SH. SATISH MEHRA

v.

DELHI ADMINISTRATION AND ANR.

JULY, 31, 1996

[M.M. PUNCHHI AND K.T. THOMAS, JJ.]

Code of Criminal Procedure, 1973 :

Sections 227 and 228—Framing of Charge—Case under sections 354, 376 and 511 registered against husband on wife's complaint—Charge framed by court relying on testimony of daughter, alleged victim of incestuous rape perpetrated by her father—Vengeful attitude of mother towards her husband—Considerations which should weigh with court at charge-stage—Sufficient ground to trial—Standard of proof normally adhered to at the final stage is not to be applied.

Sections 226 and 239—Scope of—Admissibility of any material other than those produced by the prosecution.

Appellant 'S' and his wife 'A', the second respondent lived in U.S.A. ever since their marriage. They had three children among whom the eldest was 'N'. The relationship between appellant and second respondent had been far from cordial ever since the marriage and there had been allegations and counter - allegations. The appellant approached a court in U.S.A. for the custody of children. The second respondent left the house with the children and then filed a complaint in the USA alleging that appellant had sexually abused 'N' who was then aged four. On investigation in the USA found the allegation of incestuous abuse to be untrue. The second Respondent then returned to India with the children. Meanwhile, a court in USA ordered the custody of the children to be given to the appellant. Upon her return to India, the second Respondent once again filed a complaint to the police alleging that appellant sexually abused 'N' while they were in USA and other allegations were also made thereafter. Appellant also returned to India and moved the court for the custody of children.

The present case is based on the complaint filed by second Respondent under which a case was registered against the appellant under sections 354, 376 and 498-A of the I.P.C. Finally, the charged for offences

A under section 354 and 376 read with section 511 of IPC was framed against him by the sessions court. Having failed at the FIR stage itself in the High Court, appellant had approached this court.

On the question whether the sessions court should have framed the charge against the appellant as it did : Allowing the appeal, this court

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HELD : 1.1. There is no sufficient ground to proceed to trial. The sessions Judges has missed certain germane aspects. Apart from the seemingly incredulous nature of the accusations against a father that he molested his infant child (who would have just passed her suckling stage C then) the sessions Judge ought not to have overlooked the telling circumstances. [205-B-C]

1.2. Even overlooking all the inherent infirmities shrouding the testimony of a tiny-tot speaking about what her father did when she was aged 3 and even ignoring the appellant's persistent submission that the D little child was briskly tutored by her mother to speak to the present version, there is no reasonable prospect of the sessions court relying on such a testimony to reach the conclusion that the prosecution succeeded in proving the offence beyond all reasonable doubt. [207-E-F]

E 1.3. Moreover, one has to see the consequence if this nebulous allegation is allowed to proceed to the trial stage. It is foreseen that 'N', the child witness, now eight years and four months old, must necessarily be subjected to cross-questions involving sex and sex organs. The traumatic impact on the child when she would be confronted by volley of questions dealing with such a subject is a matter of concern. As submitted F by the appellant such an order would inflict devastating impairment on the development of the child's personality. Of course, if such a course is of any use to the cause of justice, it may have to be borne with as an inevitable course of action to be resorted to. But in this case, when the trial is going to be nothing but a farce, such a course of action should not be G allowed to take place on account of the impending consequences befalling an innocent child. [207-F-H; 208-A]

1.4. The Second Respondent's attitude to the appellant, even *de hors* the allegation involving the child, was vengeful. The assertion of the appellant that the present story involving 'N' was concocted by the second H respondent to wreak vengeance by embroiling him in serious criminal

cases in india so that he could be nailed down here and prevent him from going back to U.S.A. has to be taken into account. [205-G] A

2.1. Considerations which should weigh with the sessions Court at charge stage have been well designed by the Parliament through section 227 of the Code of Criminal Procedure. [202-F] B

2.2. Section 228 contemplates the stage after the case survives the stage envisaged in section 227 of the code. When the court is of opinion that there is ground to presume that the accused has committed an offence the procedure laid down therein has to be adopted. When those two sections are put in juxtaposition with each other the test to be adopted becomes discernible. It is axiomatic that the standard of proof normally adhered to at the final stage is not be applied at the stage where the scope of consideration is where there is "sufficient ground for proceeding". [203-H; 204-A-B] C

State of Bihar v. *Ramesh Singh,* AIR (1977) SC 2018; *Supdt. & Remembrancer of Legal Affairs, West Bengal* v. *Anil Kumar Bhunja,* (1979) Cr. L.J. 1390 = AIR (1980) SC 52; *Alamohan Das* v. *State of West Bengal,* AIR (1970) SC 863 and *Union of India* v. *Profulla Kumar,* (1979) Cr. L.J. 154, referred to. D

2.3. Whether the sessions Judge can look into any material other than those produced by the prosecution is an incidental question which has emerged in this case. Section 226 of the code obliges the prosecution to described the charge brought against the accused and to state by what evidence the guilt of the accused would be proved. The next provision enjoins on the sessions Judge to decide whether there is sufficient ground to proceed against the accused. In so deciding the Judge has to consider (1) the record of the case and (2) the documents produced therewith. He has then to hear submissions of the accused as well as the prosecution on the limited question whether there is sufficient ground to proceed. E F

[203-H; 204-A-B]

2.4. Similar situation arises under section 239 of the code (which deals with trial of warrant cases on police report). In that situation the magistrate has to afford the prosecution and the accused an opportunity of being heard besides considering the police report and the documents sent therewith. At these two stages the code enjoins on the court to give audience of the accused for deciding whether it is necessary to procesed to the next stage. It is a matter of exercise of judicial mind. There is nothing G H

A **in the code which shrinks the scope of such audience to oral arguments. If the accused succeeds in producing reliable material at that stage which might fatally affect even the very sustainability of the case, it is unjust to suggest that no such material shall be looked into by the court at this stage. Here the "ground" may be any valid ground including insufficiency of**
B **evidence to prove charge. [204-C-E]**

2.5. The opportunity provided in section 227 of the code is to enable the court to decide whether it is necessary to proceed to conduct the trial. If the case ends there it gains a lot of time of the court and saves much human efforts and cost. If the materials produced by the accused even at
C **that early stage would clinch the issue, why should the court shut it out saying that such documents need be produced only after wasting a lot more time in the name of trial proceedings. Hence,the sessions Judge would be within his powers to consider even materials which the accused may produce at the stage contemplated in section 227 of the code. [204-F-G]**

D **2.6. But when the Judge is fairly certain that there is no prospect of the case ending in conviction the valuable time of the court should not be wasted for holding a trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date. Most of the sessions courts in India are under heavy pressure of work-load. If the**
E **sessions Judge is almost certain that the trial would only be an exercise in futility or a sheer waste of time it is advisable to truncate or snip the proceedings at the stage of section 227 of the code itself. [204-H; 205-A-B]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1385 of 1995.

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From the Judgment and Order dated 14.3.95 of the Delhi High Court in Cr. W.P. No. 215 of 1994.

In-persons for appellant.

G S.N. Sikka for S.N. Terdol for the Respondent No. 1.

N.B. Joshi for the Respondent No. 2.

The Judgment of the Court was delivered by

H **THOMAS, J.** Some eerie accusations have been made by a wife

against her husband, Incestous sexual abuse, incredulous *ex facie*, is being attributed to the husband. Police on her complaint conducted investigation and laid charge sheet against the appellant, who has filed this Criminal Appeal by special leave as he did not succeed in his approach to the High Court at the F.I.R. stage itself. A

More details of the case are these : Appellant (Satish Mehra) and his wife (Anita Mehra) were living in New York ever since their marriage. They have three children among whom the eldest daughter (Nikita) was born on 2nd April, 1988. Before and after the birth of the children relationship between husband and wife was far from cordial. Husband alleged that his wife, in conspiracy with her father, had siphoned off a whopping sum from his bank deposits in India by forging his signature. He also alleged that his wife is suffering from some peculiar psychiatric condition. He approached a court at New York for securing custody of his children. On 31.10.1992 his wife left his house with the children and then filed a complaint with Saffolk County Police Station (United States) alleging that her husband had sexually abused Nikita who was then aged four. United Stated police at the local level moved into action, but after conducting detained investigation concluded that the allegations of incestuous abuse are untrue. B C D

On 7.3.1993, appellant's wife (Anita) returned to India with her children. In the meanwhile Family Court at New York has ordered that custody of the children be given to the husband and a warrant of arrest was issued against Anita for implementation of the said order. E

The battle filled between the parties was thereafter shifted to India as she came back home. On 19.3.1993, Anita filed a complaint to the "Crime Against Women Cell" (CAW Cell for short) New Delhi in which she stated that her husband committed sex abuses with Nikita while they were in United States and further alleged that appellant committed certain matrimonial misdemeanour on his wife. But the complaint was closed for want of jurisdiction for the CAW Cell to investigate into what happened in United States. Appellant returned to India on 12.7.1993 and thereafter filed a petition for a Writ of Habeas Corpus for securing the custody of the children. F G

The present case is based on a complaint filed by Anita before Greater Kailash Police Station on 14.8.1993. FIR was prepared and a case H

A was registered as Crime No. 197/93 for offences under Sections 354 and 498-A of the Indian Penal Code. On 25.8.1993, the investigating officer moved the Sessions Court for adding Section 376 of the IPC also. The case was charge sheeted by the police and it was committed to the Court of Sessions.

B As committal proceedings took place during the pendency of the Special Leave Petition, this Court directed the Sessions Judge on 22.2.1996 "to apply its mind to the case committed and see whether a case for framing charge/charges has been made out or not". Learned Sessions Judge, by a detailed order, found that no charge under Section 498-A IPC could be C framed against the appellant, but charge for offences under Sections 354 and 376 read with Section 511 of IPC should be framed against him. Accordingly, the charge has been framed with the said two counts.

First count in the charge is that appellant had outraged the modesty of his minor daughter aged about 3 years during some time between March D and July, 1991 at D-108, East of Kailash, New Delhi by fondling with her vagina and also by inserting bottle into it and thereby committed the offence under Section 354 of the IPC. Second count in the charge is that he made an attempt to commit rape on the said infant child (time and place are the same) and thereby committed the offence under Section 376 read E with Section 511 of the IPC. At this stage it is superfluous to consider whether the FIR is liable to be quashed as both sides argued on the sustainability of the charge framed by the Sessions Judge. We are, therefore, considering the main question whether the Sessions Court should have framed the charge against the appellant as it did now.

F Considerations which should weigh with the Sessions Court at this stage have been well designed by the Parliament through Session 227 of the Code of Criminal Procedure (for short 'the Code') which reads thus :

> "227. Discharge. - If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the G submissions of the accused and the prosecution in this behalf, the Judge considers that there in not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

H Section 228 contemplates the stage after the case survives the stage en-

visaged in the former section, When the Court is of opinion that there is ground to presume that the accused has committed an offence the procedure laid down therein has to be adopted. When those two sections are put in juxtaposition with each other the test to be adopted becomes discernible : Is there sufficient ground for proceeding against the accused? It is axiomatic that the standard of proof normally adhered to at the final stage is not to be applied at the stage where the scope of consideration is where there is "sufficient ground for proceeding". (Vide *State of Bihar* v. *Ramesh Singh,* AIR (1977) SC 2018, and *Stupdt. & Remembrancer or Legal Affairs, West Bengal* v. *Anil Kumar Bhunja,* (1979) CR. L.J. 1390 : AIR (1980) SC 52.

In *Alamohan Das* v. *State of West Bengal,* AIR (1970) SC 863 Shah, J. (as he then was) has observed in the context of considering the scope of committal proceedings under Section 209 of the old Code of Criminal Procedure (1898) that a Judge can sift and weigh the materials on record by seeing whether there is sufficient evidence for commitment. It is open to the Court to weigh the total effect of the evidence and the documents produced to check whether there is any basic infirmity. Of course the exercise is to find out whether a *prima facie* case against the accused has been made out.

In *Union of India* v. *Profullakumar,* (1979) Cr. L.J. 154, this court has observed that the Judge while considering the question of framing the charge has "the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether a *prima facie* case against the accused has been made out". However, their Lordships pointed out that the test to determine a *prima facie* case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. "By and large, however, if two views are equally possible and the Judges satisfied that the evidence produced before him gives rise to some suspecion but not grave suspecion, the Judge would be fully within his right to discharge the accused". At the same time the Court cautioned that a roving enquiry into the pros and cons of the case by weighing the evidence as if he was conducting the trial is not expected or even warranted at this stage.

An incidental question which emerges in this context is whether the Sessions Judge can look into any material other than those produced by

A the prosecution. Section 226 of the Code obliges the prosecution to describe the charge brought against the accused and to state by what evidence the guilt of the accused would be proved. The next provision enjoins on the Sessions judge to decide whether there is sufficient ground to proceed against the accused. In so deciding the Judge has to consider (1) the record of the case and (2) the documents produced therewith. He has then to hear the submissions of the accused as well as the prosecution on the limited question whether there is sufficient ground to proceed. What is the scope of hearing the submissions ? Should it be confined to hearing oral arguments alone ?

Similar situation arises under Section 239 of the Code (which deals with trial of warrant cases on police report). In that situation the Magistrate has to afford the prosecution and the accused an opportunity of being heard besides considering the police report and the documents sent therewith. At these two stages the code enjoins on the Court to give audience to the accused for deciding whether it is necessary to proceed to the next stage. It is a matter of exercise of judicial mind. There is nothing in the code which shrinks the scope of such audience to oral arguments. If the accused succeeds in producing any reliable material at that stage which might fatally affect even the very sustainability of the case, it is unjust to suggest that no such material shall be looked into by the Court at that stage. Here the "ground" may be any valid ground including insufficiency of evidence to prove charge.

The object of providing such an opportunity as is envisaged in Section 227 of the code is to enable the Court to decide whether it is necessary to proceed to conduct the trial. If the case ends there it gains a lot of time of the Court and saves much human efforts and cost. If the materials produced by the accused even at that early stage would clinch the issue, why should the Court shut it out saying that such documents need be produced only after wasting a lot more time in the name of trial proceedings. Hence, we are of the view that Sessions Judge would be within his powers to consider even materials which the accused may produce at the stage contemplated in Section 227 of the Code.

But when the Judge is fairly certain that there is no prospect of the case ending in conviction the valuable time of the Court should not be wasted for holding a trial only for the purpose of formally completing the

procedure to pronounce the conclusion on a future date. We are mindful that most of the sessions courts in India are under heavy pressure of work-load. If the Sessions Judge is almost certain that the trial would only be an exercise in futility or a sheer waste of time it is advisable to truncate or snip the proceedings at the stage of Section 227 of the Code itself.

In the present case learned Sessions Judge has missed certain germane aspects. Apart from the seemingly incredulous nature of the accusations against a father that he molested his infant child (who would have just passed her suckling stage then) the Sessions Judge ought not to have overlooked the following telling circumstances.

The complaint made by her with the New York police that her husband committed sexual offences against her 18 months old female child was investigated by the New York police and found the complaint bereft of truth hook, line and sinker. The present charge is that the appellant committed offences against the same child at East Kailash, New Delhi some time during March to July, 1991. There is now no case of what happened in United States. The Sessions Judge should have noted that appellant's wife has not even remotely alleged in the complaint filed by her on 19.3.1993 before CAW Cell, New Delhi that appellant has done anything like that while he was in India. Even the other complaint petition (on which basis the FIR was prepared) is totally silent about a case that appellant did anything against his daughter anywhere in India. When we perused the statement of Anita Mehra (second respondent) we felt no doubt that she has been brimming with acerbity towards the petitioner on account of other causes. She describes her marital life petitioner as "extremely painful and unhappy from the very inception". She complains that petitioner has "a history of irrational outbursts of temper and violence". She accused him of being alcoholic and prone to inflicting severe physical violence on her from 1980 onwards.

Thus her attitude to the petitioner, even *de hors* allegation involving the child, was vengeful. We take into account the assertion of the petitioner that the present story involving Nikita was concocted by the second respondent to wreak her vengeance by embroiling him in serious criminal cases in India so that he could be nailed down here and prevent him from going back to U.S.A.

While hearing the arguments we ascertained whether the spouses

A could settle their differences. Second respondent, who too was present in court, made an offer through her counsel that she would agree for annulling the criminal proceedings against the petitioner on the condition that he should withdraw his claims on the bank deposits and would also relinquish his claim for custody of the children, and further he should concede for a divorce. In response to the said conditional offer, petitioner agreed to give
B up all his claims on the large amounts in banks deposits, and further agreed to have the divorce. But he stood firm that on no account custody of the children could go to the second respondent but if made to, subject to his rights of visitation. This, he said, is because he is convicted that second respondent is unsuitable to be entrusted with the care of the children.

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In the above context petitioner drew our special notice to a medical report issued by Dr. Prabha Kapoor (Children Medical Centre, Jorbagh, New Delhi) on 26.7.1992. It is stated in the report, that Nikita was brought to the doctor by the second respondent and on examination of the genetals
D of the child the doctor noticed "a wide vaginal opening - wider than would be expected of her age group." On the strength of the aforesaid medical report, petitioner made a frontal attack on second respondent, alleging that in order to concoct medical evidence against him the little child's genitals would have been badly manipulated by its mother. To substantiate this allegation he drew our attention to the U.S. police report, in which there
E is mention of a medical examination conducted on Nikita by a U.S. doctor (Dr. Gordon) on 24.11. 92. That doctor pointed out that there was absolutely no indication of any sexual abuse when the child was physically examined. If the medical examination done on the child in November, 1992 showed such normal condition, petitioner posed the question - who would
F have meddled with the child's genitals before 26.7.93, to cause such a widening of the vaginal orifice ? (We now remember again that, as per the present case, the last occasion when the petitioner should have abused the child was in July, 1991). The aforesaid question, posed by the petitioner in the context of expressing grave concern over what the mother might do with the little female child for creating evidence of sex abuse, cannot be
G sidelined by us in considering whether the case should proceed to the trial stage.

Petitioner invited our attention to the answers which Mrs. Veena Sharma (or CAWC) has elicited from Nikita, a verbatim reproduction of
H which is given in the counter affidavit filed by the second respondent. The

said interrogation record reveals that Mrs. Veena Sharma has practically put on the tongue of the little girl that her father had molested her. The following questions and answers can bring the point home. The questioner asked the child "what your dady did with you" and the child answered that he put his finger (and showed her private part). Not being satisfied with the answer the next question put to the child was "Daddy puts what else". Then Nikita answers "Dady puts his bottle". We noticed with disquiet that the questioner drew the picture of the petitioner - face to body and then asked certain questions such as "where is papa's bottle ? Is it on the cupboard ?" The child kept looking at the drawn sketch end pointed to the part between legs. Questioner then asked if anything was missing in the picture, to which Nikita answered "glasses". After the child again pointed to the private parts between the legs, the questioner wanted the child to draw "papa'a bottle". But then the child told her "you do it." The questioner at the stage had the temerity to draw the picture of the private parts of child's father. We are much disturbed at the manner in which the little child was interrogated by the said officer of CAW Cell. At any rate we have no doubt that the purpose of such questions was to lead the child unmistakably to the tutored answers.

Even overlooking all the inherent infirmities shrouding the testimony of a tiny tot speaking about what her father did when she was aged 3 and even ignoring the appellant's persistant submission that the little child was briskly tutored by her mother to speak to the present version, there is no reasonable prospect of the sessions court relying on such a testimony to reach the conclusion that the prosecution succeeded in proving the offence charged beyond all reasonable doubt.

Over and above that, what would be the consequence if this nebulous allegation is allowed to proceed to the trial stage. We foresee that Nikita, the child witness, now eight years and four months old, must necessarily be subjected to cross-questions involving sex and sex organs. The traumatic impact on the child when she would be confronted by volley of questions dealing with such a subject is a matter of concern to us. We cannot brush aside the submission of the appellant that such an ordeal would inflict devastating impairement on the development of child's personality. Of course, if such a course is of any use to the cause of justice, we may have to bear with it as an inevitable course of action to be resorted to. But in this case, when the trial is going to be nothing but a farce, such a course

A of action should not be allowed to take place on account of the impending consequence befalling an innocent child.

After adverting to the above aspects and bestowing our anxious consideration we unhesitatingly reach the conclusion that there is no sufficient ground to proceed to the trial in this case.

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We, therefore, quash the proceedings and the charge framed by the Sessions Judge and discharge the appellant. The appeal would stand allowed.

S.S. Appeal allowed.