

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL REVISION APPLICATION NO. 157 OF 2021

**BALWANTRAO HARIDASRAO BHISE
VERSUS
THE STATE OF MAHARASHTRA AND ANR.**

Shri. Sudarshan J. Salunke, Advocate for the applicant
Shri. S. D. Ghayal, APP for the respondent/State

**CORAM : M. G. SEWLIKAR, J.
RESERVED ON : 21st December, 2021
PRONOUNCED ON : 7th April, 2022**

PER COURT :-

1. By this application applicant has challenged the order dated 21st October, 2021 passed by the learned Judge, Special Court (POCSO), Jalna below Exhibit 27 in Special Case (Child) No. 57 of 2020 whereby application for discharge (Exhibit 27) came to be rejected by the Special Court.

2. Facts leading to this application are that the informant, aged 17 years got acquainted with accused Manoj Motiram Sable who is residing in the area of Christ Church, Jalna. Their friendship blossomed into love. Accused Manoj Motiram Sable promised to marry her in the month of April, 2018. He called her at his house at Kranti Nagar. He demanded

sexual favour from her. He promised her that he would marry her. Initially she refused. However, because of his promise of marriage, informant/victim consented for sexual intercourse. This act was repeated multiple times. Every time she consented for the physical relations only for the reason that accused had promised to marry her. After some days, she realized that she was pregnant. She shared this news with accused. When mother of the informant realized that informant was pregnant, she along with Surekha Gaikwad, Anita Dabhade and her mother went to the hospital of the applicant at Ambad. Applicant is a Doctor by profession. She was put on I.V. and some injection was administered to her. On the next day she realized that her foetus was aborted. On this allegations she filed FIR against the applicant and accused Manoj Motiram Sable.

3. Applicant was referred for medical examination. After receipt of medical examination report, offence came to be registered under Sections 376, 315, 316, 506 read with Section 34 of the Indian Penal Code and under Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012.

4. Applicant filed this application at Exhibit 27 in the record of the Trial Court alleging therein that the applicant has been falsely implicated in the case. The alleged incident was of October-November, 2018 and FIR came to be lodged on 3rd October, 2019. He further contended in this application that name of the applicant is not mentioned in the FIR. Applicant is a Child Specialist. He does not have a machinery by which sex of the foetus could be determined. Therefore, patients do not come to him for abortion. It is further alleged that from the charge-sheet it appears that foetus was of six month. In such a case pregnancy cannot be terminated without cesarean. On these allegations he filed application for discharge.

5. Learned Trial Court after hearing both the learned counsel rejected the application holding that statement of mother of the victim establishes the role of the applicant. He was authorized vide registration certificate (Exhibit 30) issued under the Bombay Nursing Home Registration Act, 1949 to do the nursing. This certificate (Exhibit 30) also reveals that he was allowed to run nursing home and maternity home. Holding thus, his application came to be rejected.

6. Heard Shri. Salunke, learned counsel for the applicant and Shri. Ghayal, learned APP for the respondent/State.

7. Learned counsel Shri. Salunke submitted that the applicant is a Child Specialist. He has no concern with the termination of pregnancy. He submitted that the applicant did not have even sonography machine. There is delay of more than one year in lodging FIR for which no explanation is forthcoming. He further submitted that the Medical Officer has given the report that no opinion can be given about pregnancy of the informant/victim as it is a very old case. He further submitted that the applicant being a Child Specialist is not authorized to terminate pregnancy. There is no record to show that the pregnancy was terminated in the hospital of the applicant. He has, therefore, prayed for allowing the application. Learned counsel Shri. Salunke for the applicant placed reliance on the case of **Govind Sakharam Ubhe Versus The State of Maharashtra, 2009 SCC OnLine Bom 770.**

8. Section 227 of the Code of Criminal Procedure deals with discharge of the accused. Section 227 reads as under:-

"227. Discharge – If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

9. Under this section a duty is cast on the Judge to apply his mind to the material on record and if on examination of the record he does not find sufficient ground for proceeding against the accused, he must discharge the accused. On the other hand if after such consideration and hearing, he is satisfied that a prima facie case is made out against the accused, the Court must proceed to frame a charge as indicated by Section 228 of the Code of Criminal Procedure. In the case of ***Niranjan Singh Karam Singh Punjab Vs. Jitendra Bhimraj Bijja and others, AIR 1990 Supreme Court 1962*** the Hon'ble Supreme Court has laid down the parameters for discharge of the accused and for framing of charge. Paragraph Nos. 5 and 6 reads thus:

"5. Section 227, introduced for the first time in the New Code, confers a special power on the Judge to discharge an accused at the threshold if 'upon 'upon consideration' of the record and documents he considers 'that there is not sufficient ground' for proceeding against the accused. In other words his consideration of the

record and document at that stage is for the limited purpose of ascertaining whether or not there exists sufficient grounds for proceeding with the trial against the accused. If he comes to the conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not he will discharge the accused. It must be remembered that this section was introduced in the Code to avoid waste of public time over cases which did not disclose a prima facie case and to save the accused from avoidable harassment and expenditure.

6. The next question is what is the scope and ambit of the 'consideration' by the trial Court at that stage. Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is obvious that since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution. In the *State of Bihar v. Ramesh Singh*, (1978) 1 SCR 257 : (AIR 1977 SC 2018) this Court observed that at the initial stage of the framing of a charge if there is a strong suspicion-evidence which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not

open to the Court to say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. In *Union of India v. Prafulla Kumar Samal*, (1979) 2 SCR 229 : (AIR 1979 SC 366), this Court after considering the scope of section 227 observed that the words 'no sufficient ground for proceeding against the accused' clearly show that the Judge is not merely a post-office to frame charge at the behest of the prosecution but he has to exercise his judicial mind to the facts of the case in order to determine that a case for trial has been made out by the prosecution. In assessing this fact it is not necessary for the court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but he may evaluate the material to find out if the facts emerging therefrom taken at their face value establish the ingredients constituting the said offence. After considering the case law on the subject, this Court deduced as under:

"(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 adduced 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 of Judge which (sic) 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 roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

10. Same principle has been initiated in the Case of ***Govind Sakharam Ubhe Versus The State of Maharashtra, 2009 SCC OnLine Bom 770.***

11. It is, thus, clear that for framing charge mere suspicion is not enough. There has to be grave suspicion against the accused for framing charge and proceeding with the trial. The test to determine a prima facie case would depend upon the facts and circumstances of each case. No straight jacket formula

can be laid down. The Court has to consider broad probabilities of the case, the total effect of the evidence and the documents produced before the Court. Roving enquiry is not contemplated while framing charge. On these principles it will have to be ascertained whether prosecution has produced material for framing of charge.

12. Applicant is accused of committing offence under Sections 315 and 316 of the Indian Penal Code read as under:-

“Section 315 : Act done with intent to prevent child being born alive or to cause it to die after birth: Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

Section 316: Causing death of quick unborn child by act amounting to culpable homicide: Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also

be liable to fine.”

13. Ingredients of Section 315 of the IPC are as under:

- (i) Woman must be pregnant.
- (ii) Before the birth of any child the accused does any act with the intention of preventing that child from being born alive or causing it to die after its birth.
- (iii) Such act must not be done in good faith for the purpose of saving the life of the mother.

. In terms of Section 316 of the IPC such an act is treated as amounting to culpable homicide.

14. Admittedly, applicant is a Doctor by profession. According to him he is a Child Specialist. Applicant possesses the certificate under the Bombay Nursing Home Registration Act, 1949 authorizing him to run nursing and maternity home. Therefore, learned Trial Court was justified in holding that the applicant was authorized to run nursing home and maternity home.

15. True it is that Medical Officer has declined to give any opinion about the past pregnancy of the informant/victim as it is a very old case of pregnancy. However, medical examination record shows that hymen of the victim was ruptured. Medical

science is so advanced that now a days past pregnancy also can be determined on the basis of changes in the body of a woman on account of pregnancy. Learned author Parikh in his Parikh's Textbook of Medical Jurisprudence, Forensic Medicine and Toxicology for Classrooms and Courtrooms, Eighth edition, Editor B. V. Subrahmanyam on page No. 399 has noted following signs in past pregnancy:

"A previous pregnancy usually leaves permanent marks on a woman, especially if the pregnancy has gone to full term. The extent and character of the signs found will depend upon whether the woman is primiparous or multiparous. The diagnosis of a previous pregnancy may be considered justifiable, if all or a majority of the following signs are present.

The breasts are lax, soft and pendulous. They are frequently wrinkled, if the woman has nursed her baby and occasionally show subcutaneous scars (linea albicantes). The nipples are enlarged with a persistent dark areola around them, and Montgomery's tubercles are usually present. Milk can frequently be squeezed from the nipples. The abdominal walls tend to be lax and show the presence of linea albicantes on the lateral aspects. There is commonly a deeply pigmented line (linea nigra) from the pubis to the umbilicus. There may be a scar due to old laceration of the perineum and the absence of signs of virginity, i.e. the hymen is ruptured, the vagina open and gaping, and a non-rugose condition of the vaginal walls."

. This shows that past pregnancy can be

determined on account of this permanent changes in the body of a woman. Moreover there is oral evidence in the form of statement of mother of the victim and one Rupesh Jayram Mhaske. Both of them have stated that victim was pregnant of six months. Mother of the informant has also stated that informant was pregnant. Admittedly, there is delay of more than one year in lodging the FIR. However, the aspect of delay can be considered during trial. In such cases, women generally do not come forward to lodge the report soon after the incident. Moreover, victim was less than 17 years when the intercourse happened. After her alleged termination of pregnancy, she attained majority. Therefore, even at this prima facie stage it can be said that delay is properly explained. In this view of the matter, I do not find that the learned Trial Court committed any error in dismissing the application for discharge of the applicant. Application is devoid of substance, hence dismissed.

[M. G. SEWLIKAR, J.]

ssp