

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

CRIMINAL APPLICATION (APL) NO. 27 OF 2017

Dr. Parthsarathi s/o Mukund Shukla,
 Aged about 45 years, Occ.: Medical
 Practitioner, R/o Gangadhar Plot, Akola.

... APPLICANT_

VERSUS

The State of Maharashtra,
 through Police Station Officer,
 Ramdaspath Police Station,
 Akola.

... NON APPLICANT_

Harish s/o Manoharlal
 Chhutlani, Aged about 34 years,
 Occ. Business, R/o Nimwadi,
 Sindhi Camp, Akola, Tah. &
 District – Akola.

(Amendment carried as per
 Court's order dated 30.06.2017)

... INTERVENER

Shri Firdos Mirza, Advocate for the applicant.
 Shri H.D. Dubey, A.P.P. for non-applicant/State.
 Shri O.S. Harwani, Advocate (Assist to prosecution)

CORAM : **VINAY JOSHI, J.**
JUDGMENT RESERVED ON : **29.07.2022.**
JUDGMENT PRONOUNCED ON : **05.08.2022**

JUDGMENT :

Heard finally by consent of learned Counsel appearing for the parties.

2. The applicant has applied for discharge from all the offences, however the Trial Court has declined to discharge the applicant for the offence punishable under Sections 120-B, 201, 417, 419, 420, 467, 468, 469 and 470 read with Section 34 of the Indian Penal Code and therefore, this application.

3. Briefly stated, at the instance of report dated 16.12.2008 lodged by one Manoharlal Chhutlani, crime was registered. It is the informant's case that his grandson was a pre-mature baby to whom initial treatment was given at different places. However, as the baby's condition deteriorated, on 11.11.2008, he had admitted the baby aged 2.5 months in the Hospital of the applicant who is a Doctor. The baby was admitted in ICU and placed in the incubator. There were total eight babies kept in different incubators. It is stated that on 15.11.2008, when the informant went to see his grandson, he found that it was an another baby having black complexion. He suspected about the change of baby, therefore, reported the matter to the Police. Since informant

Chhutlani disowned the baby, which was said to be their baby, it was sent to Nursing home.

4. On 10.11.2008 one Mahadev Dhaberao has also admitted his baby of similar age in the applicant's Hospital. While his baby was under treatment, on 15.11.2008 in the wee hours, he was informed that baby's condition is critical and then, it was informed that his baby died. Thereafter, the dead body was handed over to Mahadev Dhaberao, who in turn cremated the dead body. During the course of investigation, the Police visited the place of cremation, exhumed and collected samples for DNA profile. The blood samples of the Dhaberao couple, Chhutlani couple, and samples of disowned baby (alive baby), were collected and sent for DNA profiling. It was revealed from DNA profiling that Dhaberao couple was the biological parents of the disowned baby, which was alive. However, DNA profile reveals that Chhutlani couple is not biological parents of the dead baby, which was cremated.

5. It is the prosecution case that the applicant (accused no.1) has kidnapped the baby of Mr. Chhutlani as well as caused death of baby due to negligence. Likewise, the applicant was also charged for the offence of cheating and preparation of false treatment papers. So

far as the charge of kidnapping and causing death by negligence is concerned, the Trial Court has discharged the applicant from both the offences for which there is no challenge. The rejection of discharge pertains to the charge of cheating and preparation of false documents, which is under challenge.

6. Learned counsel appearing for the applicant would submit that due to mistake dead body of Chhutlani family was handed over to Dhaberao family as belonging to them. There was neither false representation nor the applicant was to gain anything by such misrepresentation. There is no dishonest intention, but it was mistaken act. Moreover, it is argued that there is no material in the chargesheet so as to proceed with the charge of cheating and forgery. It is submitted that co-accused Dr. Vaibhav Sapkal (accused no. 3) has been discharged by this Court in Criminal Application(APL) No.65 of 2017 against whom the similar charges were leveled.

7. The learned counsel for the applicant took me through the impugned order to contend that the learned Trial Court seriously erred in appreciating the material on record. It is submitted that the Trial Court without any material held that charge is to be framed for aforesaid offences. It is submitted that the Trial Court seriously erred in

relying on the statement of co-accused, which is totally inadmissible. Moreover, it is submitted that the Trial Court has relied on the statement of Compounder Ashok Adagade, which does not disclose any material to sustain the charge of cheating and forgery.

8. On the other hand, learned A.P.P., as well as learned Counsel appearing for the informant has supported the impugned order. It is contended that the role of Dr. Sapkal (accused no.3) was quite distinct than the applicant. Moreover, the learned A.P.P. has pointed out the statement of co-accused Balkrushna Dhore (accused no. 2), co-accused Dr. Kavita Adhau (accused no. 4) to contend that their statement makes out a *prima facie* case of cheating and forgery. It is stated that since the statement of co-accused was recorded prior to their arrest, it can be taken into consideration for framing charge.

9. Considered the rival submissions, charge-sheet and the impugned order of rejection of discharge application. The applicant is seeking discharge on the premise that unless there is sufficient material to proceed further, it is abuse of the process of Court in framing charge. It is well settled principle that at the time of framing charge, the test is to see whether there is material to proceed further and not to convict. Certainly at this stage the Court is empowered to sift the material to the

limited extent to find out whether a case is made out for framing charge.

10. I may refer to the observations of the Supreme Court in case of *P.Vijayan Vs. State of Kerala and anr. AIR 2010 SC 663*, wherein it is ruled that at the stage of discharge the Judge is not a mere post office to frame the charge at the behest of prosecution, but has to exercise his judicial mind to facts of a case in order to determine whether a case for trial has been made out by prosecution. In reported case of *Union of India Vs. Prafulla Kumar Samal and anr. (1979) 3 SCC 4*, the Supreme Court expressed that while considering the question of framing the charges under Section 227 of the Code of Criminal Procedure, the Court 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.

11. In another decision of the Supreme Court in case of *Jitendra Bhimraj Bijja & ors. Vs. State of Maharashtra, AIR 1990 SC 1962*, it is observed that at the stage of framing the 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 disclose the existence of all the ingredients constituting the alleged

offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

12. In view of the above settled position, sufficiency of material to frame charges needs to be examined. Learned Counsel for the applicant took me through the statement of co-accused Balkrushna Dhore (accused no. 2) recorded on 21.12.2008. He stated that at relevant time there were eight babies kept in the incubator. He found that one of the baby was critical and thus, he has informed to the applicant in that regard. It is his statement that co-accused Dr. Kavita Adhau as well as Applicant have examined the baby and found it to be dead. It is his statement that the applicant has asked him to change the baby with other one. Though learned A.P.P. has laid much stress on said statement, however, the applicant has strenuously argued that the statement of co-accused cannot be considered even at the time of framing of charge. In this regard, he relied on the decision of this Court in case of *Laxmi Koli Babita vs. State of Maharashtra 2005 ALL MR (Cri) 571*, wherein it is held that confession of co-accused cannot be called in aid at the time of framing of charge.

13. It is submitted that the statement of accused no.2 Balkrushna Dhore was recorded prior to his arrest, and therefore, it is admissible. In response, the applicant relied on the decision of the Hon'ble Supreme Court in case of *Aghnoo Nagesia vs. State of Bihar AIR 1966 SC 119* to contend that even if a confession made by a person who is free and not in police custody before commencement of investigation is inadmissible. In view of that it is not possible to consider statement of co-accused.

14. The learned A.P.P. took me through the statement of accused no. 4 Kavita Adhau. In her statement she has stated that after 2-3 days from the occurrence, the applicant got prepared fresh treatment papers of the baby through co-accused Dr. Sapkal (accused no.3). Admittedly, her statement is of hearsay nature. Besides that it is a statement of co-accused. Though allegedly Dr.Sapkal (accused no.3) at the instance of the applicant has newly prepared the treatment papers, however, considering the said material, he has been discharged by this Court. Pertinent to note that the principal allegations of change of treatment papers are against the co-accused Dr. Sapkal, however he has been discharged. Therefore it is difficult to use same material against the applicant.

15. Moreover, my attention has been invited to the statement of one Gangabai Solanke, who is the sister of Mahadeo Dhaberao. It is pointed out that as per her statement when a dead body of a baby was handed over, they were told not to disclose the things. Merely, asking this witness for not to disclose the things, does not sense anything to connect the applicant with the offence of cheating and forgery. Even if the evidence which the prosecution is proposed to adduce is fully accepted before challenge, it can not show the commission of offence and therefore there are no sufficient grounds for proceeding further.

16. Besides that the prosecution is unable to point out any material which can *prima facie* form a basis to proceed against the applicant. Even if the admissible statement of the witnesses have been transmitted into evidence, it falls short to make out a *prima facie* case. There is no material to indicate that since inception the accused with deceitful intention made a false representation. There is no material warranting applicant to undergo a trial, which would be a futile exercise. I may reiterate that as regards to the charge of cheating is concerned there is no admissible material, whilst about the forgery Dr. Sapkal (accused no. 3) against whom main allegation lies, is already discharged. The applicant is entitled for discharge in crime No.255 of 2008 registered with Ramdaspath Police Station, District Akola. The

applicant has made out a case of discharge, hence the impugned order needs interference.

17. In view of the above, the application is allowed. The impugned order dated 03.12.2016 is hereby quashed and set aside. The applicant is discharged from rest of the offences.

(VINAY JOSHI, J.)

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