

Madhya Pradesh High Court

Shivam Sharma vs The State Of Madhya Pradesh on 2 May, 2022

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THE HIGH COURT OF MADHYA PRADESH

CRR-448-2022

Shivam Sharma Vs. State of MP and another

Gwalior, Dated : 02/05/2022

Shri R.K. Sharma, Senior Counsel with Shri V.K. Agarwar,
Counsel for the applicant.

Shri PPS Vajeeta, Counsel for the State.

This criminal revision under Section 397, 401 of CrPC has been filed against the order dated 26.11.2021 passed by Special Judge (POCSO Act), Gwalior in Special Sessions Trial No.191/2021, by which the charges under Section 354-C, 354-D, 506 (Part-II) of IPC and Section 7 read with Section 8 of Protection of Children from Sexual Offence Act have been framed against the applicant.

Challenging the order passed by the Court below, it is submitted by the counsel for the applicant that his argument is confined to charge under Section 354-C of IPC and Section 7/8 of POCSO Act. By referring to the FIR as well as statement of the witnesses, it is submitted that the prosecutrix, who is aged about 16 years, has alleged that the applicant was also studying in the same school and, therefore, he was known to her for the last one year. He is continuously harassing her and stalking her. He always come near to her and proposes that he likes her and he would marry her and in case, if she does not accept his proposal, then he would kill her. On 28.03.2021

at about 5 PM, when she was going along with her elder THE HIGH COURT OF MADHYA PRADESH CRR-448-2022 Shivam Sharma Vs. State of MP and another sister Mansi to a temple,

the applicant came near to her and started staring her while driving the vehicle around her. It was further alleged that the applicant was also harassing her by making calls and sending messages. He also threatened her that in case, if she does not agree for his proposal, then he would upload her video and photo on social media. The acts of the applicant were told to her father and accordingly, the FIR was lodged.

It is submitted by the counsel for the applicant that even if the entire allegations are accepted, then it is clear that no offence under Section 7 of POCSO Act and under Section 354-C of IPC would be made out.

Heard the learned counsel for the applicant. Section 7 of POCSO Act reads as under:-

"7. Sexual Assault.--Whoever, with sexual intent, touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

It is submitted that there is no allegation that there was any physical contact with sexual intent and, therefore, the charge under Section 7 of POCSO Act should not have been framed.

The complainant has specifically alleged that the applicant was THE HIGH COURT OF MADHYA PRADESH CRR-448-2022 Shivam Sharma Vs. State of MP and another threatening to upload the photographs on social media, which were taken in parties as well as at other places, therefore, there must have been some physical contact. Furthermore, the Supreme Court in the case of Attorney General of India Vs. Satish by judgment dated 18.11.2021 passed in Criminal Appeal No.1410/2021 has held that skin to skin contact is not necessary.

Under these circumstances, this Court is of the considered opinion that in view of the allegations that the applicant was having certain photographs of the prosecutrix clearly prima facie makes out offence punishable under Section 7 of POCSO Act.

So far as the offence under Section 354-C of IPC is concerned, Section 354-C of IPC reads as under:-

"354-C. Voyeurism.--Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanation 1.-- For the purpose of this section, "private act" includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim's THE HIGH COURT OF MADHYA PRADESH CRR-448-2022 Shivam Sharma Vs. State of MP and another genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

Explanation 2.-- Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section."

Explanation 2 of Section 354-C of IPC makes out where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section. Since the applicant was threatening to make her photographs viral and as per statement under Section 164 of CrPC had also sent to her father, therefore, under the facts and circumstances of the case, this Court is of the considered opinion that the allegations prima facie make out an offence under Section 354-C of IPC.

It is well established principle of law that roving and detailed enquiry at the stage of framing of charge is not permissible.

The Supreme Court in the case of M.E. Shivalingamurthy v. Central Bureau of Investigation, Bengaluru reported in (2020) 2 SCC 768 has held as under:-

"17. This is an area covered by a large body of case law. We refer to a recent judgment which has referred to the earlier decisions viz. P. Vijayan v. State of Kerala [P. Vijayan v. State of Kerala, (2010) 2 SCC THE HIGH COURT OF MADHYA PRADESH CRR-448-2022 Shivam Sharma Vs. State of MP and another 398 : (2010) 1 SCC (Cri) 1488] and discern the following principles:

17.1. If two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the trial Judge would be empowered to discharge the accused.

17.2. The trial Judge is not a mere post office to frame the charge at the instance of the prosecution.

17.3. The Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the police or the documents produced before the Court.

17.4. If the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, "cannot show that the accused committed offence, then, there will be no sufficient ground for proceeding with the trial".

17.5. It is open to the accused to explain away the materials giving rise to the grave suspicion.

17.6. The court has to consider the broad probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons.

17.7. At the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true.

17.8. There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused.

18. The defence of the accused is not to be THE HIGH COURT OF MADHYA PRADESH CRR-448-2022 Shivam Sharma Vs. State of MP and another looked into at the stage when the accused seeks to be discharged under Section 227 CrPC (see State of J&K v. Sudershan Chakkar [State of J&K v. Sudershan Chakkar, (1995) 4 SCC 181 : 1995 SCC (Cri) 664 : AIR 1995 SC 1954]). The expression, "the record of the case", used in Section 227 CrPC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. At the stage of framing of the charge, the submission of the accused is to be confined to the material produced by the police (see State of Orissa v. Debendra Nath Padhi [State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568 : 2005 SCC (Cri) 415 : AIR 2005 SC 359]).

The Supreme Court in the case of Soma Chakravarty v. State through CBI reported in (2007) 5 SCC 403, has held as under:-

"10. It may be mentioned that the settled legal position, as mentioned in the above decisions, is that if on the basis of 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. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing a charge the court must apply its judicial mind on the material placed on

record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial.

19. Some of the questions, however, which have been raised by the appellant are of some importance and it may be necessary to deal therewith. The learned trial Judge, it appears, did not properly apply its mind in regard to the different categories of THE HIGH COURT OF MADHYA PRADESH CRR-448-2022 Shivam Sharma Vs. State of MP and another the accused while framing charges. It ought to have been done. Charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the court must come to a prima facie finding that there exist some materials therefor. Suspicion cannot alone, without anything more, it is trite, form the basis therefor or held to be sufficient for framing charge."

The Supreme Court in the case of State (NCT of Delhi) v. Shiv Charan Bansal and others reported in (2020) 2 SCC 290, has held as under:-

"39. The court while considering the question of framing charges under Section 227 CrPC has the power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case has been made out against the accused. The test to determine prima facie case would depend upon the facts of each case. If the material placed before the court discloses grave suspicion against the accused, which has not been properly explained, the court will be fully justified in framing charges and proceeding with the trial. The probative value of the evidence brought on record cannot be gone into at the stage of framing charges. 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 ingredients constituting the alleged offence. At this stage, there cannot be a roving enquiry into the pros and cons of the matter, the evidence is not to be weighed as if a trial is being conducted. Reliance is placed on the judgment of this Court in State of Bihar v. Ramesh Singh [State of Bihar v. Ramesh Singh, (1977) 4 SCC 39 : 1977 SCC (Cri) 533] where it has been held that at the stage of framing charges under Sections 227 or 228 CrPC, if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused had committed the offence, then the court should proceed with the trial.

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40. In a recent judgment delivered in Dipakbhai Jagdishchandra Patel v. State of Gujarat [Dipakbhai Jagdishchandra Patel v. State of Gujarat, (2019) 16 SCC 547] decided on 24-4-2019, this Court has laid down the law relating to framing of charges and discharge, and held that all that is required is that the court must be satisfied with the material available, that a case is made out for the accused to stand trial. A

strong suspicion is sufficient for framing charges, which must be founded on some material. The material must be such which can be translated into evidence at the stage of trial. The veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged at this stage, nor is any weight to be attached to the probable defence of the accused at the stage of framing charges. The court is not to consider whether there is sufficient ground for conviction of the accused, or whether the trial is sure to end in the conviction."

The Supreme Court in the case of State of Rajasthan v.

Fatehkaran Mehdu reported in (2017) 3 SCC 198, has held as under:-

"26. The scope of interference and exercise of jurisdiction under Section 397 CrPC has been time and again explained by this Court. Further, the scope of interference under Section 397 CrPC at a stage, when charge had been framed, is also well settled. At the stage of framing of a charge, the court is concerned not with the proof of the allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt. The framing of charge is not a stage, at which stage final test of guilt is to be applied. Thus, to hold that at the stage of framing the charge, the court should form an opinion that the accused is certainly guilty of committing an offence, is to hold something which is THE HIGH COURT OF MADHYA PRADESH CRR-448-2022 Shivam Sharma Vs. State of MP and another neither permissible nor is in consonance with the scheme of the Code of Criminal Procedure."

Under the facts of the case where a grave suspicion is raised pointing out that the accused might have committed the offence, it is sufficient to frame charges.

Accordingly, no case is made out warranting interference. The revision fails and is hereby dismissed.

(G.S. Ahluwalia) Judge Abhi ABHISHEK CHATURVEDI 2022.05.05 15:20:25 +05'30'