

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Ajoy Kumar Mukherjee

CRR 1593 of 2018

Dr. Nikhil Kumar Ghorai

-vs-

The State of West Bengal & anr.

For the petitioner : Mr. Rabindra Nath Bag
Mr. Rohan Raj

For the State : Mr. Arijit Ganguly
Mr. Sanjib Kumar Dan

Heard On : 07.07.2022

Judgment On : 12.07.2022

Ajoy Kumar Mukherjee, J.

1. The present revisional application has been preferred for quashing the Special Court Case No.05/2018 pending before the Court of Learned Special Judge under protection of children from Sexual offences Act, 2012 (in short POCSO Act) arising out of Darjeeling Sadar Women Police Station Case No.01/2018 dated 2.3.2018 under Sections 6/17 of the POCSO Act and added Sections 314/315 of the Indian Penal Code read with Section 5(3) of the Medical Termination of Pregnancy Act, 1971.

2. The petitioner contended that the petitioner is the senior most Gynecologist in the District Hospital, Darjeeling and he tried to save the life of a minor girl aged about twelve years by aborting her in the District hospital having due consent of her relative, who got pregnant due to commission of rape by one of her close relative.

3. One Mousam Rai, who is the uncle of the victim girl lodged a written complaint on 2.3.2018 alleging that he went to Delhi due to economic/financial hardship, leaving the victim girl in the custody of his sister and brother-in-law. Due to continuous rape committed on the victim girl by his brother-in-law, Mr. Sishan Rai, the victim girl became pregnant and she was carrying for almost six months. When defacto complainant came to learn about the incident he returned immediately. He reached Darjeeling on 28.02.2018 and after return he came to know that his sister and brother-in-law consulted the doctor and it was alleged that the complainant thereafter met the doctor and came to learn that the victim child may loss her life unless she is aborted immediately and on hearing the caution made by doctor and also seeing the condition of the victim, he signed a paper. However, the complainant requested the police to take action against the accused persons and punish them as per the provision of law. The said complaint was received by Sadar Women Police Station, Darjeeling on 2.3.2018.

4. During investigation it revealed that the victim was admitted at District Hospital, Darjeeling on 2.3.2018 and was discharged from the Hospital on 7.3.2018 and she was aborted there. Subsequently, she was kept under the safe custody of Childrens' Home, Darjeeling.

5. During investigation it further appeared that the victim girl was taken at private clinic of one Dr. N. K. Ghorai (hereinafter referred to as the petitioner) by the wife of the principal accused, Chandrika Rai on 28.2.2018, and petitioner confirmed about a live foetus in the womb of the child and opined for the termination of foetus. On 2.3.2018 the victim was admitted under the petitioner at Sadar Hospital where the live feotus in the womb of the victim girl was aborted by the petitioner.

6. It is alleged by a letter issued by the Superintendent of District Hospital, Darjeeling vide Memo No. 64/1(4) supdt. dated 07.03.2018, addressed to the Inspector-in-Charge, Sadar Police Station, Darjeeling, that the petitioner had conducted an illegal abortion on the victim and that the pregnancy was more than twelve weeks duration and the petitioner did not consult with other Medical Officers for forming an opinion before conducting the abortion and on the basis of said information a General Diary No. 319/18 was recorded in the Sadar Women Police Station, Darjeeling.

7. It is submitted on behalf of the petitioner that the police wrongly added Sections 314/315 of the Indian Penal Code and Section 5(3) of the Medical Termination of Pregnancy Act and implicated the present petitioner falsely along with the principal accused persons.

8. Mr. Rabindra Nath Bag, Learned Counsel appearing on behalf of the petitioner submits that the provisions laid down in Section 6 of the POCSO Act, is not at all applicable to the petitioner as no allegation of aggravated penetrative sexual assault has been attributed against the petitioner. The petitioner saved the life of the victim girl who became pregnant for more than six months due to rape committed by her close relative. The petitioner by aborting the foetus saved her life because she is minor and unmarried and if she was not aborted she would have lost her life.

9. Mr. Bag further submits that the provision laid down in Section 17 of the POCSO Act is also not applicable to the petitioner because that Section provides that whoever abates any offence under the said Act and if the, offence is committed in consequence of the instigation or in pursuance of the conspiracy or with the aid which constitutes the abetment such person shall be an abator. In the instant case abatement if at all was made, was made by the

wife of the principal accused, namely Chandrika Rai and the petitioner being a doctor tried to save the life of a girl, who came to her chamber with her relatives and as such cannot come under the said definition of offence and there is no whisper of abetment in committing the rape, against the petitioner. The medical check up done by the petitioner does not come under the purview of POCSO Act.

10. Mr. Bag further submits that Section 314 of the Indian Penal code (IPC) is not at all applicable in the present context against the petitioner as in the instant case the victim girl whose life was saved by aborting live foetus from her womb has not died and still alive and was discharged from District Hospital on 07.03.2018 and had been kept under care and protection of Childrens' Home and as such the provision laid down in Section 314 is not at all applicable to the petitioner.

11. Mr. Bag further submits that Section 315 of the Indian Penal Code is also not applicable in the present context as in the instant case the victim was admitted in the Darjeeling District Hospital while there was absolute threat on her life because of the pregnancy and if she was allowed to carry out the pregnancy caused by rape on her, the pregnancy would have led to death of the victim girl and by reason of good faith and having received consent of her guardian, the petitioner being the registered medical practitioner aborted the life foetus from the womb of the victim girl.

12. It has also been argued on behalf of the petitioner that Section 5(3) of the Medical Termination of Pregnancy Act, 1971 is not applicable because the provisions of Section 4 and the provisions of Sub-section (2) of Section 3 of the said Act relating to the length of the pregnancy and the provision for taking opinion of not less than two registered medical practitioners shall not apply to

the termination of a pregnancy by a registered medical practitioner, in a case where he is of opinion formed in good faith that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

13. Here in the present case, it is apparent from the concerned prescription issued by the petitioner that the abortion became necessitated in order to save the life of the victim. Under the said Act, the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence and whoever terminates any pregnancy in a place other than that mentioned in Section 4 is also a punishable offence but here the said provisions under the said Act is not applicable to the petitioner because the petitioner is admittedly a registered medical practitioner having proper qualification and the petitioner formed a specific opinion that abortion is necessary to save the life of the victim girl and if pregnancy continues, the life of the victim girl would be in danger. Moreover, the guardian of the child had given written consent to terminate the pregnancy and the petitioner aborted the victim girl at District Hospital run by Government of West Bengal, which is an authorized place to carry out abortion in terms of Section 4 of the said Act.

14. Mr. Bag further submits that in the charge-sheet the investigating agency has purportedly added Section 201 of the Indian Penal Code but the said section is also not applicable to the petitioner, since he has not caused disappearance of offence or has not given false information to screen offender. The petitioner being registered medical practitioner took decision to save the life of the victim girl aged about 12/13 years and whose life was in danger for the reason of pregnancy caused due to rape, without taking opinion of other medical practitioner and aborted her in the District Hospital Darjeeling when

the victim got admission on 02.3.2018 after having received written consent from her close relative since she was a minor one.

15. Mr. Arijit Ganguly, learned counsel appearing on behalf of the State, submits that sufficient incriminating materials have been collected against the petitioner during investigation and as such, charge-sheet has already been submitted against the principal accused as well as other accused persons including the present petitioner and the case is pending for framing of charge. Whether the petitioner is guilty or not in connection with the present offence shall be decided after conclusion of trial and the present proceeding against the present petitioner cannot be quashed at its threshold simply on the ground that the petitioner is a registered medical practitioner and for which he cannot commit any offence, as whatever act done by petitioner has been done in good faith to save life of a child.

16. Considered the rival submissions.

17. Before entering into further details and before going to proceed with the examination of allegations in terms of the sections mentioned therein under the respective Acts against the petitioner, one should bear in mind the guideline for quashing of a proceeding as laid down in ***State of Haryana and others vs. Bhajan Lal and others***, reported in ***AIR 1992 SC 604***. It is only when the petition of complaint does not disclose a prima facie cognizable offence or when the allegations in the petition of complaint or the FIR are inherently improbable or absurd or when the petition of complaint or the FIR is a *malafide* one intend to harass the opponent, or no evidence of legal character is available or when there is illegal bar to entertainability of application, that a criminal proceeding should be quashed. This basic principles of law has been reiterated in various subsequent judgments.

18. In view of the line of precedents determining the principle of law where a proceeding can be quashed under Section 482 of the Code of Criminal Procedure, it is clear that one of such cases where power under Section 482 can be invoked by the High Court is when from the complaint, no evidence of legal character is available, and also when complaint does not disclose a prima facie cognizable offence.

19. In this context, if we return to the factual aspect of the case, we find that the complainant who is the uncle of the victim after return from Delhi lodged the written complaint before the Sadar Women Police Station, Darjeeling on 02.3.2018. During investigation it appears that the victim girl was taken to the private clinic of petitioner by one of the co-accused Chandrika Rai and her relative on 28.02.2018 and on examining the victim, doctor confirmed about a live foetus in the womb of the victim and opined for the termination of foetus and on 02.3.2018 the victim girl was admitted under the petitioner at Sadar Hospital Darjeeling.

20. In this context, I want to reproduce Section 19 and 21 of the POCSO Act, 2012:-

“19. Reporting of offences. – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,-

(a) the Special Juvenile Police Unit; or

(b) the local police.

(2) Every report given under sub-section (1) shall be-

(a) ascribed an entry number and recorded in writing;

(b) be read over to the informant;

(c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

21. Punishment for failure to report or record a case. *-(1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.*

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions of sub-section (1) shall not apply to a child under this Act."

21. Admittedly, in the present context, the petitioner first came to confirm about the offence on 28.2.2018, when the victim along with co-accused Chandrika Ray went to the petitioner's chamber and the petitioner confirmed about the live foetus in the womb of the child. In such circumstances, in terms

of Section 19 of the POCSO Act the petitioner was duty bound to report the same in the local police station but it appears that instead of doing the same, he simply opined for the immediate termination of pregnancy which was carrying for about six months. Ultimately the complaint was lodged by the uncle/complainant afterwards on 2.3.2022. Accordingly, Section 21 of the said Act may have attracted in the present context against the petitioner as it is the fact which constitutes offence. Apart from the other allegations against petitioner, allegation levelled by Superintendent District Hospital vide his memo no. 64/1(4) supdt. dated , 7.3.2018 also exists where Superintendent has reported at the local police station about the allegedly illegal abortion conducted by the petitioner.

22. Now whether the said abortion was illegally conducted by the petitioner or not and whether opinion of other doctors was needed to be taken by the petitioner, before aborting the girl or not, can only be decided if the parties go on trial and the proceeding cannot be quashed at the threshold, simply because the petitioner noted in the prescription, issued by the petitioner himself, that the abortion is required in order to save her life. Whether abortion was at all required to save her life or not can be the subject matter of scrutiny and which may be required to be decided in consequence of expert opinion but at this stage, all these facts and circumstances, prima facie discloses cognizable offence against the present petitioner. So it is not a fit case where the proceeding can be quashed against petitioner invoking power under Section 482 of the Code of Criminal Procedure.

23. Accordingly, CRR 1593 of 2018 is dismissed. However Trial Court is requested to conclude the trial at the earliest, preferably within a period of ten months from the date of the order.

Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)