

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

CRIMINAL REVISION APPLICATION NO. 49 OF 2014

1. Dr. Gopal S/o Moreshwar Battalwar,
Age : 43 Years Occ. Medical Practitioner,
R/o. Vasant Nagar, Nanded. ..Applicant
(Orig. Accused No.2)

V E R S U S

1. The State of Maharashtra,
Through Incharge Police Station
Officer, Vimantal Police Station,
Nanded
2. Dr. Uttam S/o Marotrao Ingale,
Resident Medical Officer, Nanded
R/o. Swatantrya Sainik Colony,
Nanded. .. Respondents

WITH

CRIMINAL REVISION APPLICATION NO. 8 OF 2015

Noorjahan Begum @ Taj Begum w/o Shaikh Maqdoom,
Age : 49 Years, Occ. Labour,
R/o. Haz Dulhe Shah Raheman Nagar,
Nanded .. Applicant
(Orig. Accused No.3)

VERSUS

1. The State of Maharashtra,
Through the Police Station Officer,
Vimantal Police Station, Nanded.
2. Dr. Uttam S/o Marotrao Ingale,
Age : Major, Occ. Medical Officer,
R/o. Swatantrya Sainik Colony,
Nanded. .. Respondents
(Respondent No.2 is Orig.
Complainant)

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Mr. Bipinchandra K. Patil, Advocate for the applicant in Rev.
No.8/2015

Mr. P R. Katneshwarkar, Advocate for the applicant in Revision
No. 49/2014

Mr. Y.G. Gujarathi, A.P.P for the respondent Nos. 1 and 2.

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CORAM : S. G. MEHARE, J.

Reserved on : 09.08.2023

Pronounced on : 09.10.2023

JUDGMENT :

1. The applicants have impugned the common order of the learned Assistant Sessions Judge Nanded below Exhs.9 and 14, in Sessions Case No. 200 of 2013, dated January 31 2014.

2. The applicants will be referred to as “accused”, and respondents will be referred to as “State”.

3. The facts giving rise to the prosecution of lodging the report against the applicants were that the applicant in Revision No. 8 of 2015 was a sonologist. He was working with Dr. Agrawal, who was running the hospital by the name Lifeline Hospital and had a registration certificate under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection Act) 1994 (hereinafter referred to as “P.C.P N.D.T. Act” for short.)

4. The applicant in Revision Application No. 8 of 2015 was a Nurse in the said hospital. It has been alleged against the accused that the victim had been to their hospital on 22.06.2013, and the accused/Dr. Gopal performed sonography on her. One Shaikh Arefabee w/o Khudabaksh, another accused, took the victim to the hospital where the accused Dr. Gopal, was doing the sonography on the pregnant woman. She instructed the victim that she should not talk to anybody and that she would manage everything. Firstly, she went to the hospital on 11.06.2013. She deposited the charges. Her form "F" as required under the PCPNDT Rules 1996, was also filled up. However, she left the hospital that day, and her sonography could not be done. Accused Arefabee brought her again to the hospital on 22.06.2013. That time, her sonography was done. It has been alleged that both accused had disclosed to Arefabee the sex of the foetus. After about a month, the accused Arefabee, terminated her pregnancy illegally at her house. The complainant had the secret information; hence, a raid was laid at the house of the accused Arefabee. She was caught red-handed treating the victim for illegal termination of pregnancy. The victim was taken to the Government Hospital, and on the next day, i.e. on 23.07.2013, she was aborted. During the investigation, the applicants were found involved in the illegal termination of the pregnancy. On the basis of the

statements of the witnesses, they also had been there for sex determination at the said hospital long back; the accused have been arraigned as an accused in the crime. On the basis of the report, a crime bearing No. 83 of 2013 for the offence punishable under Sections 312, 315, 316, 109 read with Section 34 of the Indian Penal Code, Section 5(3)(5) of the PCPNDT Act and Section 33(a) of the Maharashtra Medical Practice Act, 1961 was registered.

5. Both applicants had moved an application under Section 227 of the Code of Criminal Procedure for discharge. However, the learned Assistant Sessions Judge declined the prayer for discharge; hence, they are before this Court.

6. The learned counsel Mr. Katneshwarkar, for accused Dr. Gopal has vehemently argued that he had remotely no concern with the alleged illegal termination of pregnancy. He was strictly following the PCPNDT Rules. He never determined the sex of the foetus of the victim and never made it public, as prohibited under Section 5(2) of the PCPNDT Act.

7. The last sonography was done on 22.06.2013. After that, the victim never came to his hospital. However, on 24.06.2013, she went to Dr. Katte and requested for termination of the pregnancy, but he

convinced her. Thereafter, on 22.07.2013, she went to the accused Areefabee and terminated her pregnancy illegally. He had no concern with the activities of the accused Areefabee. It was also argued that the prosecution had falsely created the evidence against him by recording the statements of witnesses, namely Gangaram and Kavita Aade. Considering the time which they have stated, that falsify the allegations. For such a long period, they never complained against the present applicant that they determined the sex and told the sex to the pregnant woman, her relatives or anybody else. Their statements were remote in time; therefore, those cannot be used against them. There is no possibility of his conviction. The victim's statement is also not specific that the present accused told her the sex directly. The statement of the victim further reveals that she was interested in terminating the pregnancy as she did not want to have another female child. Her brother-in-law was searching for a person who would do the medical termination of pregnancy and came into contact with Arefabee. The police have given colour to the case and indulged the innocent accused in a serious crime. On reading the material as a whole, no charges can be framed against the present accused. Since the victim was caught raid-handed, she might have been pressured to state against the applicants. Relying on the case laws, he would

submit that no case is made out against the accused Dr. Gopal; hence, he deserves discharge.

8. The learned counsel, Mr. Patil, for the accused Noorjahan Begum a nurse, has vehemently argued that there is no iota of evidence against her except the material that the victim noticed from a long distance that she and accused Arefabee were talking in the hospital. Being a staff nurse, she used to talk with the patients and other persons who used to come to the hospital. It is insufficient to prove that she has committed the alleged offence. She is simply a nurse, and she never attended the sonography. She had no reason to know the sex. He adopted the rest of the argument of the learned Advocate, Mr. Katneshwarkar, and prayed to discharge the applicant.

9. Per contra, the learned A.P.P. Mr. Gujrathi has vehemently argued that the offence is serious and against the prohibition of sex discrimination. Stringent restrictions have been imposed upon the medical practitioners performing ultrasonography on the pregnant woman. PCPNDt Act has been enacted for the prohibition of sex selection and control of the male-female ratio. He also argued that the victim, who was the best witness and her statement carry the importance. Her statement is very specific that she had been to the Lifeline Hospital. The co-accused Arefabee told her the name of Dr.

Gopal, who had performed the sonography on her. Dr. Gopal told her that she had a female baby. Noorjahan was continuously in touch with Arefabee in the hospital. The other witnesses, namely Gangdhar and Kavita Aade, have specifically deposed against the applicant that they had conducted the sonography on the pregnant woman and disclosed the sex to them. The acts of the applicants are in contravention of the PCPNDT Act. On reading the material available on record, *prima facie* material is available to frame the charges against the accused. The offence is serious; hence, the present accused does not deserve the discharge.

10. Section 227 of the Code of Criminal Procedure provides that 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 that 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.

11. The law is well settled that in exercising the powers under Section 227 of the Code of Criminal Procedure, the Judge, while considering the question of framing of charges under this Section, has the undoubted powers to go through the evidence for the limited purpose of finding out whether or not the *prima facie* case against the

accused is made out. Where the material placed before the Court disclose grave suspicion against the accused, which is not properly explained, the Court will be fully justified in framing the charge and proceeding with the trial.

12. The learned counsels for the applicants would rely on the Judgment of this Court passed in Writ Petition No. 520 of 2014 dated March 12, 2014, whereby Dr. Rajesh Kamalkishor Agrawal, the partner of Lifeline Diagnostic Center had impugned the order of seizure of sonography machine was quashed and set aside. He would further rely upon the case of **Union of India Vs Prafulla Kumar Samal And Another (1979) 3 SC cases page No. 4** in which the law is laid down that;

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. 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.”

13. He also relied upon the Judgment of this Court passed in Criminal Writ Petition No. 200 of 2014, dated April 6 2015, co-accused Dr. Rajesh S/o Kamalkishor Agrawal based upon the allegations levelled against him has quashed and set aside R.C.C.

No. 752 of 2013 registered for the offences under Section 3(A), 4,5(2), 6, 23 and Rule 9 and 18 of the Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short, it is referred as “ PCPNDT Act”) along with the impugned order dated 07.01.2014 passed below Exhibit-1 by the learned Chief Judicial Magistrate, Nanded, in RCC No. 752 of 20 Bearing in mind the law as regards the powers of the Court under Section 227 of the Code of Criminal Procedure, the Court has examined the record.

14. It is admitted that on 22.06.2013, Dr. Gopal had done the sonography on the pregnant victim. Thereafter, she did not contact him or Noorjahanbegum. The statements and material collected by the Investigating Officer reveal that accused Arefabee took the pregnant woman to Lifeline Hospital, where both applicants worked. It has also not been disputed that on 11.06.2013, the sonography on the pregnant woman could not be done as she left the hospital. When she again visited the hospital on 22.06.2013, her form “F” to be maintained under the PCPNDT Rules 1994 was already available. Dr. Gopal did not deny that he had performed the sonography on the victim. The statement of the witnesses, particularly the brother-in-law and husband of the victim, reveals that they were searching for a person who may terminate the pregnancy of the victim as they were not

willing to have a female child. The statements of the witnesses, particularly the victim, reveal that co-accused Arefabee was taking her to Lifeline Hospital. She never allowed her to speak to the doctors. She did not even know the name of Dr. Gopal, but her statement reveals that on her inquiry, co-accused Arefabee told him the name of the Dr. Gopal. As far as the allegations against Noorjahanbegum is concerned, the only material available against her is that the victim saw her talking to co-accused Arefabee at the Lifeline Hospital. Admittedly, after about a month of her last sonography done at Lifeline Hospital, the victim and Arefabee were caught raid-handed doing illegal termination of the pregnancy.

15. The question is whether, under these circumstances, the accused had any nexus with the offences punishable under Sections 112, 315, 316, and 109 read with Section 34 of the Indian Penal Code. Section 312 of the Indian Penal Code speaks of causing miscarriage. If the miscarriage was voluntarily caused, it is an offence punishable under the said Section. Section 315 of the Indian Penal Code speaks of the act intended to prevent a child from being born alive or to cause it to die after death. It provides that the person, whosoever he may be before the birth of the child, does any act with the intention to prevent that child from being alive; doing any such act preventing the child

from being born alive is an offence punishable under that Section. Section 316 of the Indian Penal Code speaks of causing the death of an unborn child by an act amounting to culpable homicide. The Section requires the act to be done by a person under peculiar circumstances, thereby causing the death of an unborn child. The prosecution case is specific that on 22.07.2013, on secret information, the raid was conducted, and the trap was successful. They found various medical materials at the house of co-accused Areefabi used for termination of medical pregnancy, and the victim was administered the medicine for termination of pregnancy. There is also material that two days after the sonography was done at Lifeline Hospital, the victim had been to another doctor requesting him to terminate her pregnancy as she knew the sex, but she did not disclose to him the source of knowing the sex.

16. As far as section 109 of the Indian Penal Code is concerned, it is an offence abetting to commit the crime. Abetment to commit a crime requires the instigation of any person to do a particular thing, intentional aid, by any act of illegal omission for doing that thing as defined under Section 107 of the Indian Penal Code. In order to prove the common intention under Section 34 of the Indian Penal Code, there shall be a meeting of mind either before or at the spur of the moment of the commission of the offence. None of the

witnesses stated that these two accused ever had any dialogue with the victim that they would assist her in terminating her pregnancy through co-accused Arefabee. There is no material on record to believe that the present applicant had a nexus with the illegal termination of pregnancy of the victim at the house of co-accused Areefabi.

17. There is no evidence remotely to *prima facie* establish the nexus of the applicants abating Arefabee to do the illegal termination of pregnancy, nor did they share a common intention at any time.

18. As far as the allegation of disclosing the sex is concerned, there is evidence that Dr. Gopal told her that she had a female foetus. Her statement is that the sex of a foetus was told to her through co-accused Areefabi. The Court, having regard to the specific statement of the victim, is of the view that this appears to be sufficient evidence to try Dr. Gopal for the offences punishable under Sections PCPNDT Act. As far as the allegation against the Noorjahanbegum is concerned, except the bare words of the victim that she saw her talking to Arefabee, the prosecution has no material at all.

19. Considering the record of the case and the documents submitted therewith, this Court opines that there was no sufficient ground for proceeding against both accused for the offences

punishable under Sections 312, 315, 316, 109 and read with Section 34 of the Indian Penal Code. There was no sufficient material on record to frame the charge against the accused Noorjanbegum for the offence punishable under the provisions of the PCPNDT Act. However, there is *prima facie* material against Dr. Gopal to frame the charges under the PCPNDT Act. On the above discussion, the following order is passed:-

ORDER

- (i) Revision Application No.49 of 2014 is partly allowed.
- (ii) The order rejecting application Exh.9 by the learned Additional Sessions Judge Nanded passed in Sessions case No. 200 of 2013, dated 31.01.2014, is partly quashed and set aside.
- (iii) Applicant Dr. Gopal Moreshwar Battalwar stands discharged for the Offences punishable under Sections 312, 315,316, and 109 read with Section 34 of the Indian Penal Code, Section 5(3)(4) of Medical Termination of Pregnancy Act, 1971 and Section 33(a) of the Maharashtra Medical Practitioners Act, 1961.
- (iv) Revision Application No. 8 of 2015 is allowed.
- (v) The order passed by the learned Assistant Sessions Judge, Nanded below Exh. 14 in Sessions Case No.200 of 2013 dated 31.01.2014, is quashed and set aside.

- (vi) The accused, Noorjahan Begum @ Taj Begum w/o Shaikh Maqdoom stands discharged in crime No. 83/2013 registered with Police Station Vimantl Nanded for the offences punishable under Sections 312, 315, 316, 109 r/w 34 of the Indian Penal Code and Section 5(3)(4) of Medical Termination of Pregnancy Act, 1971 and Section 33(a) of the Maharashtra Medical Practitioners Act 1961.
- (vii) Her bail and surety bond stand cancelled and surety stands discharged.
- (vii) Record and proceedings be returned to the concerned trial court.

(S. G. MEHARE)
JUDGE

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