

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL WRIT PETITION NO.1071/2019

PETITIONER : Ku. Kalyani D/o Subhash Gandlatwar
(Ori. Accused Aged about :
No.2) Occupation : nil
R/o Lalganj Gujar, Near Zade square,
Itwari, Dahi Bazaar, Nagpur – 02.

...VERSUS....

RESPONDENTS : 1. State of Maharashtra
Through Police Station
Shanti Nagar, Nagpur.

2. Child Welfare Committee
Through Its Chairman
Angulimal Nagar, Patankar Chowk,
Nagpur.

3. Amitkumar Upalap
Aged about :
Occupation : Service
R/o Bungalow No.33, Rai Imperial
Chinchbahavan, Nagpur
and
Office at Administrative Building No.2
5th Floor Opposite Zilla Parishad
Civil Lines, Nagpur 01.

Mrs. Gauri Venkatraman, Advocate with Mr. Yash Vankatraman, Advocate for
petitioner
Ms Tajwar Khan, Addl. Public Prosecutor for respondent no.1
Mr. R.B. Gaikwad, Advocate for respondent no.3

**CORAM : SUNIL B. SHUKRE AND
AVINASH G. GHAROTE, JJ.**

Judgment reserved on : 01/02/2021

Judgment pronounced on : 09/02/2021

J U D G M E N T : (PER : AVINASH G. GHAROTE, J.)

1. Heard. Rule. Rule made returnable forthwith.
2. The present petition, seeks to quash and set aside the F.I.R., dated 25/10/2017 filed by the Shanti Nagar Police Station, Nagpur in Criminal Case No.287/2017; the charge-sheet dated 26/11/2017 and supplementary charge-sheet dated 26/10/2019 as well as the report of the Child Welfare Committee dated 24/10/2017 on the complaint of the respondent no.3.
3. The facts, in so far as they are relevant to the present case, are as under :
 - (i) The petitioner and the respondent no.3 were related earlier as the petitioner, being sister of Sonali, erstwhile wife of respondent no.3, was the sister-in-law of respondent no.3.

(ii) The petitioner's sister Sonali was married to the respondent no.3 - Amitkumar, from which marriage, they have a son named Veer @ Virendra.

(iii) The marriage of the respondent no.3 and Smt. Sonali, came to be dissolved by a decree of divorce by mutual consent dated 16/12/2013, and under the terms of the decree for divorce, the child, Veer who was aged 2 years, at that time, was to remain with his mother Smt. Sonali, who now resides in the joint family which includes her sister (the present petitioner), her brother Shri Rahul Gandlatwar and other members.

(iv) The husband - respondent no.3 was granted access to the child, which order of access came to be modified from time to time.

(v) The respondent no.3, in the meantime, had remarried and had a daughter, named Aditi from the second marriage, which was 2 and half years in 2017.

(vi) On 10/09/2017, a complaint came to be filed by the respondent no.3, alleging that the child was being assaulted and treated cruelly by his mother Smt. Sonali and her family members, including the present petitioner and her brother Rahul.

(vii) On 21/9/2017, a complaint came to be lodged by the respondent no.3, with the Child Welfare Committee, Nagpur, to the effect that the child Veer, had informed him that the child's mother Smt. Sonali and maternal Uncle Shri Rahul were treating him cruelly and so also that the present petitioner, was sexually abusing the child, who by that time had turned 6 years of age. The allegations of sexual abuse were to the effect that when the minor child Veer, was staying with his mother, he was sleeping between the petitioner and his mother, at which time, the petitioner, used to insert her hands into the pant of the child and fondle and play with his penis and also touch his anus and so also used to take the hand of the child and touch her vagina and anus. The petitioner also had threatened the child not to disclose the same to his mother, otherwise she would beat him. This is contained in para 5 of the complaint dated 21/9/2017. The Child Welfare Committee, referred the matter to the Protection Officer and asked her to meet that child and record his statement.

(viii) On 21/10/2017, the respondent no.3 had taken custody of the child for access, and was to return the child on 23/10/2017, which was not done.

(ix) On 23/10/2017 in the presence of witnesses, the Protection Officer, District Child Welfare Committee, Smt. Sadhna Hatwar, met the child, recorded his statement in absence of the respondent no.3, when the child Veer stated that when he was staying with his mother, he was sleeping between the petitioner and his mother, at which time, the petitioner, used to insert her hands into the pant of the child and fondle and play with his penis and also touch his anus and so also used to take the hand of the child and touch her vagina and anus. The petitioner also had threatened the child not to disclose the same to his mother, otherwise she would beat him. The Protection Officer forwarded the same to the Child Welfare Committee. (pg.156)

(x) The Child welfare Committee, on 24/10/2017, upon receipt of the report of the Protection Officer found *prima facie* incidence of sexual abuse by the petitioner and cruel treatment by his mother Smt. Sonali and maternal Uncle Shri Rahul and therefore directed that appropriate action be taken.

(xi) On 25/10/2017 at the instance of the Child Welfare Committee an F.I.R. No.3093 of 2017 dated 25/10/2017 came to be registered for the alleged acts of sexual misconduct, by the present

petitioner as well as cruel treatment by his mother Smt. Sonali and maternal uncle Shri Rahul, under Sections 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (for short, “the POCSO Act”) and also Section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short “the J.J. Act” hereinafter) and Section 323 read with 34 of Indian Penal Code (for short “I.P.C.” hereinafter).

(xii) On 8/11/2017, the J.M.F.C. Court No.2, Nagpur, recorded the statement of the child Veer, under section 164 of Cr.P.C. in which also the child reiterated the statement as made before the Protection Officer, on 23/10/2017.

(xiii) On 28/10/2017, the petitioner as well as Smt. Sonali and Shri Rahul were intimated by the Police about the lodging of the F.I.R.

(xiv) On 26/11/2017, charge-sheet was filed, in which the petitioner as well as the mother and maternal uncle Rahul were charged with the offences punishable under Sections 8 and 12 of POCSO Act, Section 75 of the J.J. Act and Section 323 and 34 of I.P.C.

(xv) Smt. Sonali, the mother filed an application before the Family Court bearing M.J.C. No.79/2017, seeking restoration of the custody of the child.

(xvi) On 24/01/2018, an application for discharge was filed by the mother Sonali as well as the maternal uncle Rahul.

(xvii) Smt. Sonali, the mother, also filed Criminal Writ Petition No.399/2018, seeking a writ of Habeas Corpus for production of a minor child Veer. This petition came to be disposed of by an order dated 23/7/2018 in view of the pending M.J.C. No.79/2017 with a direction to the Family Court to decide application for grant of interim custody of the child within a period of four weeks and permitting the mother access to the child before the Counselor on first and third Saturday between 11:00 to 2:00 p.m.

(xviii) On 18/09/2018, the Family Court No.2, Nagpur, rejected the application for restoration of custody, M.J.C. No.79/2017, as filed by Smt. Sonali.

(xix) On 19/09/2018, statement of the child Veer came to be recorded by the Investigating Officer Kiran Kursange, where the child restated those allegations and also stated that when he used to narrate the incidences to his mother, she used to disregard them.

(xx) On 25/09/2018, a supplementary charge-sheet was filed by adding charges under Sections 16, 19 and 21 of POCSO Act.

(xxi) The Special Court under POCSO Act rejected the application for discharge as filed by the mother and maternal uncle, by an order dated 5/10/2018, Special Child Case No.287/2017.

(xxii) Against the above rejection, Criminal Revision No.229/2018 was filed by the mother and maternal uncle Rahul, which came to be allowed by this Court by judgment dated 14/2/2019. A review vide Criminal Application No.70/2019 came to be rejected by order dated 12/07/2019.

(xxiii) SLP (Criminal) Diary No.34641/2019 against the same, by the respondent no.3, came to be dismissed by the Hon'ble Apex Court by order dated 18/10/2019. Thus the discharge of the mother Sonali and maternal uncle Rahul has been maintained by the Hon'ble Apex Court.

It is in this background, that the petitioner has filed the present petition, seeking quashing of the F.I.R. and other reliefs as stated above.

4. Mrs. Gauri Venkatraman, learned Counsel for the petitioner submits that the allegations, against the petitioner, stem from a malafide action on part of the respondent no.3, who was nurturing a grudge against the petitioner, who was supporting her sister in her discord with the respondent no.3 and has been initiated for settling personal scores and for getting permanent custody of the child by making false allegations. It is submitted that the respondent no.3 has ill-will against the petitioner. Though the F.I.R. dated 25/10/2017, in para 5 states that the allegations about abuse had come to the knowledge of the respondent no.3 in February, 2017 itself, no complaint of any nature was made till 25/10/2017. She submits that the delay itself is telling and reflects the ill-will and malafides of the respondent no.3. She submits that throughout the respondent no.3, had been litigating to get the custody of the child and as his application for the same in Custody Petition No.D-51/2015 came to be rejected on 9/6/2017, the respondent no.3 has with a malafide intent has filed the F.I.R., on 25/10/2017. She submits that if the respondent no.3 was aware of the nature of the allegations in February 2017, had that been any truth in the same, he would not have kept quiet till 21/9/2017 on which date he had

lodged the complaint to the Police Station Shanti Nagar, Nagpur. She submits that the child has been brainwashed and is being used as a means to harass the petitioner. She further submits that in spite of allegations of the nature as indicated above, the mother has been granted access to the child. There is no independent statement. The entire action is abuse of the process of law and this is a fit case for quashing the F.I.R. She places reliance upon ***State of Haryana and others Vs. Bhajan Lal and others, 1992 Supp (1) SCC 335*** and specifically on illustration - 7 in para 102. She further places reliance upon ***G. Sagar Suri and another Vs. State of U.P. and others, (2000) 2 SCC 636*** and ***Niranjan Lakhumal Hiranandani Vs. Central Bureau of Investigation and another, 2018 SCC OnLine Bom. 1116*** to contend that even if the remedy of discharge is available, it is permissible for this Court to exercise the powers under Section 482 of Cr.P.C. and Article 226 of the Constitution of India to quash the F.I.R. Reliance is also placed on ***Navin Dhaniram Baraiye Vs. State of Maharashtra, 2018 Cri. L.J. 3393*** to contend that the presumption under Section 29 of POCSO Act is not absolute. Reliance is also places on ***Ahmad Ali Quraishi and another Vs. State of Uttar Pradesh and another, 2020 SCC OnLine SC 107*** to contend that it is

permissible to quash prosecution under POCSO Act. She therefore submits that the present petition needs to be allowed.

5. Mr. R.B. Gaikwad, learned Counsel for the respondent no.3 invites our attention to the statement of the child as recorded by the Investigating Officer, the Child Welfare Committee as well as the Magistrate and submits that the statement about abuse by the child is not only consistent, but is specific about the petitioner. He submits that the statements have been recorded in camera, i.e. of the child alone, without the presence of the father and therefore there is no reason to disbelieve the same. He submits that the contentions of the petitioner regarding malice, ill-will, harassment, cannot be a ground for discharge and only the statement of the child regarding the sexual abuse has to be looked into. He submits that all the contentions as are being canvassed by the learned Counsel for the petitioner, could only be decided in a trial and cannot form the basis for exercise of jurisdiction under Article 226 of the Constitution of India or Section 482 of Cr.P.C. He therefore submits that there is no merits in the petition and the same needs to be rejected.

6. Mrs. Gauri Venkatraman, learned Counsel for the petitioner, in rebuttal submits that the statements have been improved from time to time and are therefore not worthy of reliance. She submits that the child has been tutored since he is in custody of the respondent no.3, which fact also needs to be looked into and considered for the purpose of quashing the F.I.R.

7. Ms Tajwar Khan, learned Additional Public Prosecutor for the respondent no.1/State supports the arguments of Mr. R.B. Gaikwad, learned Counsel for the respondent no.3.

8. After having heard the learned Counsel for the parties and perused the record with their assistance, we find that we cannot grant the relief which is claimed in the petition. It is not in dispute that the marriage of the respondent no.3 and Sonali the mother of the child, stood dissolved with effect from 16/12/2013 by mutual consent. It is also not in dispute that under the terms of consent respondent no.3 is entitled to the custody of the child on the evening from 5:00 p.m. of every second and fourth Friday till the morning of the next Monday.

9. A complaint was lodged by the respondent no.3 on 10/09/2017 with the Police Station Shanti Nagar, wherein it was stated that on 10/09/2017 when he had brought the child to his residence at about 11:30 a.m., he made a complaint that the petitioner had assaulted him. Upon being asked the reason for the same, the respondent no.3 was told that in the newspaper 'Navbharat' dated 08/09/2017 the name of the respondent no.3 was mentioned which portion of the newspaper was cut off by the child and kept in his pocket to show to the respondent no.3, which was seen by the petitioner, pursuant to which the assault happened. The respondent no.3 thereupon is said to have confronted Smt. Sonali, the mother who stoutly denied any such incident. The respondent no.3 in the complaint also indicated that the child was being mentally and physically harassed at the residence of his mother.

10. On 21/09/2017, the respondent no.3 filed a complaint with the President, Child Welfare Committee, wherein in para 5 a specific allegation has been made about sexual harassment by the present petitioner. The Child Welfare Committee ordered an enquiry, by the Protection Officer, in pursuance to which the statement of the

child Veer @ Virendra was recorded on 23/10/2017 by the Protection Officer, Smt. Sadhna Hatwar in the presence of Mr. Mustaq Pathan, District Child Welfare Officer, where the child specifically stated the nature of the sexual abuse by naming the petitioner, which was to the effect, as stated in para 3 (vii) above. The Child Welfare Committee on the basis of the report as submitted to it on 24/10/2017 found *prima facie* incidence of cruelty and sexual abuse and directed action to be taken. F.I.R. came to be lodged with the Police Station Shanti Nagar on 25/10/2017, bearing F.I.R. No.3093 against the present petitioner as well as Smt. Sonali the mother and Shri Rahul the maternal uncle under Sections 8 and 12 of the POCSO Act, Section 75 of the J.J. Act and Section 323 and 34 of I.P.C., which as stated above, was supplemented by adding offences under Sections 16, 19 and 21 of the POCSO Act by way of a supplementary charge-sheet, dated 25/09/2018. It would thus be apparent that the allegations of sexual abuse by the child, were prior in point of time to 21/10/2017, when the respondent no.3 received the custody of the child. This would clearly indicate that the contention of the learned Counsel for the petitioner that the child

was tutored after the respondent no.3 received his custody on 21/10/2017, is without any merits.

11. In so far as the contention that the respondent no.3 was aware of the abuse in the month of February, 2017 and still he did not take any action therein till 21/09/2017, the same also, cannot be given any weightage for the reason that throughout this period the child was in the custody of the mother, who was residing at her parental house, jointly with the petitioner and her brother Rahul, and this clearly must have weighed with the respondent no.3, before initiating any action. Thus, merely because there is some delay in lodging of the complaint about sexual abuse, that cannot be a ground to quash the same. In fact the child in his statement to the Investigating Officer, states that he had informed about the sexual abuse by the petitioner to his mother Smt. Sonali, who disregarded the same, which is telling.

12. In a case of quashing of an F.I.R. and the subsequent charge-sheet, what needs to be seen, is the nature of the contention made and its *prima facie* veracity. In the instant matter, the child

has been independently examined by the Child Welfare Committee on 21/10/2017. The statement of the child under Section 164 of Cr.P.C., has further been recorded by the J.M.F.C., Court No.2, Nagpur on 8/11/2017. The statement of the child has also been recorded by the Investigating Officer on 19/9/2018. All these statements, appear to have been recorded in the absence of the respondent no.3. All the statements are consistent in their stand regarding the act of abuse at the hands of the petitioner. The allegations as to sexual abuse by the petitioner, therefore being clear and specific, we do not feel that this is a case which merits interference under Section 482 of Cr.P.C. or under Article 226 of the Constitution. This is clearly a matter which will have to undergo the tribulations of a trial as *prima facie* specific allegations are there, which in light of the presumption under the POCSO Act, can only be tested on the anvil of the evidence which would be forthcoming in a trial, the cross-examination and the rebutting of the presumption and not otherwise.

13. The discharge of the mother Sonali and maternal uncle by the High Court in Criminal Revision Application No.229/2018,

was on the ground, that the Court found from the statement of the victim child that nothing was stated against his mother/Sonali and maternal uncle Rahul about sexual assault as defined under Section 7 of the POCSO Act. The judgment dated 14/02/2019, in fact, in para 8 thereof, notes that from the statement of victim child, it was clear that some allegations are made against his maternal aunt. It is thus clear that the discharge of the mother and the maternal uncle is of no assistance to the case being advanced by the learned Counsel for the petitioner.

14. There cannot be any two opinions about the proposition as laid down in *G. Sagar Suri and Niranjan Hiranandani* (supra) that in an appropriate case the remedy of discharge, cannot be held to be a bar to exercise discretion under Article 226 of the Constitution of India or Section 482 of Cr.P.C. That however does not assist the petitioner in any manner, on account of the facts of the present case, where clear and specific allegations about sexual abuse/assault have been made by the child victim who was aged merely six years at the relevant time. Though the presumption under Section 29 of the POCSO Act is held to be rebuttable in *Navin Dhaniram Baraiye*

(supra) the question of rebutting such a presumption could only arise in the trial and not otherwise. In ***Ahmad Ali Quraishi*** (supra) upon which reliance has been placed by the learned Counsel for the petitioner, the quashing of the proceedings under the POCSO Act, by the Hon'ble Apex Court was on account of the enquiry report by the C.O. (City), which in clear terms stated that no sufficient grounds were available to register a case under the POCSO Act. In so far as the position laid down in ***Bhajan Lal*** (supra) is concerned, the facts in hand, clearly disclose *prima facie* material demonstrating the registration of the offences as indicated in the charge-sheet and therefore, we do not consider the present case to fall under illustration-7 as given in para 102 therein, rather as rightly submitted by Mr. R.B. Gaikwad, learned Counsel for the respondent no.3, illustration-1 in para 102 is attracted.

15. The provisions of Sections 29 and 30 of the POCSO Act, mandate a presumption, regarding committing of an offence and of the culpable mental state to commit it, which presumption in our considered opinion, can only be rebutted by leading evidence to the contrary, which can only be done during the course of the trial. The

provisions of the POCSO Act having been brought in with the avowed intention of preventing children from sexual abuse, as defined in the Act, and any claim for discharge, has to be considered in light of the nature of offences stated therein. It cannot be doubted that offences of such a nature, may not be disclosed by the child, for multiple reasons, some of them being the threat of assault, further abuse, disbelief, insensitivity etc. However, when once such allegation has been made, the same has to be tested on the anvil of evidence to be led at the trial, unless the allegation is absurd to its core. In our considered opinion, the nature of allegations of sexual abuse/assault as have been made in the present matter against the petitioner, which have been independently verified from the child by three different agencies, have consistently remained the same, which leaves no room for exercise of any discretion in favour of the petitioner.

16. The allegations of malice, malafides, ill-will, harassment, tutoring of the child, their falsity, they being made for settling personal scores, the litigation background, violation of the custody order, delay, absence of any independent witness, all pale

into insignificance, in light of the clear and specific nature of the allegations and the consistency throughout, by the child Veer, even over a period of time, from 21/9/2017 to 19/9/2018, besides which these contentions cannot form the basis of a discharge, except for falsity, which has to be proved in trial and not merely malice but malice in law, which is absent.

17. In the instant matter, apart from the provisions of the POCSO Act, Section 75 of the J.J. Act have also been alleged, which also definitely require a trial.

18. In light what we have stated above, there is no merits in the present petition. The same is therefore without any merits and is rejected. Rule stands discharged.

(AVINASH G. GHAROTE, J.)

(SUNIL B. SHUKRE, J.)

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Shailendra
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by Shailendra
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