

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRR 2384 of 2022

Smritikana Das

Vs.

The State of West Bengal & Anr.

For the Petitioner: Mr. Malay Bhattacharyya, Adv.,
Mr. Mihir Banerjee, Adv.,
Mr. Subhrajyoti Ghosh, Adv.,
Ms. S. Mondal, Adv.

For the private O.P/Respondent:

Mr. Jayanta Narayan Chatterjee, Adv.,
Mr. Debashis Banerjee, Adv.,
Ms. Moumita Pandit, Adv.,
Ms. Nandini Chatterjee, Adv.,
Mr. S. Naskar, Adv.,
Ms. Sreeparna Ghosh, Adv.,
Ms. Dipanwita Das, Adv.

For the State: Mr. Rudradipta Nandy, APP
Ms. Sonali Das, Adv.

CRR 3388 of 2022

Sumit Adhikari

Vs.

The State of West Bengal & Anr.

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CRR 3741 of 2022

Chhaya Hazra and Ors.

Vs.

The State of West Bengal & Anr.

For the Petitioner: Mr. Sekhar Kumar Basu, Sr. Adv.
Mr. Rajdeep Mazumder, Adv.,
Mr. Sourav Chatterjee, Adv.,

Mr. Moyukh Mukherjee, Adv.,
Mr. Kaustav Lal Mukherjee, Adv.,
Mr. Shakti Halder, Adv.

For the Private O.P/Respondent:

Mr. Jayanta Narayan Chatterjee, Adv.,
Mr. Debashis Banerjee, Adv.,
Ms. Moumita Pandit, Adv.,
Ms. Nandini Chatterjee
Mr. S. Naskar, Adv.,
Ms. Sreeparna Ghosh, Adv.,

For the State:

Mr. Rudradipta Nandy, APP
Ms. Sonali Das, Adv.

Heard on: 11 November & 18 November, 2022.

Judgment on: 09 January, 2023.

BIBEK CHAUDHURI, J. : –

1. The above referred revisional applications challenging an order passed by the trial court rejecting petitioners' applications under Section 227 of the Code of Criminal Procedure praying for their discharge arise out of one and identical case. Therefore, this Court proposes to dispose of the aforesaid revisional applications by passing the following judgment for the sake of convenience and brevity of discussion.

2. Factual aspect common to all the above mentioned revisional applications is stated below:-

3. One Smt. Apurba Ray and her husband being issueless married couple approached the competent authority expressing their desire to adopt a child. After due verification and home study of the prospective adoptive parents, a girl child aged about 9 years and 8 months was handed over to the opposite party No.2 on 13th July, 2021 and in terms of

the provisions of the Hindu Adoption and Maintenance Act, 1956 the proposed adoptive parents filed an application before the learned District Judge, Howrah which was registered as Misc Case No.93 of 2021 for taking adoption of the aforesaid girl child by the opposite party No.2 and her husband. The learned District Judge, Howrah allowed the petitioners (opposite party No.2 herein and her husband) to adopt the said girl child vide order dated 30th July, 2021. The girl child was declared as the adoptive child of the opposite party No.2 and her husband. Subsequently, opposite party No.2 lodged a written complaint before the women police station, Howrah police commissionerate on the basis of which FIR case No.31 of 2021 dated 20th November, 2021 under Section 376AB/376(2)(d) of the Indian Penal Code and Sections 4/6/17 of the POCSO Act and Section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015 was registered against the petitioners of the above mentioned revisions and others.

4. It is pertinent at this stage to state in brief the contents of the FIR lodged by the defacto complainant/opposite Party No.2. It is stated by the opposite party No.2 that she and her husband Joydeep Chowdhury were in the process of adopting a girl child aged about 9 years and 8 months from S.A.A, named, Karuna West Bengal Women and Children Welfare Society at Howrah and they brought the said child to their home on 13th July, 2021. Right from the very beginning the defacto complainant noticed that the said child was suffering from physical discomfort associated with a nervous wreck. She was medically treated by the defacto complainant

and her husband. The said child was treated by the adoptive parents with parental affection and consolation. Subsequently, she disclosed that she was sexually assaulted by a person at Karuna West Bengal Women and Child Welfare Society for the last three years approximately. She was in tremendous anxiety and mental agony which she tried to suppress from the defacto complainant and her husband. The said girl child also revealed that she was taken to an abandon house twice by the perpetrator of the offence and subsequently dropped by a car after sexual assault to Karuna West Bengal Women and Child Welfare Society. So, she was suffering from car trauma. The said girl child could not state the name of the perpetrator of offence, but informed the defacto complainant that the said person was called as "Takla" by one Gitashree Adhikari. She also identified the said person from the photograph affixed in a photo album provided by Karuna West Bengal Women and Child Welfare Society. Thereafter the girl child was medically examined by the gynecologist. The gynecologist confirmed that she was sexually abused earlier and it continued for a long period. It was also learnt from the said adoptive child that she was subjected to extreme physical and verbal abuse at the hands of Smt. Gitashree Adhikari, Secretary of the above named welfare society, Smritikana Das, Social Worker (petitioner of CRR 2384/2022), Miss Papia Social Worker, Deboshree Roy, Nurse, Tusi, Care giver, Chaya, Care giver, Puspita, Care giver and Rama, Care giver and others. She was not offered with proper food from her childhood by the above named persons and she endured scarcity of food and unbearable pain of sexual assault by the

above named persons and others for long three years in the said welfare society. The said girl child was forced to cook for social workers and others and used to work as maid servant with other children of the said welfare society.

5. On the basis of the said complaint police registered the above referred case and took up the case for investigation.

6. It is on record that on completion of investigation police submitted charge-sheet against the petitioners and others under Section 376-AB/376(2)(d) of the IPC read with Sections 4/6/17 of the POCSO Act and Section 75 of the Juvenile Justice (Care and Protection of the Children) Act, 2015. The accused persons filed separate applications praying for their discharge from the case. The said applications were rejected by the learned Special Judge, POCSO Act at Howrah.

7. In case of the petitioner of CRR 2384 of 2022, the application under Section 227 of the Cr.P.C was rejected by the learned trial judge vide order dated 10th June, 2022.

8. The petitioners of CRR 3741 of 2022 are the care givers of the aforesaid welfare society. Their application under Section 227 of the Cr.P.C was rejected by the learned trial judge on 14th September, 2022.

9. Petitioner of CRR 3388 of 2022 is the husband of Gitashree Adhikari. His prayers for discharge under Section 227 of the Cr.P.C was rejected vide order dated 10th June, 2022.

10. Being aggrieved, the above named petitioners have preferred the instant revision assailing legality, validity and propriety of the above

mentioned orders rejecting the petition separately filed by the petitioners praying for their discharge from the above mentioned criminal case.

11. It is stated on behalf of the petitioner of CRR 3388 of 2022 that he is no way connected with the alleged offence. The petitioner is the husband of Gitashree Adhikari, Secretary of the Karuna West Bengal Women and Child Welfare Society. The petitioner is not connected or associated in any way to the day to day affairs and functions of the said Welfare Society. The abovenamed Welfare Society was inducted as a tenant by the petitioner in respect of ground floor, first floor, second floor and fourth floor of the building situated at premises No.234, Sri Ramdanga, Howrah. The third floor of the said house is under possession of the petitioner for his own use and occupation. The petitioner was arrested only because he is the husband of the said Gitashree Adhikari. During investigation of the case petitioner's name never transpired as perpetrator or abettor of any offence for which other accused persons were charged. It is further pleaded by the petitioner that charge against an accused can only be framed when there is grave suspicion against the accused having committed an offence and not on the basis of mere suspicion. Only because the petitioner is the owner of the building in which the abovenamed Welfare Society was housed cannot be a ground to implicate the petitioner alleging commission of offence under the POCSO Act. It is alleged by the petitioner that the impugned order is bereft of any reason and therefore, illegal, arbitrary, unreasonable and prejudicial to the interest of justice and is liable to be set aside.

12. Petitioners of CRR 3741 of 2022 indisputably are the care givers attached to Karuna West Bengal Women and Children Welfare Society. It is submitted by them by filing the instant application that merely because they are the employees of the said Welfare Society, they have been roped in as accused persons in connection with Howrah P.S Case No.31/21 it is further submitted by the petitioners that they were supplied with the copies of the documents, statements of the witnesses recorded under Section 161 and 164 of the Cr. P.C etc. in compliance of Section 207 of the Cr.P.C. On perusal of the said documents and statements it is ascertained that there was absolutely no allegation against the petitioners to the effect that they were involved in committing any offence under the Protection of Children from Sexual Offences Act, 2012 or under the Indian Penal Code. There is also no allegation of abetment of any such offence against them. Therefore, petitioners have also assailed the order passed by the Id. Special Judge rejecting their application for discharge under 227 of the Constitution of India.

13. For the sake of convenience, it is recorded at the outset that the application under Section 227 of the Cr.P.C filed by the Smritikana Das, petitioner of CRR 2384 of 2022 was rejected by the Id. Special Judge under POCSO Act, Howrah vide order dated 10th June, 2022.

14. Application under Section 227 of the Cr.P.C filed by the accused Sumit Adhikari was also rejected vide order dated 10th June, 2022.

15. Similar application under Section 227 of the Cr.P.C filed by the petitioners of CRR 3741 of 2022 was rejected by the learned Trial Judge vide order dated 14th September, 2022.

16. Learned Advocate for Miss Smritikana Das who is the petitioner of CRR No.2384 of 2022 at the outset draws my attention to annexure-P2 of the revisional application which is an order of appointment of the petitioner for the post of social worker. It is strenuously submitted by Malay Bhattacharjee, learned Advocate for the petitioner that the petitioner was appointed as social worker with effect from 12th September, 2020. In the appointment letter working hours of the petitioner was stated from 10.30 am to 7 pm. Scope of her job was mainly outdoor work involving home-study of the prospective adoptive parents, post adoption follow up, maintaining office registers and record keeping.

17. Mr. Bhattacharjee next takes me to the statement of the victim girl recorded under Section 161 of the Code of Criminal Procedure. The learned Advocate specially refers to the reply given by the victim child to question No.4 onwards. The victim girl stated before the learned Magistrate that occasionally a wicked man used to come to the home from the back side door. He used to go to the upstairs wearing a short pant. He used to commit bad acts with her. Madam-Ma (Gitashree Adhikari) used to call the said person as Takla. He used to commit obscene act with the said child. He used to insert his penis inside his mouth. He also used to insert his penis insider her vagina. The victim child used to cry and scream with pain but nobody paid any heed to her cry. Takla used to

threaten her saying that if he would disclose anything against him he would show obscene pictures of the child which he took in his mobile phone to others and tell them that the victim girl insisted him to commit such act. The victim girl stated further before the learned Magistrate that she informed those incidents to Madam-Ma but she also threatened her saying that if the victim girl would disclose the said incidents to others, she would be punished and her obscene pictures would be circulated to others. Madam-Ma used to call Takla to the home over phone. She compelled the victim girl and others to see pornography, threatened and assaulted them. Smritikana, the petitioner herein also used to assault the victim girl physically. Smritikana also used to teach the victim girl and other inmates of the home different ways as to how obscene acts were required to be performed. She also directed the victim and others to perform such obscene acts. The petitioner also compelled the victim girl and others to see pornography.

18. It is strenuously argued by Mr. Bhattacharjee that the victim girl was handed over the foster care of the opposite party NO.2 on 13th July, 2021. On the other hand, the present petitioner was appointed as social worker in the above named home on 12th September, 2021. Thus, on the date when the victim girl was handed over to the opposite party No.2 under her foster care, the present petitioner was not associated with the said home.

19. Mr. Bhattacheryya next refers to statement of the complainant recorded under Section 164 of the Cr.P.C and submits that the

complainant did not make any allegation against the present petitioner. There is absolutely no material to frame charge against the petitioner for the offence punishable under Section 6 read with Section 17 of the POCSO Act and also under Sections 420/406/409/120B/34 of the IPC and Sections 75/87 of the Juvenile Justice (Care and Protection of the Children) Rule, 2015.

20. Mr. Sekhar Kumar Basu, learned Senior Counsel on behalf of the petitioners of CRR No.3388 of 2022 and CRR 3741 of 2022 submits at the outset that the trial court while considering discharge application under Section 227 of the Cr.P.C is not to act as a mere post office. The Court has to sift through the evidence in order to find out whether there are sufficient grounds to try the suspect. The court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case and so on. In support of his contention Mr. Basu refers to a decision of the Hon'ble Supreme Court in the case of **Sanjay Kumar Rai vs. State of Uttar Pradesh & Anr.** reported in **2021 SCC OnLine SC 367**.

21. Mr. Basu next refers to another decision of the Hon'ble Supreme Court in **Union of India vs. Profulla Kumar Samal & Anr.** reported in **1979 (3) SCC 4**. In paragraph 10 of the said report the Hon'ble Supreme Court has laid down the following principles to be followed by the trial court while considering an application for discharge of an accused:-

- (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 produced 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 the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece 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.

22. Thus, it is submitted by Mr. Basu that Section 227 of the Code casts a duty 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 him.

23. With the above introduction, Mr. Basu submits that the learned trial judge while rejecting the above named petitioner's prayer for discharge, passed an order holding, inter alia, that charge against the said accused shall be framed under Section 6 of the POCSO Act read with Section 17 of the POCSO Act as well as Sections 420/406/409/120B/34 of the IPC and Sections 75/87 of the Juvenile Justice (Care and Protection of Children) Rule, 2015.

24. It is urged by Mr. Basu that from the documents and statements of the witnesses recorded under Section 161 and 164 of the Cr.P.C, it is ascertained that the petitioner is the owner of Premises No.234, Sri Ram Dhang Road, Howrah. He inducted the above named Welfare Society as tenant in respect of ground floor, first floor, second floor and fourth floor of the said building. The petitioner used to stay in the third floor of the said building. He had no connection with the management and affairs of the said welfare society. The learned trial judge while rejecting the petition under Section 227 of the Code filed by the petitioner relied heavily on the statement of one Pradip Karar who used to work as a peon in the said welfare society. From his statement under Section 161 of the Code it is ascertained that occasionally late night parties were arranged in the residential floor of accused Gitashree Adhikari who is the wife of the petitioner. The petitioner was also present in such parties. One Laltu, a friend of Sumit Adhikari used to supply liquor in the said party. They used to consume liquor sitting in the third floor of the said building, Smritikana, Dipmala and Papia were also present in those parties.

Statement of Pradip Karar was also recorded under Section 164 of the Cr.P.C during investigation. In his statement recorded under Section 164 of the Cr.P.C, he stated that his duty hours was from 10 am to 7 pm. On certain occasions he used to stay in the office of the said welfare society till 10 pm at night. He came to know from his office that on certain occasions evening parties continued till midnight. He also heard that in those parties the guests used to take liquor.

25. Learned Senior Counsel on behalf of the petitioner next takes me to the statement of Radheshyam Santra recorded under Section 161 of the Cr.P.C. In his statement he described himself as a close friend of Adhikari family. He stated before the Investigating Officer that on the occasion of any festival Gitashree Adhikari and her husband Sumit Adhikari used to arrange late night parties. The guests invited in those parties consumed liquor. The petitioner, his friend Laltu and one Subrata used to supply bottles of liquor in those parties. Once huge numbers of bottles of wine were recovered from the ground beside the house of Sumit. The witness asked Sumit about the matter, but Sumit told him not to poke his nose over any incident concerning the said welfare society. The learned Senior counsel next takes me to the victim's statement and submits that the victim did not state even a single word implicating the present petitioner in committing any offence upon her or other inmates of the said welfare society.

26. It is submitted by Mr. Basu that if a person arranges late night party to treat his guests and friends and consumes liquor sitting in his

house without committing any offence or disturbing any person or committing any nuisance, no criminal liability can be attributed to him. It is also submitted by him with reference to the statement of the victim that there is absolutely no allegation against the petitioner of abetment of offence of aggravated penetrative sexual assault punishable under Section 17 of the POCSO Act. It is submitted by the learned Senior Counsel that there is absolutely no material to frame charge against the petitioner under Section 420/406/498 of the IPC.

27. On behalf of the petitioners of CRR 3741 of 2021, it is submitted that they used to work as care givers of children/inmates of the said welfare society. The victim girl stated in her statement recorded under Section 161 of the Cr.P.C that the said petitioners used to assault her and other inmates of the said society. They also used to make false allegations against the inmates so that they might be severely assaulted by Madam-Ma, Smritikana and Papia. Learned Advocate for the petitioner also refers to the statement of the victim girl recorded under Section 164 of the Cr.P.C. It is found from her statement that in the third floor of the said building night party is organised almost daily, Madam-Ma being the Secretary of the home, Smritikana and others used to dance playing hindi songs wearing short dresses. During such party they used to switch off all lights of the said building. Only dim lights were on in the third floor of the said building. During such party the care givers (Aaya) used to sleep in the ground floor. Many guests used to attend those parties. They used to commit obscene act with the care givers. Other witnesses, namely, Pradip

Karar, Radheshyam Santra etc stated before the Investigating Officer that the care givers knew everything if any wrong was committed upon the victim girl and other inmates of the said society because their responsibility was to look after the minor inmates of the said society.

28. Drawing my attention to the documents aforesaid, it is submitted on behalf of the petitioners that there is absolutely no material against the above named accused persons for frame charge under Section 6 read with Section 17 of the POCSO Act. It is also submitted by the learned Counsel on behalf of the above named petitioners that even if broad probabilities of the case and the total effect of the evidence collected by the Investigating Officer during investigation are taken into consideration, charge under Section 75 of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 may at best attract against the petitioners. The petitioners may also be charged for committing offence of abetment of offence under the Juvenile Justice (Care and Protection of Children) Act under Section 87 of the said Act. Therefore, the order passed by the learned trial judge while disposing of the application under Section 227 of the Cr.P.C requires intervention and consequent modification by this Court.

29. Mr. Jayanta Narayan Chatterjee, learned Advocate on behalf of the opposite party No.2 at the outset submits that he cannot deny and dispute the scope of Section 227 of the Cr.P.C and the duty of the trial judge while disposing of an application under Section 227 of the Code filed by an accused. The law is settled on the point that the trial judge while considering the question of framing the charges under Section 227

is not intended to act merely as a recording machine and pass an order directing framing of charge in respect of the offences under which the Investigating Officer filed charge-sheet. It is the bounden duty to sift and weigh, materials on record, but only for seeing whether there is sufficient evidence for framing charge against the accused and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is the duty to discharge the accused. If there is some evidence on the basis of which a grave suspicion arises in the mind of the learned Judge, he is fully within his right to frame charge against the accused.

30. Coming to the instant case, it is submitted by the learned Advocate for the opposite party No.2 that the above named welfare society was registered as a safe home for the children up to six years. Thus, the minor children up to the age of six years who need care and protection are sent to the said home for their safe stay and proper rearing and development. The investigation of this case revealed that not only the victim girl but also the children of even four years were subjected to gross sexual abuse. The said fact came to the surface only after the victim girl was taken in adoption by the defacto complainant. Sensing her physical and mental discomfort, the adoptive mother got adoptive child treated by a gynaecologist. It was learnt only then that she was subjected to gross sexual abuse while staying under the care and custody of the said welfare society.

31. Learned Advocate for the opposite party No.2 submits that the defacto complainant did not state the names of the offenders in the written complaint. What she came to learn from her daughter was narrated in the written complaint. The defacto complainant stated that one "Takla" sexually abused the victim girl while she was staying in the said welfare society. In course of investigation the Investigating Officer collected evidence and it was unearthed that very often there were late night parties organized by the secretary of the said welfare society in her residence situated at the third floor of Premises No.234, Sri Ram Dhang Road, Howrah. It is found from the statement of the victim girl that in those late night parties the principal offender, namely, Takla @ Deb Kumar Bhattacharya remained present. The guests invited in the said parties used to consume liquor. Gitashree Adhikari, Smritikana Das and some other women associated with the said home used to dance wearing short dresses to the tune of hindi songs. The victim girl was abused by Takla @ Deb Kumar Bhattacharya inside the said safe home when he attended late night parties. Accused Sumit Adkhikary is the husband of Gitashree Adhikari. The evidence collected by the Investigating Officer suggests that he remained present in those parties and used to drink. It is submitted by the learned Advocate for the opposite party No.2 that if the evidences collected by the Investigating Officer is considered in the document of the broad probabilities of the case, the total effect of evidence and the documents produced before the Court, it is to be held that accused Sumit Adhikari had direct knowledge about all such incidents

that took place inside the four walls of the said welfare society. Section 19 of the POCSO Act makes it obligatory for any person who has apprehension that an offence under the POCSO Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to the special juvenile police unit or the local police. Section 21 of the said Act prescribes punishment for failure to report or record such offence in spite of having knowledge of a commission of such offence. It was obviously within the knowledge of accused Sumit Adhikari that offence under the POCSO Act was being repeatedly committed not only in the said welfare society but also in his residence during late night parties but he did not inform the said incidents to the police. Therefore, he is liable to be prosecuted under Section 21 of the POCSO Act.

32. It is further submitted by the learned Advocate for the opposite party that Section 16 of the POCSO Act defines “abetment of an offence”. The text of Section 16 of the said Act is similar to Section 107 of the IPC. Explanation 1 and Section 16 runs thus:-

“16. Abetment of an offence-A person abets an offence, who-

First.-Instigates any person to do that offence; or

Secondly.- Engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that offence; or

Thirdly.-Intentionally aids, by any act or illegal omission, the doing of that offence.

Explanation I.-A person who, by wilful misrepresentation, or by wilful concealment of a material fact,

which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that offence.

Explanation II.-Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Explanation III.-Whoever employ, harbours, receives or transports a child, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position, vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of any offence under this Act, is said to aid the doing of that act.”

33. In the instant case accused Sumit Adhikari willfully concealed the material fact of sexual abuse of minor children inside the said welfare home under Section 19 of the Act he is bound to disclose commission of offence inside Premises No.234, Sri Ram Dhung Road, Howrah. The evidence collected by the Investigating Officer is sufficient that offence of sexual abuse was also committed during the late night parties in the third floor of the said premises. Thus, the accused is liable to be prosecuted under the charge of Section 6 read with Section 17 of the POCSO Act.

34. Mr. Chatterjee also submits that the evidence collected by the Investigating Officer clearly shows that Smritikana Das used to train the minor inmates of the said welfare society. The manner in which sexual coloured obscene acts were to be performed. The victim girl stated that they had to perform such obscene acts in the late night parties. Smritikana Das remained present in such late night parties. She used to drink alcohol. She also treated the inmates of the said home with utmost

cruelty. Therefore, it is submitted by the learned Advocate for the opposite party No.2 that the accused Smritikana Das is also liable to be prosecuted under Section 6 read with Section 17 and Section 21 of the POCSO Act.

35. With regard to the involvement of the petitioners of CRR No.3741 of 2022, it is submitted by Mr. Chatterjee that petitioners were care givers in the said welfare society. It was the duty of the said care givers to look after the children of the said home properly. Mr. Chatterjee submits that the care givers would obviously know if any girl child was sexually abuse. The victim girl stated in her statement that she was subjected to aggravated penetrative sexual assault by the said "Takla". As a result of forceful sexual violence she suffered bleeding injury in her private part. The care givers whose duty was to look after the inmates of the said welfare society must have the knowledge that the victim girl was subjected to aggravated penetrative sexual assault. They did not report the matter to the police. They suppressed the incidents of sexual, physical and mental torture perpetrated upon the victim girl inside the said welfare society. Willful concealment and suppression of fact amounts to atetment and the petitioners are also liable to be prosecuted under Section 6 read with Section 17 of the POCSO Act.

36. Learned Public Prosecutor-in-Charge has referred to the specific materials in case diary to urge that the petitioners are not entitled from being discharged under Section 227 of the Cr.P.C.

37. At the outset I must be very candid to record that the learned Counsels on behalf of the petitioners in all three revisions have raised

serious question as to the legality, validity and propriety of the impugned order passed by the learned trial judge rejecting prayer of the petitioners to discharge them under Section 227 of the Cr.P.C and consequently holding, inter alia, that the petitioners are liable to be charged for committing offence under Section 6 read with Section 17 of the POCSO Act. The learned Advocates for the petitioners do not raise any question with regard to the decision of the learned trial judge on the issue of framing of charge under various penal provisions of Juvenile Justice (Care and Protection of Children) Act and the IPC.

38. Therefore, this Court primarily restricts its discussion on the question as to whether charge under Section 6 read with Section 17 could be framed against the petitioners or not. It is strenuously argued by the learned Advocate for the opposite party that accused Sumit Adhikari instigated the principal offender namely, Takla @ Deb Kumar Bhattacharya to commit the offence of aggravated penetrative sexual assault, while other petitioners intentionally aided by their specific acts the commission of the said offence. "Abetment" as defined by Section 107 of the IPC as well as Section 16 of the POCSO Act comprises (i) instigation to do that thing which is an offence, (ii) engaging in any conspiracy for the doing of that thing, and (iii) intentionally aids, by any act or illegal omission, the doing of that thing. Section 108 of the IPC defines Abettor as a person abets an offence, who abets either the commission of an offence or the commission of an act which would be an offence. The word "instigate" in the literary sense means to incite, spur or urged on, stir up,

goad, foment, provoke, etc. The dictionary meaning of the word “Aid” is to give assistance, help etc. as to what would constitute instigation for commission of offence would depend upon the facts of each case. Therefore, in order to decide whether a person has abetted by instigation the commission of an offence or not, the act of abetment has to be judged in the conspectus of the entire evidence in the case. The act of abetment attributed to an accused is not to be viewed or tested in isolation. Such being the case, the instigating effect of the words used by the accused must be judged on the basis of the peculiar facts and circumstances of each case.

39. In order to constitute abetment, the abettor must be shown to have “intentionally” aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor, is not enough compliance with the requirements of Section 107 of the IPC. In **Shri Ram Vs. State of Uttar Pradesh** reported in **(1975) 3 SCC 495** the Hon’ble Supreme Court had set out an example. A person may, for example, invited another casually or for a friendly purpose and that may facilitate the murder of the invitee. But unless the invitation was extended with intent to facilitate the commission of the murder, the person inviting cannot be said to have abetted the murder. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of crime. Intentional aiding and, therefore, active complicity is the gist of the offence of abetment under Section 107 of the IPC.

40. Under the backdrop of the above stated legal formalities and ingredients of offence under Section 107 of the IPC, let us now consider the case of the prosecution on the basis of the evidence and document collected by the Investigating Officer during investigation to come to a finding as to whether the accused persons/petitioners who face trial under the charge of Section 6 read with Section 17 of the POCSO Act. It is not in dispute that accused Sumit Adhikari is the owner of Premises No.234, Sri Ram Dhang Road, Howrah. His wife Gitashree Adhikari is the secretary of the said welfare society. Entire building except the third floor was given on rent to the said welfare society. In the third floor Gitashree Adhikari and her husband Sumit Adhikari, the petitioner herein used to stay. The Investigating Officer has also collected the evidence to show that on any festive occasion there was late night parties hosted by Gitashree Adhikari was organized. In those late night parties the guests used to consume liquor. Gitashree Adhikari, Smritikana Das and some other employees of the said home used to dance playing hindi songs in the said party wearing short dresses. In all such parties the principal accused, named, "Takla"@ Deb Kumar Bhattacharya remained present. It is also ascertained from the record that said Deb Kumar Bhattacharya was a Social Welfare Officer under the government of West Bengal. There is evidence collected by the I.O that in the said parties the victim girl and other inmates of the said welfare society were asked to attend to perform obscene or illicit act (nongra kaaj). The I.O also collected evidence that accused Sumit Adhikari remained present in those late night parties and

consumed liquor. Therefore, it is ascertained from the evidence that late night parties were organized by none else than the wife of accused Sumit in their residence : Secondly the guests present in those parties consumed liquor. The employees of the said welfare society also consumed liquor. They used to perform dance with hindi songs: the minor inmates of the home were asked to attend those parties to perform obscene/illicit act and lastly the principal accused namely Takla @ Deb Kumar Bhattacharya committed aggravated penetrative sexual assault inside the welfare society premises. From all the above circumstances, it is curled out that accused Sumit Adhikari had direct and specific knowledge about commission of the offence of aggravated sexual assault. While sift and weighing the evidence for the limited purpose of finding out whether or not a prima facie case against Sumit Adhikari has been made out or not and considering the broad probabilities of the case, at the stage of consideration of charge the learned trial judge found that accused Sumit Adhikari by wilful concealment of a material fact which he is bound to disclose voluntarily caused the offence to be done and thus, he is said to instigate the commission of offence. Therefore, the learned trial judge rightly held that accused Sumit Adhikari may be charged under Section 6 read with Section 17 of the POCSO Act.

41. In **Ram Kumar and Nain Singh vs. State of H.P** reported in **(1995) Suppl. 4 SCC 67** the prosecutors was raped in police station by the head constable. The other constable, who participated in forcibly taking the girl and her husband to the police station, did not respond to

her shrieks while she was being raped, was held to have been rightly convicted under Section 376 read with Section 107 of the IPC.

42. In the instant case, the victim girl being an inmate of the said welfare society was subjected to aggravated penetrative sexual assault inside the home run by the wife of the accused and the victim girl was also abused in course of late night parties where accused Sumit Adhikari was actively present, intentional and wilful concealment of such material fact prima facie amounts to instigation of doing of the offence and therefore, the learned trial judge rightly held that accused Sumit Adhikari should face trial under the charge of Section 6 read with Section 17 of the POCSO Act.

43. It is needless to say that at the stage of framing of charge, the court has to see if there is sufficient ground for presuming that the accused has committed an offence. If the answer is in affirmative, the order of discharge cannot be passed and the accused has to face trial. The decision of the Hon'ble Supreme Court in **Rajbir Singh vs. State of U.P** reported in **AIR 2006 SC 1963** may be relied on in this regard.

44. It is held in **State of Bihar vs. Ramesh Singh : AIR 1977 SC 2018** that reading Sections 227 and 228 of the Code of Criminal Procedure together in juxta position, as they have got to be, it would be clear that at the beginning and the initial stage of trial the truth, veracity and effect of evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the judge at that stage of

the trial to consider in any detail and weigh in a sensitive balance whether the effects, if proved would be incompatible with the innocence of the accused or not. The standard of tests and judgment which is finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient court for conviction of the accused or whether the trial is sure to end in his conviction.

45. There is another important point to note Section 29 of the POCSO Act speaks about presumption as to the offence under Section 3, 5, 7 and Section 9 of the said Act or abating or attempting to commit such offence.

Section 29 states :-

“Where a person is prosecuted for committing or abating or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abated or attempted to commit the offence, as the case may be unless the contrary is proved.”

46. Section 30 speaks of presumption of culpable mental state of the accused. It is pertinent to see that presumption under Section 29 and 30 of the POCSO Act is available as soon as a person is prosecuted. It is needless to say that the petitioners are prosecuted on submission of police report. Therefore, at the time of consideration of charge it is open for the court to take into account the law relating to presumption in respect of an offence under the POCSO Act as per the provision of Section 29 and 30 of the said Act. Thus, in order to frame charge against the

accused if from the totality of evidence a case is made out against the accused trial court is entitled to frame charge. Degree of prima facie evidence in order to ascertain broad probabilities of the case under the POCSO Act is, in my considered opinion less than a case under the penal code.

47. Bearing the above principles in my mind and having heard the learned Counsel for the petitioners of all three cases, learned Advocate for the Opposite Party No.2 as well as the learned P.P-in-charge, and on careful perusal of the materials on record and the case diary, I like to record at the outset that though the learned Counsel for Smritikana Das vehemently urged that she was appointed as social worker in the abovenamed welfare society with effect from the 12th September, 2020 and her duty hours was from 10.30 am to 7 pm, at this stage of proceeding there is other scope to hold that the said appointment letter in the name of Smiritikana Das was a subsequent manufactured document. This Court has a prima facie reason to come to the above finding on perusal of the statement of the defacto complainant as well as the victim girl. From the statement of the defacto complainant it is found that when she and her husband decided to adopt a child she had initially took that Gitashree Adhikari and Smritikana Das. Therefore the above named petitioner was engaged with the affairs of the said society much before 12th September, 2020. It is also found from the said statement of the defacto complainant that the abovenamed petitioner insisted the defacto complainant time and again not to adopt the victim girl for some reason

best known to her. Subsequently the reason was known to the defacto complainant prompting her to lodge a complaint against her and others.

48. From the statement of the victim girl it is prima facie ascertained that the petitioner used to teach her and other inmates of the home how to perform obscene act, she showed them obscene videos and told them to perform such obscene act with others. Thus, there is sufficient evidence against the Smritikana that she instigated the victim girl to commit obscene act. Thereby she became the victim of sexual violence, evidence is sufficient that she was engaged with Gitashree Adhikari and others in direct conspiracy for engaging victim girl in aggressive penetrate assault. Therefore, the abovenamed petitioner is liable to face trial under the charge of Section 6 read with Section 17 of the POCSO Act. She is also liable to be tried for the offence punishable under Section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

49. It is found from the materials on record that accused Sumit Adhikari who is the husband of Gitashree Adhikari, Secretary of the said welfare society took active part in organising late night parties in his residence the principal offender used to attend the said late night parties. One Laltu and another person who being the close aides of Sumit used to supply alcohol for the guest of those parties. The victim girl was abuse by the principal offender in the premises of the said welfare society when he attended such late night parties. At the stage consideration of charge the trial court rightly held that accused Sumit Adhikari is liable to be tried under the charge of Section 6 read with Section 17 of the POCSO Act.

From the materials on record it appears that the abovenamed accused knew that the offence under the POCSO Act was committed in the said welfare home. He failed to report the commission of such offence and therefore he is also liable to be charged for the offence under Section 21 of the POCSO Act.

50. In relation to Chhaya Hazra and others it is also recorded that they were employed in the said welfare society as care givers. If an inmate of the said home is subjected to gross sexual violence it is very natural that such violence would be noticed by the care givers. They failed to report the commission of such offence upon the victim girl and therefore they are also liable to be tried under the charge of Section 21 of the POCSO Act. The abovenamed petitioners are also to be charged for the offence punishable under Section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

51. In view of the above circumstances all three revisions are dismissed on contest.

52. The learned Special Judge, Howrah (POCSO) is directed to frame charge against the accused persons on the basis of the finding made by this Court in this judgment.

(Bibek Chaudhuri, J.)