



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

901 CRIMINAL WRIT PETITION NO. 1510 OF 2021

Fakira S/o Namdeo Vasu

VERSUS

The State of Maharashtra

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Advocate for the Petitioner : Mr. Rathi Swapnil S.

APP for Respondent: Mrs. Pratibha J. Bharad

Advocate to assist the A.P.P. : Mr. Usha N. Jadhao

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CORAM : SANJAY A. DESHMUKH, J.
DATED : 10th MAY, 2024.

PER COURT :-

1. This writ petition is directed against the order dated 24.11.2021 passed by the learned Additional Sessions Judge, Hingoli below Exh.1 in Special case No. 33 of 2020 thereby rejecting the prayer of the petitioner who was seeking for discharge from criminal case and framing of charge against the petitioner who is accused No.5. Objection was raised on behalf of this petitioner that he has not abetted as alleged by the prosecution, therefore, he prayed for discharge of the petitioner under Section 227 of the Code of Criminal Procedure, 1973.

2. Learned advocate for the petitioner pointed out the statements of witnesses particularly the informant and other witnesses that this petitioner has no such knowledge and criminal intention to abet accused No.1 for commission of the alleged crime

punishable under Sections 363, 366, 376(2)(n), 506, 34 of I.P.C. and under Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012.

3. Learned advocate for the petitioner submits that admittedly the victim was 17 years and 6 months old. Accused No.1, a married man, eloped and stayed with the victim child for more than 7 months. The report was immediately lodged against accused No.1. Learned advocate for the petitioner further submits that there is no evidence of alleged illegal omission or instigation on the part of this petitioner. Learned trial court did not discuss the matter showing that illegal omission on the part of this petitioner. Learned advocate for the petitioner is relying upon the authorities in the following cases:-

I) ***Asha Patil @ Asha Sagar Rathi vs. State of Maharashtra, 2020 (2) Mh.L.J. (Cri.) 75***, in which it is held that *“failure of mother of victim to report matter to police even though she had knowledge of commission of offence by step father, would not amount to intentional aid or abetment. Mens rea is an essential element of offence of abetment. Her subsequent failure to take recourse to law by lodging FIR does not aid commission of offence by accused No.1 though it might aid concealment of an offence already perpetrated. Mere negligence or carelessness on the part of accused cannot be termed as ‘abetment’.*

ii) **Gurcharan Singh vs. State of Punjab, AIR 2020 SC 4714**, in which in para 15 it is observed as under:-

“15. As in all crimes, mens rea has to be established. To prove the offence of abetment, as specified under Section 107 of IPC, the state of mind to commit a particular crime must be visible, to determine the culpability. In order to prove mens rea, there has to be something on record to establish or show that the appellant herein had a guilty mind and in furtherance of that state of mind, abetted the suicide of the deceased. The ingredient of mens rea cannot be assumed to be ostensibly present but has to be visible and conspicuous. However, what transpired in the present matter is that both the Trial Court as well as the High Court never examined whether appellant had the mens rea for the crime, he is held to have committed. The conviction of appellant by the trial court as well as the High court on the theory that the woman with two young kids might have committed suicide, possibility because of the harassment faced by her in the matrimonial house, is not at all borne out by the evidence in the case. Testimonies of the PWs do not show that the wife was unhappy because of the appellate and she was forced to take such step on his account.”

Learned advocate for the petitioner lastly prayed to allow the writ petition by setting aside the impugned order and discharge the petitioner from the alleged offence.

4. Learned advocate for the respondent-State has strongly objected the writ petition and submitted that the petitioner is involved in serious crime. Learned counsel for the respondent pointed out the

statements of victim child recorded on 12.2.2020 in which she has stated that the petitioner was informed by making phone calls that accused No.1 is proceeding with her and they will not come back. This is a sufficient evidence against this petitioner that he was knowing the said fact but he did intimate the said fact either to the police or to the father of the victim child. Learned advocate for the respondent further pointed out the statements of other witnesses and submitted that section 21 of the POCSO Act will have to be invoked against the petitioner by the prosecution which provides punishment for failure to report the commission of offence committed under the POCSO Act.

5. Learned advocate for the respondent further pointed out that it is a case of abetment and the learned trial court has rightly observed in para 6 of the impugned order that this petitioner was knowing that the victim is minor and this petitioner allowed accused No.1 to take the vehicle seized by police to elope the said victim. The reasons given by the trial court are correct. Therefore, it is lastly prayed to dismiss the writ petition.

6. Perused the charge sheet, particularly the report and the statements of the informant as well as the witnesses. Admittedly, the vehicle used for eloping the victim child bearing No. MH-38-7405 is registered in the name of Gajanan @ Bandu Vasu i.e. accused No.1. There is no evidence to show that this petitioner handed over that

vehicle to accused No.1. Therefore, there is no substance in the contentions and allegations that this petitioner allowed accused No.1 to use his vehicle to elope with the victim child. From the statements of witnesses and the entire charge sheet it is not pointed out that there is any illegality or omission on the part of this petitioner. Mere knowledge to the petitioner that victim was child and report was lodged against accused No.1 Bandu about eloping with child and accordingly crime was registered which was not the duty of the petitioner to report the commission of offences punishable under Sections 363, 366, 376(2)(n), 506, 34 of I.P.C. and under Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012.

7. The essential ingredients of the offences such as illegal omission or intention on the part of the petitioner is not established from the material placed on record, particularly from the charge sheet. Hence, the reasons given by the trial court are not legal and correct. Therefore, in view of the law laid down in the authority of ***Gurcharan Singh vs. State of Punjab (cited supra)***, about the ingredient of *mens rea* cannot be assumed to be ostensibly present but has to be visible and conspicuous. The ratio laid down in the said case is helpful to this petitioner. There is absolutely no evidence against this petitioner.

8. The learned trial court failed to assign sufficient reasons of

the prima facie evidence as to the abetment on the part of this petitioner. Hence, there is no sufficient material to proceed against the petitioner as contemplated under Section 227 of Cr.P.C. The writ petition deserves to be allowed. The petitioner deserves to be discharged under Section 227 of the Cr.P.C. for the offences punishable under Sections 363, 366, 376(2)(n), 506, 34 of I.P.C. and under Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012.

9. For the reasons stated above, the arguments of the learned advocate for the respondent are not accepted. The writ petition is therefore, allowed in terms of prayer clause "B" and "C" .

10. The writ petition is accordingly disposed of.

(SANJAY A. DESHMUKH, J.)

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