

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

CRIMINAL REVISION APPLICATION NO. 29 OF 2023

APPLICANT : Anup S/o. Dasaram Pardhi, Aged
about 45 years, Occu: Doctor, R/o.
Yerola, Tah: Tumsar, District-
Bhandara.

//VERSUS//

NON-APPLICANT NO.1 : 1. The State of Maharashtra, through
PSO Aroli, Dist. Nagpur.
2. XYZ (Victim), through Informant in
the Crime No.11 of 2021 registered
with Police Station Aroli, Dist.
Nagpur.

Mr. H.G. Katekar, Advocate for the Applicant.
Mr. A.R. Chutke, APP for Non-applicant No.1/State.
Ms. A.M. Kshirsagar, Advocate (Appointed) for Non-applicant
No.2.

CORAM : G. A. SANAP, J.
RESERVED ON : 1st MARCH, 2023.
PRONOUNCED ON : 28th MARCH, 2023.

JUDGMENT

Heard.

02] **Admit.** Matter is taken up for final disposal by consent
of the learned advocates for the parties.

03] In this criminal revision, challenge is to the order dated 23rd October, 2021 passed by the Extra Joint District Judge-4 and Additional Sessions Judge, Nagpur, whereby the learned Judge rejected the application at Exh.13 made by the applicant, who is accused No.2, for his discharge in Special Case (POCSO) No.206/2021.

04] The relevant facts for deciding this revision application are as follows:

The applicant will hereinafter be referred to as the accused No.2. The accused No.2 is Electro Homeopathy Doctor. The victim is the daughter of the informant. The accused Nos.1 and 2 are facing the prosecution for the offences punishable under Sections 376(2)(n), 312 and 313 of the Indian Penal Code, 1860 and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act”). The accused No.1, as per the case of the prosecution, has sexually assaulted the victim and, therefore, the victim was conceived.

05] It is the case of the prosecution that when the victim came to know that her menstrual period had stopped, she informed about it to the accused No.1. It is the case of the prosecution that

before taking the victim to the accused No.2, the accused No.1 met the accused No.2 and apprised him about his problem. The accused No.1, as per the case of prosecution, assured the victim that he had already spoken to the accused No.2 and the accused No.2 would give her medicine and thereafter there would be miscarriage. The accused No.1 took the victim to the accused No.2. The accused No.2 gave her medicines/tablets like HP4, Destam, Ome Tab, Dashmularist etc. The victim consumed the medicines. On the next day, there was vaginal bleeding. The informant, the mother of the victim carried the victim to the Government Hospital, Bhandara. The Medical Officer apprised the mother of the victim about the pregnancy and miscarriage. It is the case of the prosecution that the accused No.2 gave the medicines/pills to the victim and, therefore, the miscarriage was caused. The accused Nos.1 and 2 are, therefore, facing the prosecution.

06] The accused No.2 made an application before the Sessions Court, Nagpur for his discharge. According to him, he has not committed any offence. There was love affair between the accused No.1 and the victim. The victim was brought to him by the accused No.1. The accused No.2 examined the victim for stomach pain. He gave the medicine to the victim and he

prescribed the medicine to the victim. It was his duty to protect the victim who was brought to him as a patient. He has acted in a good faith. He has not committed any offence. The final report given by the experts stating that the miscarriage was caused due to the medicines, is vague and cannot be accepted.

07] The prosecution has filed reply and opposed the application before the Sessions Court. It is the case of the prosecution that during the course of investigation, the tablets were seized from the victim and sent for analysis and examination. The report has been received. The report clearly indicates that the miscarriage can be caused by the medicines prescribed by the accused No.2. It is further stated that the accused No.2 was not authorised to prescribe the medicine. He is not Gynecologist. He did not refer the victim to the Gynecologist. It was, therefore, contended that the accused No.2 has not made out a case for discharge.

08] The learned Additional Sessions Judge on the basis of the material placed on record found that the complicity of the accused No.2 has been *prima facie* made out. The learned Judge, therefore, rejected his application.

09] I have heard Mr. H.G. Katekar, learned advocate for the accused No.2, Mr. A.R. Chutke, learned Additional Public Prosecutor for the State and Ms. A.M. Kshirsagar, learned advocate for the victim. Perused the record and proceedings.

10] The learned advocate for the accused No.2 submitted that the accused No.2 on the say of the accused No.1 in good faith prescribed the medicine to the victim. The learned advocate submitted that the accused No.1 prescribed the medicine for the acute pain in the stomach of the victim. The learned advocate submitted that at the relevant time he was not aware that the victim was carrying pregnancy. The learned advocate submitted that the report submitted by the expert stating that the medicines prescribed by the accused No.2 caused miscarriage, is vague and, therefore, cannot be made the basis of the prosecution. The learned advocate submitted that the learned Additional Sessions Judge has not taken all these aspects into consideration and as such has come to a wrong conclusion. The learned advocate further submitted that the provisions of the POCSO Act cannot be applied against the accused No.2, in view of the mandatory provisions of Section 41 of the POCSO Act.

11] The learned Additional Public Prosecutor for the State submitted that at this stage the Court has to see the evidence available on record and not to appreciate the said evidence and record a finding of fact as to the issue involved in the trial. The learned Additional Public Prosecutor submitted that there is overwhelming evidence on record to establish the complicity of the accused No.2 in the commission of crime. The learned Additional Public Prosecutor submitted that the protection of Section 41 of the POCSO Act is not applicable to the case of the accused No.2.

12] It is to be noted that after investigation, the charge-sheet came to be filed against the accused Nos.1 and 2. During the course of investigation, the medicines/tablets prescribed by the accused No.2 to the victim were seized and forwarded to the Superintendent, Government Ayurvedic College, Nagpur. The panel consisting of three members on examination of the tablets/medicines gave the report. In the said report, it has been categorically stated that the tablets/medicines prescribed by the accused No.2 to the victim has caused miscarriage. The report dated 3rd March, 2021 is on record. It is the case of the prosecution that the accused No.1, who is not the custodian or guardian of the victim, had taken her to the doctor. It is the case of the prosecution

that before taking the victim to the doctor-accused No.2, the accused No.1 had met him and apprised him about the problem he has been facing on account of the pregnancy of the victim. It is the case of the prosecution that as per the assurance of the accused No.2 to take care of his problem, the accused No.1 took the victim to the accused No.2 and the accused No.2 on examination prescribed the medicines/tablets to her.

13] It is to be noted that on the very next day of the consumption of medicine by victim vaginal bleeding started. The mother of the victim took the victim to the Government Hospital at Bhandara. In the Government Hospital, Bhandara, the Medical Officer on examination informed the mother of the victim that the victim was pregnant. The Medical Officer further informed her that there was miscarriage. The mother of the victim on being confronted with the real state of affairs and involvement of the accused No.1 went to the police station and reported the matter to the police.

14] During the course of investigation, ample material has been collected. On the basis of the said material, it has been *prima facie* established that the accused No.2 had prescribed the tablets/

medicines, which resulted into miscarriage of the victim. It is the case of the accused No.2 that the victim was suffering from acute stomach pain, when she was brought to him by the accused No.1. It is his case that he has examined the victim and prescribed the medicines. It is his case that being a doctor, it was his duty to take care of the patient. In short, it is his case that he has acted in good faith. It needs to be stated that whether he has acted in good faith or not is a question of fact. The said question of fact would be required to be addressed on appreciation of the evidence led by the prosecution. It is undisputed that the accused No.2 is not the Gynecologist. He did not refer the victim to the Gynecologist. The Medical Board has categorically opined that the medicines/tablets can cause miscarriage.

15] In my view, therefore, this fact is required to be borne in mind while considering the submissions advanced on behalf of the accused No.2. The case of the accused No.2 that he has acted in good faith is required to be considered in totality of the facts and evidence. The accused No.2 knew that the victim and the accused No.1 were not married. It is not his case that this fact is not borne out from his record. It is also not his case that he had verified the relationship between the accused No.1 and the victim. It is also not

his case that the accused No.1 was the guardian or care taker of the victim. In my view, all these facts are required to be taken into consideration. In the above background, it would be necessary to bear in mind and consider the settled legal position applicable at the stage of deciding the discharge application made by the accused No.2.

16] In this context, a useful reference can be made to the decisions of the Hon'ble Apex Court in the cases of *Tarun Jit Tejpal Vs. State of Goa and Another [(2020) 17 SCC 556]* ; *Niranjan Singh Karam Singh Punjabi, Advocate Vs. Jitendra Bhimraj Bijaya and Others [(1990) 4 SCC 76]* and *Sajjan Kumar Vs. Central Bureau of Investigation [(2010) 9 SCC 368]*, wherein it has been held that appreciation of evidence at the time of framing of the charge or while considering discharge application, is not permissible. The Court is not permitted to analyse all the material touching the *pros* and *cons*, reliability and acceptability of the evidence. In the case of *Tarun Jit Tejpal* (supra), it is held that at the time of consideration of the application for discharge, the Court cannot act as a mouth piece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of

discharge. It is held that at the stage of consideration of application for discharge, the Court has to proceed with an assumption that the materials brought on record by prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offences. At this stage, the Court is not expected to go deep into the matter and hold that materials would not warrant a conviction. It is held that what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting accused has been made out. It is further held that the law does not permit a mini trial at the stage of deciding the discharge application or at the time of framing of charge.

17] In my view, if the facts culled out from the prosecution case if examined in the teeth of the legal position as above, it would show that the learned Judge was right in rejecting the application. The questions involved in this case are required to be addressed on merits after recording evidence. The evidence cannot be appreciated at this stage. On *prima facie* analysis of the material on record, the Court has to see whether the said material is sufficient

to presume that the accused has committed offence or not. If it is found sufficient to draw such a presumption, then the Court has to proceed further and frame the charge. It is trite law that the probative value of the evidence cannot be considered by appreciating the evidence while deciding the discharge application or at the stage of framing of charge. In my view, if the submissions advanced by the learned advocate for the accused No.2 are accepted and the material is appreciated and its probative value is tested, then it would be nothing short of holding a mini trial at this stage. It is not permissible in law. Therefore, I do not find any substance in the revision application. The revision application stands **dismissed**.

(G. A. SANAP, J.)

Vijay