



2024:DHC:5979



\$~46

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Date of decision : 12th July, 2024

+

**CRL.REV.P. 444/2017 & CRL.M.A. 10169/2017,
CRL.M.A. 10171/2017**

STATE

.....Petitioner

Through: Mr.Naresh Kumar Chahar,
APP for the State with SI
Shivani, PS Bharat Nagar.

versus

ASHISH KUMAR

.....Respondent

Through:

CORAM:**HON'BLE MR. JUSTICE AMIT MAHAJAN****AMIT MAHAJAN, J. (Oral)**

1. The present petition is filed under Sections 397/401 of the Code of Criminal Procedure, 1973 (hereafter '**CrPC**'), for setting aside the order dated 04.08.2016 (hereafter '**impugned order**') passed by the learned Additional Sessions Judge (**ASJ**), Rohini Courts, Delhi, in FIR No. 729/15 registered at Police Station Bharat Nagar for offences under Sections 363/366/376 of the Indian Penal Code, 1860 (hereafter '**IPC**') and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereafter '**POCSO Act**').

2. By impugned order, the learned ASJ discharged the respondent of all the charges on the ground that there was no substantive evidence to ascertain that the prosecutrix was a child within the meaning of Section 2(d) of the POCSO Act, except the
CRL.REV.P. 444/2017

Page 1 of 10

Signature Not Verified

Digitally Signed
By: HARMINDER KAUR
Signing Date: 12.08.2024
17:35:38



2024:DHC:5979



entry made in the school record. The learned ASJ also noted that there was nothing on record to show that the respondent made any overt act to induce/take away the prosecutrix from her lawful guardianship or that the prosecutrix was subjected to any form of sexual assault.

3. It is stated that on 06.12.2015, an FIR was registered on the basis of a missing persons' report lodged by the mother of prosecutrix A. It was stated that the prosecutrix who left home on 05.12.2015 did not return. Despite police efforts, the prosecutrix remained untraceable until 15.12.2015, when the complainant informed the IO that her daughter was in Hardoi, U.P., with the respondent, after allegedly marrying him. The police located them in Hardoi, arrested the respondent, and brought the prosecutrix back to Delhi.

4. Thereafter, on 23.12.2015, the prosecutrix's statement under Section 164 of the CrPC was recorded which revealed that she had left home because her mother intended to marry her to someone the prosecutrix did not prefer. She further claimed to have pressurised the respondent into taking her to his home by threatening to consume poison, should the respondent disagree to take her to his village. The prosecutrix denied any sexual or physical assault and also refused a gynecological examination.

5. The prosecutrix further stated that her age was understated by her parents during her school admission, and her date of birth, recorded as 10.06.1999 in her school records, was based on her parents' estimation, owing to the absence of supporting documents.

Signature Not Verified

Digitally Signed
By: HARMINDER KAUR
Signing Date: 12.08.2024
17:35:38

CRL.REV.P. 444/2017

Page 2 of 10



2024:DHC:5979



6. Chargesheet was filed in the present case under Sections 363/366/376 of the IPC and Section 4 of the POCSO Act.

7. The learned Additional Public Prosecutor submitted that the learned Trial Court has misinterpreted the judgment of the Hon'ble Supreme Court in ***Birad Mal Singhvi v. Anand Purohit : 1988 Supp. SCC 601*** and ignored that the date of birth in the certificate from the first school attended is conclusive evidence of the date of birth. He submitted that the learned Trial Court has incorrectly determined that the prosecutrix was not under 18 years of age. It is further submitted that the learned ASJ erred in dismissing the evidentiary value of the school entry for the date of birth on the grounds of lack of supporting material for that entry.

8. It is also submitted that the learned ASJ failed to consider that there was sufficient *prima facie* evidence to frame charges against the accused persons.

Analysis

9. Since the petitioner has assailed the impugned order dated 04.08.2016 whereby, the learned ASJ discharged the respondent, it will be apposite to succinctly discuss the statutory law with respect to framing of charge and discharge as provided under Sections 227 and 228 of the CrPC. The same is set out below:

“227. Discharge

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 this 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.

Signature Not Verified

Digitally Signed
By: HARMINDER KAUR
Signing Date: 12.08.2024
17:35:38

CRL.REV.P. 444/2017

Page 3 of 10



228. *Framing of Charge*

(1) *If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which--*

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, 1 [or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate] shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

10. The Hon'ble Apex Court, in the case of ***Sajjan Kumar v. CBI : (2010) 9 SCC 368***, has culled out the following principles in respect of the scope of Sections 227 and 228 of the CrPC while observing that a *prima facie* case would depend on the facts and circumstances of each case. The relevant paragraphs read as under :

"21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 CrPC 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. The test to determine prima facie case would depend upon the facts of each case.

(ii) 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.

(iii) The 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, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.



(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.”

(emphasis supplied)

11. The Court at the stage of framing of charge is to evaluate the material only for the purpose of finding out if the facts constitute the alleged offence, given the ingredients of the offence. Though, for the purpose of conviction, the same must be proved beyond reasonable doubt.

12. In the present case, chargesheet was filed under Sections 363/366/376 of the IPC and also Section 4 of the POCSO Act. At the stage of hearing arguments on charge, the learned Trial Court noting the evidence collected by the prosecution, noting the version of the prosecutrix recorded under Section 164 of the CrPC had noted that not even a *prima facie* case is made out against the respondent. He accordingly stood discharged.

13. Thus, the first and foremost ingredient to be satisfied before a person can be convicted for offence under Section 363 of the IPC, is that the minor has been enticed and removed out of the lawful guardianship without the consent. Though the consent of the minor is immaterial, however, it is a categorical stand of the prosecutrix that she left her maternal home since she did not want to stay with her parents who wanted to get her married. The prosecutrix further stated that she, in fact, pressurised the respondent to accompany her, threatening him that she will consume poison if he does not agree.



2024:DHC:5979



14. On a bare perusal of the complaint, it cannot be concluded that the prosecutrix was enticed away from lawful guardianship, compelled to marry the respondent, or forced or seduced into illicit intercourse. The complaint merely indicates that she voluntarily left her parents' lawful guardianship, met the respondent, and subsequently married him.

15. The Hon'ble Apex Court in ***Mafat Lal v. State of Rajasthan : (2022) 6 SCC 589*** held as under :

7. The High Court although records all such facts, appears to have been swayed with the fact that the abductee was a minor at the time when she left her home and that the appellant had evaded the investigation and had been successful in keeping away from the process of law for several years. The High Court further proceeded on the assumption that the appellant had actually kidnapped/abducted the minor daughter of the complainant.

8. Before this Court, also the abductee has joined the accused as Appellant 2. Once again similar stand has been taken as was taken before the High Court. Both the appellants have filed separate affidavits. Appellant 2 has specifically stated before the High Court as also before this Court that she had left her parental home on her own free volition. The appellants are married since December 2006 and have been living happily. They have also been blessed with a son in the year 2014 who would now be 8 years old. No fruitful purpose would be served by relegating the matter for conducting the trial as the same would not be conducive for either of the appellants. It would be a futile exercise.

16. It is further relevant to note that even though the chargesheet has also been filed alleging offence under Section 376 of the IPC, however, no complaint has been made by anyone, be it the complainant or the prosecutrix that the accused has established any sexual relationship with the prosecutrix. Even

Signature Not Verified

Digitally Signed
By: HARMINDER KAUR
Signing Date: 12.08.2024
17:35:38

CRL.REV.P. 444/2017

Page 7 of 10



2024:DHC:5979



though the prosecutrix stated that she got married with the accused, no allegation has been made that she was also subjected to any sexual or physical assault. The prosecutrix also did not undergo any internal gynaecological examination.

17. From the facts as noted above and the evidence of the prosecutrix, it is apparent that no allegation in regard to offence of kidnapping/ abduction or commission of rape was made by the prosecutrix.

18. Thus, without going into the issue as to whether the school certificate was a conclusive evidence of the date of birth of the prosecutrix, this Court is of the opinion that the accused has not committed any offence. It is trite law that the Court does not have to act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case.

19. From the material/ evidence as brought on record, it can safely be said that no *prima facie* case is made out against the accused.

20. The present petition is filed with a delay of 170 days. Apart from the usual excuses which are taken by the Government Departments, no worthy reason has been mentioned which would entitle the application for condonation of delay, that is, CRL. M.A. No. 10169/2017, to be allowed. The application merely states that the impugned order was pronounced on 04.08.2016 and the complete case file was prepared. The opinion to file an appeal was given after one and a half months, on 17.09.2016. The noting for filing the appeal was, thereafter, put on



2024:DHC:5979



27.09.2016. The file was, thereafter, sent to the Standing Counsel after almost three months on 21.12.2016 and the present petition was filed after more than three months of the file being sent to the Standing Counsel on 31.03.2017.

21. The Hon'ble Apex Court has frowned upon following of such practices by the Government departments. The Hon'ble Apex Court, in the case of ***Postmaster General v. Living Media India Ltd.*** : (2012) 3 SCC 563, had held that the Government cannot claim to have a separate period of limitation when the Department is possessed with competent persons familiar with court proceedings. The delay cannot be condoned mechanically merely because the Government or a wing of the Government is a party before the Court. The Hon'ble Apex Court had rejected the claim on account of impersonal machinery and bureaucratic methodology of making several notes in view of the modern technologies being used and available.

22. The Hon'ble Supreme Court in the case of ***State of M.P. v. Bherulal*** : (2020) 10 SCC 654, while observing the irony that no action is taken against the officers who sit on files and do nothing under a presumption that the court would condone the delay in routine, held as under:

“6. We are also of the view that the aforesaid approach is being adopted in what we have categorised earlier as “certificate cases”. The object appears to be to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and thus, say that nothing could be done because the highest Court has dismissed the appeal. It is to complete this formality and save the skin of officers who may be at default that such a process is followed. We have on earlier occasions also strongly deprecated such a practice and process. There seems to be no improvement. The purpose of coming to this Court is not to obtain such certificates and

Signature Not Verified

Digitally Signed
By: HARMINDER KAUR
Signing Date: 12.08.2024
17:35:38

CRL.REV.P. 444/2017

Page 9 of 10



2024:DHC:5979



if the Government suffers losses, it is time when the officer concerned responsible for the same bears the consequences. The irony is that in none of the cases any action is taken against the officers, who sit on the files and do nothing. It is presumed that this Court will condone the delay and even in making submissions, straightaway the counsel appear to address on merits without referring even to the aspect of limitation as happened in this case till we pointed out to the counsel that he must first address us on the question of limitation.”

23. It is apparent that no explanation has been given for condoning the delay in filing the appeal.
24. The appeal is, therefore, dismissed on the ground of delay as well as on merits.
25. Pending applications also stand disposed of.

AMIT MAHAJAN, J

JULY 12, 2024