

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 27.05.2025

Pronounced on:06.06.2025

Crl. R. No.12/2022

BASIT BASHIR

... PETITIONER(S)

Through: - Mr. Adnan Fayaz, Advocate.

Vs.

UT OF J&K

...RESPONDENT(S)

Through: - Mr. Mohsin Qadiri, Sr. AAG, with
Ms. Nadiya Abdullah, Assisting
Counsel.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) Through the medium of present petition, the petitioner has challenged order dated 09.03.2022 passed by learned Special Judge (POCSO Cases), Srinagar, whereby charges for offences under Section 363, 376 IPC and Section 4 of POCSO Act, have been framed against him.

2) As per the charge sheet which has emanated from FIR No.83/2021 for offences under Section 363, 376 IPC and Section 4 of POCSO Act registered with Police Station, Batamaloo, on 10.06.2021, complainant Zaffar Ahmad Sheikh lodged a report with the police alleging therein that his minor daughter, Ms. X, had left her home on 9th June, 2021 at 9th June, 2021, at about 3.00 p.m. and at that

time, she was accompanied by her friend, Ms. Y. It was submitted in the report that whereabouts of the two girls, both of whom are aged between 14 and 15 years, are not known.

3) On the basis of aforesaid report, the police registered FIR No.83/2021 for offence under Section 363 IPC and started investigation of the case. During investigation of the case, it was found that on 10.06.2021, the two girls returned to their home and they were produced by their family members before the police. The victim girls were subjected to medical examination and it was found that they had been subjected to sexual intercourse. The investigation further revealed that the petitioner had enticed the victim girls to board his vehicle bearing No.HR72D-9395, whereafter he kidnapped them with a view to commit sexual assault upon them. Thus, offences under Section 363, 376 IPC and Section 4 of POCSO Act were found established against the petitioner.

4) During investigation of the case, statements of two girls under Section 164 of Cr. P. C were recorded and besides this, the statements of other witnesses under Section 161/164 of Cr. P. C were also recorded. The challan was laid before the learned Special court on

09.03.2022. The learned Special court, after hearing the parties and after analysing the material on record, framed charges for offences under Section 363, 376 of IPC and Section 4 of the POCSO Act against the petitioner.

5) The petitioner has challenged the impugned order on the grounds that the material on record before the learned trial Magistrate does not contain any evidence against the petitioner and on the basis of said material, it cannot be stated that the petitioner has committed any offence as against Ms. X or against Ms. Y. It has been further contended that even the statements of the father and brother of the victim girls have not supported the prosecution case. According to the petitioner, the impugned order has been passed by the learned trial court without application of mind. It is being contended that merely because the medical report of the victim girls is suggestive of sexual assault upon them, without there being anything to connect the petitioner with the said act, the charge could not have been framed against him

6) I have heard learned counsel for the parties and perused record of the case, the grounds of challenge as well as the trial court record.

7) Before dealing with the contentions raised by the petitioner in the present case, it would be necessary to understand the legal position as regards the scope of power of a Court while considering discharge of an accused.

8) In **Union of India vs. Prafulla Kumar Samal and another**, (1979) 3 SCC 4, the Supreme Court while considering the ambit and scope of a Trial Judge's power to pass an order of discharge under Section 227 of the CrPC, analysed its previous judgments on the issue and laid down the following principles:

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under section 227 of the Code 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.

(2) 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.

(3) 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 Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece 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 appearing in the

case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial”.

9) The aforesaid ratio laid down by the Supreme Court was reiterated and reaffirmed by it in the case of **Dilawar Balu Kurane vs State of Maharashtra**, (2002) 2 SCC 135 and it was clarified that in exercising jurisdiction under Section 227 of the Cr. P. C, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but he has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

10) Again, in the case of **Sajjan Kumar vs. CBI** (2010) 9 SCC 368, the Supreme Court, after analysing its previous precedents on the issue, laid down the following principles regarding the scope of Sections 227 and 228 of the CrPC:-

“21 On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:-

- (i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. 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 there from taken at their face value discloses 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”.

11) The Supreme Court, in the case of **Ghulam Hassan Beigh vs. Mohammad Maqbool Magrey and others,**

2022 LiveLaw (SC) 631, after noticing the aforesaid position of law, has held that the trial Court is enjoined with the duty to apply its mind at the time of framing of charge and should not act as a mere post office. It has been observed by the Supreme Court in the said case that the material which is required to be evaluated by the Court at the time of framing of charge should be the material which is produced and relied upon by the prosecution and sifting of such material is not to be so meticulous as would render the exercise a mini trial to find out the guilt or otherwise of the accused. It was further observed that all that is required at this stage is that the Court must be satisfied that the evidence collected by the prosecution is sufficient to presume that the accused has committed an offence. Even a strong suspicion would suffice.

12) In **Shashikant Sharma and ors vs. State of Uttar Pradesh and another, 2023 Live Law (SC) 1037**, the Supreme Court has held that at the stage of framing of charges, if, from the admitted evidence of the prosecution as reflected in the documents by the I.O in the report under Section 173 CrPC, the necessary ingredients of an offence are not made out, then the Court is not obligated to frame charge for such offence against the accused.

13) From the foregoing analysis of law on the subject, it is clear that at the time of framing of charge, the Court has only to consider the material available for framing an opinion as to whether, prima facie, offence is committed which would require the accused to be put on trial. It is open to the Court, at the stage of framing of charge, to ascertain as to whether the allegations made in the charge sheet against the accused are supported by the material collected by the I.O during investigation of the case.

14) With the aforesaid legal position in mind, let us now advert to the facts of the instant case. The allegation against the petitioner is that he enticed Ms. X and Ms. Y who are minor girls and made them to board his vehicle. It is alleged that the petitioner kidnaped two girls and thereafter he subjected them to sexual assault.

15) Star witnesses of the prosecution to establish the aforesaid allegation against the petitioner are Ms. X and Ms. Y. Ms. X in her statement recorded under Section 164 of Cr. P. C has stated that she along with her friend had gone to have a visit of Dargah Hazratbal. They spent a lot of time sitting over there and thereafter they could not get a vehicle for their home. In the meantime, a vehicle came on spot and its driver enquired from them as to where they

had to go, to which they replied that they had to go to children's park, Lal Chowk. The said person offered them lift in his vehicle and they boarded the said vehicle. After driving for some time, it got very late. Ms. Y had some argument with her family and because of this and also for the reason that it was too late, they were not feeling comfortable to go back to their home. They were apprehending that their family members would deal with them strictly. Thereafter the driver offered to make arrangement for the two girls in a hotel. They took meals in the hotel and she along with her friend, Ms. Y, slept in one room of the hotel whereas the driver slept in a separate room. In the morning, the driver told them to go back to their home and he dropped them near Mughal Darbar Karan Nagar. On reaching their home, they came to know that their family members had lodged a complaint with the police. Ms. Y made a statement under Section 164 of Cr. P. C exactly on similar lines.

16) Brother of Ms. Y, PW Gowhar Ahmad Sheikh, while making his statement under Section 164 of Cr. P. C, has deposed that on 9th June, 2021, while he was selling vegetables on his cart, he received a phone call that his sister, Ms. Y, had not come back to home. He proceeded to his home and he along with his brother , Zaffar Ahmad,

launched search for Ms. Y. On the next day, he along with his brother went to Police Station, Batamaloo, where his brother Zaffar Ahmad lodged a complaint. At 11.00 am, on the same day, he came to know that his sister had come back to home, whereafter he rushed to home and thereafter he along with his brother and his sister, Ms. Y. went to Police Station, Batamaloo, where the police conducted the proceedings. He enquired from her sister as to where she had gone during the night, to which she replied that she along with her friend, Ms. X. had gone to visit the market and they lost their way back to their home, whereafter the petitioner met them and took them to his home. She further narrated to him that on the next day, the petitioner brought back them to their home.

17) PW Bashir Ahmad Wani, father of Ms. X, has stated that on 9th June, 2021, when his daughter was at home, Ms. Y, who happens to be her friend, came over there and both of them decided to visit the market. The two girls went to the market but did not come back during the night. He along with his other family members launched search for the two girls but they could not find them. On the next day, PW Gowhar Ahmad Sheikh, the brother of Ms. Y, went to Police Station, Batamaloo, and he also went over there. They lodged a report with the police. After some

time, he received a phone call from his home informing him that his daughter, Ms. X. had come back to home. On reaching home, he enquired from his daughter who told him that while she was visiting the market, it got late and dark. She further narrated to him that the petitioner met them and he took them to his home as it was late in the evening. She also narrated to him that the petitioner gave them shelter for the night and also gave them meals, whereafter, next morning, he dropped them at their home. The witness further stated that he took his daughter to the police station where police conducted the proceedings.

18) The I.O. has also recorded statements of other witnesses under Section 161 of the Cr. P. C but none of these witnesses have any direct knowledge about the alleged occurrence. PW Zaffar Ahmad Sheikh is witnesses to the lodging of missing report whereas PW Mohammad Yousuf Wani also does not have any direct knowledge about the alleged occurrence.

19) Besides the above oral evidence on record, the victim girls have been subjected to medical examination and as per opinion of the doctor, sexual intercourse had taken place with them two days back. The medical opinion was given on 11th June,, 2021, meaning thereby that the sexual intercourse upon the victim girls had taken place

somewhere on 9th June, 2021. The medical record further shows that no spermatozoa were seen in the vaginal smear of the two girls. This is all the material that has been collected by the Investigating Agency.

20) The question that arises for determination is whether, on the basis of aforesaid material on record, it can be presumed that the petitioner/accused has committed the offence of kidnapping and rape upon the victim girls. It is to be borne in mind that at the time of framing of charges, the court has to accept the material assembled by the Investigating Agency during investigation of the case at its face value and its probative value cannot be gone into. The court has only to derive satisfaction about the commission of offence by the accused.

21) In the present case, both the victim girls have stated that they could not get any vehicle for returning to their home and they boarded the vehicle of the petitioner out of their own will and volition. This Court is conscious of the fact that both the victim girls were minor at the relevant time and their consent or otherwise is immaterial. However, the two girls, in their statements under Section 164 of the Cr. P. C, have not even whispered that the

petitioner had asked them to board his vehicle. According to them, vehicle of the petitioner came there on spot and he gave them lift without there being any inducement or allurement on the part of the petitioner. In fact, the two girls have stated that they did not muster courage to go back to their home because it was too late in the evening and because Ms. Y. had some argument with her family and they were apprehending strictness from their family members.

22) From the statements of the two girls, it is clearly discernible that they had left their home completely uninfluenced by any promise and inducement emanating from the petitioner. Thus, when the statements of both the victim girls are read in conjunction with the statements of their immediate family members, it comes to the fore that the victim girls were neither taken nor enticed by the petitioner to go with him. Therefore, offence under Section 363 of IPC is not made out against the petitioner even if whole of the material collected by the Investigating Agency is taken to be true at its face value.

23) So far as the evidence relating to rape/penetrative sexual assault upon the victim girls is concerned, both of them have not stated anything about this aspect of the

matter. None of them have stated that they were subjected to sexual assault by the petitioner. Merely on the basis of the opinion of the doctor that the two girls had been subjected to sexual intercourse a couple of days back, it cannot be inferred that the petitioner was the author of such sexual intercourse. The Investigating Agency has not collected any scientific evidence to show that the petitioner has committed the sexual assault upon the two girls and in the absence of any oral testimony on the part of the two girls to this effect, the offence of rape/penetrative sexual assault is also not made out against the petitioner.

24) In the above circumstances, there is absolutely no evidence on record to show that the petitioner has either kidnapped the two victim girls or he has committed sexual assault upon them. Therefore, even if the material collected by the Investigating Agency during the investigation of the case remains unrebutted, the same is not sufficient to presume that the petitioner/accused has committed any offence nor does it raise any grave suspicion about the involvement of the petitioner in the alleged occurrence. The allegations made in the charge sheet against the petitioner in the instant case are not supported by the material collected by the Investigating Agency during investigation of the case. Thus, it was not

open to the learned Special Judge to frame charges against the petitioner/accused. The learned Special Judge, without sifting the material collected by the Investigating Agency for the limited purpose of framing opinion as to whether prima facie offence is committed by the petitioner/accused, has proceeded to frame charges against the petitioner. The impugned order of learned Special Judge is, therefore, unsustainable in law.

25) For the foregoing reasons, the instant petition is allowed and the impugned order dated 09.03.2022 passed by the learned Special Judge (POCSO Cases) (Principal Sessions Judge) Srinagar, whereby charges have been framed against the petitioner/accused, is set aside. The petitioner is discharged and the challan against him shall stand dismissed.

26) A copy of this order be sent to the learned Special court for information.

(Sanjay Dhar)
Judge

Srinagar,
06.06.2025
"Bhat Altaf-Secretary"

Whether the order is reportable: **YES**