

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO. 274 of 2022**

Gaurav Naresh Shinde .. Applicant
Versus
The State of Maharashtra & Anr .. Respondents
...

Mr.Ritesh Thobde a/w Sagar Tambe, C Shingade, for the applicant.

Ms. Devyani Kulkarni, for respondent no.2.

Ms.P.N. Dabholkar, APP for the State.

CORAM: BHARATI DANGRE, J.

DATED : 28th APRIL 2023

P.C:-

1 Heard learned counsel for the applicant, the appointed counsel for the complainant and the learned APP for the State.

 The present Revision Application is filed being aggrieved by the impugned order passed by the Special Judge under the POCSO, in Special Case No. 86 of 2022 on 20/5/2022, rejecting the discharge application filed by the applicant under Section 227 of the Code of Criminal Procedure.

2 The prosecution case, which surfaces through the charge-sheet and based upon the version of the prosecutrix aged 15 years and her friends, is about the victim leaving her house for celebrating the birthday of her friend on 12/12/2021. Though,

she left the house, she did not return home till the next day, which resulted in missing complaint being lodged by her mother and when the girl returned, an offence came to be registered under Sections 363, 376 r/w section 34 of IPC and Section 8 of the POCSO Act against two persons, the present applicant and one Rajesh.

3 As far as the present applicant is concerned, learned counsel Mr. Thobde would vehemently submit that on churning the entire material compiled in the charge-sheet, there is no iota of evidence, which would attribute him of committing an offence under Section 363 as well as 376 of IPC and Section 8 of the POCSO Act. The learned counsel has invited my attention to the distinct versions given by the victim girl, and the submission advanced is even the said statements are accepted as gospel truth, he is not accused of either kidnapping or committing sexual assault upon the victim.

4 In order to appreciate the aforesaid submission, when the statements of the victim are carefully read, it would reveal that her first statement dated 13/12/2021, disclose that she had joined her friends in birthday celebration, when she received phone call from one of her friend and therefore, she met him at Charni Road at 15:30 hours. She was roaming with him in Marine Lines area till 22:00 p.m and then she got down from a train at Mahalaxmi station and reached her house, but since she was scared that her mother would scold her, she again came back to Charni Road.

She further narrated that she made a phone call to the

present applicant and called him at Charni Road and accordingly, he reached there at 21:30 hours along with his friend Rajesh. Since it was too late, he persuaded her to stay in Rajesh's room and therefore, she reached a room located on 3rd floor near SK Garden and the applicant Gaurav was made to stand down. She accompanied Rajesh in the building and she allege that he forcibly committed sexual intercourse with her and left the room at 5'O clock in the morning. At 6:00 a.m, it is her version that the present applicant made a phone call to her, upon which she joined him and he dropped her home.

5 A distinct version of the victim girl comes in form of answers to the questions, put by the Investigating officer on 15/12/2021. Now, she gives a version, where she state that she accompanied her friends to Marine Drive Chowpatty and since she received a phone call from one of her male friend, she met him at Charni Road. She roamed with him till 8:45 p.m and then returned home. When specifically asked what happened at Mahalaxmi Station, she remain consistent with her statement, where she state that she called the applicant at Charni Road Station, but this time she state that around 9:30 p.m, the applicant along with the co-accused and one of her female friend came to see her. She expressed her fear that her mother might scold her, since it was too late and thereafter they started walking towards Bhuleshwar. Her female friend asked her to accompany to her house, but she refused and thereafter, her female friend as well as the present applicant returned home, whereas she continued to remain in company of the co-accused Rajesh and at

around 10:00 p.m in the night, she accompanied him to his room. When asked what transpired in the room, she respond by saying that he attempted to have sex with her.

When inquired, what happened in the morning, she state that at 5:00 a.m, Rajesh left the room and she received a phone call from the applicant asking her to come down and he dropped her to her house.

6 Her third version comes through her statement recorded under Section 164 of Cr.P.C, where she is consistent about her version of meeting her male friend and called the present applicant, who on receiving her call, came to see her. In the mean time, she state that she received phone call from co-accused Rajesh and he asked her for meeting, and initially though she was hesitant, since she thought that she is unable to return home, she agreed to meet him. At Charni Road, she met Rajesh, Gaurav and a female friend and while she was present in house of Rajesh, she was offered a sandwich. Her version is, co-accused forced himself upon her, despite her strong protest.

7 All the three versions coming through the victim girl, in any case, do not attribute the role of abduction or commission of forcible sexual intercourse upon her by the present applicant. The question that arises is that, whether he has abetted the commission of the offence, but it can be seen that the offence is not registered under Section 16 and when the statements are specifically read, the material would fall short of making out an offence for abetment, which necessary contemplate instigation by any person to do that offence, or intentional trading by an act

or illegal omission or a conspiracy for commission of an offence, being engaged with one or more other persons and in pursuance thereof, the act is committed.

The three versions given by the victim girl, reveal that she had accompanied Rajesh on her own will and she attribute sexual assault only to Rajesh. She is consistent on her version that on the next day, the applicant came to collect her and brought her home but, that itself would not make out an offence of abetment, as the applicant was aware that she had accompanied Rajesh in his room.

8 Another important aspect of the matter being, when the victim girl was referred for medical examination, she refused to undergo the examination to ascertain whether she was a victim of sexual assault. The document to that effect clearly record that she had given negative consent for examination, despite she and her relative having explained the need for conducting such examination. As a consequence, except the external examination of the victim girl in the JJ Group of Hospital, which has recorded the history given by her of subjecting to sexual assault by Rajesh, is recorded.

9 The learned Judge in the impugned order has recorded the inconsistency that appear through the statements of the victim girl, but considering that she was a young girl and it is the applicant, who had left the victim in the company of Rajesh, the discharge is refused.

I am unable to conform to the said view, since the material compiled in the charge-sheet, evidently fall short of,

framing a charge under Section 363, 376 read with section 34 of IPC and Section 8 of the POCSO Act against the present applicant.

In the wake of the inconsistency in the case of the victim girl, the conduct of trial would be a mere empty formality, with no evidence being available to sustain a finding of conviction.

The applicant, therefore deserve his discharge in POCSO Special Case No. 86 of 2022.

The application stands allowed, by quashing and setting aside the impugned order.

Needless to state that the observations made are restricted only to the present applicant and, in any case, I have not expressed any opinion about the role attributed to the co-accused, Rajesh.

Before parting, I would like to put on record my appreciation for Ms. Devyani Kulkarni, who has rendered her able assistant to this court upon being appointed to represent respondent no.2. The legal Services Authority shall ensure the payment of her legal remuneration within a period of six weeks from today.

(SMT. BHARATI DANGRE, J.)