No.175 of 2013 dated 23.1.2013 (Reportable)