



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL REVISION APPLICATION NO.90/2026

APPLICANT : Lucky @ Pankaj S/o Viveknarayan Mishra,
Aged about : 19 Yrs., Occ : Nil, through
Mother Jyoti Viveknarayan Mishra,
aged about 44 years, Occ : Housewife.
Both R/o Govardhan Nagar, Tehsil Tumsar,
District Bhandara.

...VERSUS...

NON-APPLICANTS : 1. State of Maharashtra
RESPONDENTS Through Police Station, Tumsar
Tah Tumsar, Dist. Bhandara.

2. Prosecutrix XYZ in
Crime No.407 of 2023 Police Station
Tumsar, District Bhandara.

Mr. V.H. Pandey, Advocate for applicant
Mr. A.M. Ghogre, APP for respondent No.1
Ms Rohini Pande, Advocate (appointed) for respondent No.2

CORAM : MEHROZ K. PATHAN, J.
DATE : 24/09/2026

ORAL JUDGMENT :

1. Heard. Admit. Taken up for final disposal with the consent of the learned Counsel for the rival parties.
2. The applicant has filed the present Revision Application for quashing and setting aside the order dated 04/08/2025 below Exh.6, passed by the learned Additional Sessions Court, Bhandara, whereby

application dated 30/11/2023 filed by the applicant under Section 227 of the Code of Criminal Procedure (Cr.P.C.) came to be rejected by the learned Trial Court.

3. The applicant is being prosecuted for the offences punishable under Sections 323, 354 and 354A of the Indian Penal Code (IPC) read with Sections 8, 10 and 12 of the Protection of Children From Sexual Offences (POCSO) Act, 2012.

4. Mr. V.H. Pandey, learned Counsel for the applicant submits that the applicant was mentally incapacitated and as such the application was filed on the ground of his mental status for discharging him as he was not able to understand the consequences of his action. The applicant was also suggested to undergo the test of Malin's Intelligence Scale for Indian Children and in the said test, his full scale Intelligence Quotient (I.Q.) was below 70. As per the scientific opinion, the majority of people has I.Q. between 90 to 110. However, the present applicant is having I.Q. performance only 71%, which was below the average and falls under the vulnerable growth. The applicant is not in a capacity to understand the consequences of his act and as such he was unable to understand the questions put to him in the trial.

5. The learned Trial Court after receiving such application on the ground of mental incapacity, has directed the Civil Surgeon, Bhandara to examine the accused and ascertain whether the applicant is

of unsound mind and in case of such finding of unsoundness of mind. The Civil Surgeon has submitted his report on 12/04/2024 i.e. psychiatric assessment report, which reflects that the applicant was suffering from mild intellectual disability. After receipt of such report, the learned Trial Court has called upon three witnesses i.e. PW 1- Dr. Arvind Sakhare, PW 2- Dr. Satish Bhagat and PW 3- Dr. Virendra Bante, who have examined the applicant to ascertain where the applicant was of unsound mind. According to the applicant, all the Doctors had consistently stated about the mental incapacitation of present applicant, however, the same was not considered by the learned Trial Court and the learned Trial Court has mechanically rejected the said application by making a perverse observation that there is no consistent opinion of all the Doctors that the applicant is of unsound mind. He relies upon the testimonies of three Doctors to show that the questions which were put by the Trial Court and also by the Prosecutor, establish clearly that the applicant was of unsound mind and as such the observations made by the learned Trial Court are perverse to the evidence led by the Court itself.

6. Learned Counsel for the applicant further submits that the application was rejected even without referring to the powers of the Trial Court in discharging the application under Section 329 r/w Section 330 of Cr.P.C. He further relies upon the judgment of the Madras

High Court in the case of *Kaliyappan Vs. State*, reported in *2020 (4) MLJ (Cri) 78* to submit that in such a case where the accused is found to be of unsound mind consistently, the accused can also be discharged taking recourse to the powers under Section 330 of Cr.P.C. He therefore submits that the learned Trial Court has failed to apply his mind to the evidence of Doctors, psychiatric assessment report and the provisions of Section 328, 329 and 330 of Cr.P.C. and mechanically rejected the application by making perverse observation that there is no consistent opinion of all the Doctors, who had examined the applicant, that the applicant is of unsound mind. The impugned order is, therefore, liable to be quashed and set aside and the application for discharge needs to be allowed. The applicant shall be discharged from the offences punishable under Sections 323, 354, 354A of IPC read with Sections 8, 10 and 12 of the Protection of Children From Sexual Offences (POCSO) Act, 2012, registered vide Crime No.407/2023.

7. As against this, Mr. Ghogre, learned Additional Public Prosecutor for the respondent No.1 as well as Ms Pande, learned appointed Counsel appearing on behalf of the complainant, mother of victim, strongly opposes the application on the ground that the learned Trial Court has adopted correct procedure in first directing the Civil Surgeon to submit a psychiatric assessment report. After receipt of the psychiatric assessment report, the learned Trial Court had also called

upon the concerned Doctors, who had examined the applicant, to arrive at a conclusion that the applicant was of unsound mind. The psychiatric assessment report suggested that the applicant was having mild intellectual disability, hence, the Doctors were called upon by the Court to examine the applicant. The Court had put some questions to the concerned Doctors, who had examined the applicant. The Court had also put relevant questions to the applicant/accused and after going through the evidence of three Doctors, psychiatric assessment report and the answers given by the accused to the queries made by the Court, the learned Trial Court had rightly come to the conclusion that there is no consistent opinion of all the Doctors, who had examined the applicant, that the applicant was of unsound mind.

8. Ms Pande, learned Counsel appointed for the respondent No.2 also submits that though the applicant relies upon the deposition of PW 2- Dr. Satish Bhagat, who had specifically averred in his examination-in-chief that he cannot tell that the applicant is of unsound mind, she submits that the conclusion arrived at by the learned Trial Court is just and proper and is thus liable to be maintained. The application for discharge filed by the applicant/accused was devoid of substance and merits. Perusal of depositions of PW-1 to PW-3 would show that there is no consistent opinion that the applicant is of unsound mind. The application for discharge filed by the applicant was therefore

rightly rejected. The impugned order is just and proper and is liable to be maintained.

9. I have gone through the impugned order dated 04/08/2025, passed by the learned Trial Court, wherein the application for discharge filed by the applicant under Section 227 of the Code of Criminal Procedure dated 30/11/2023 came to be rejected. I have also gone through the testimonies of PW 1- Dr. Arvind Sakhare, PW 2- Dr. Satish Bhagat and PW 3- Dr. Virendra Bante. I have also perused the psychiatric assessment report dated 12/04/2024. Perusal of the psychiatric assessment report shows that the opinion given by the Civil Surgeon of General Hospital, Bhandara is that the applicant was suffering from mild intellectual disability. Perusal of testimonies of all three Doctors, who had examined the applicant, shows that there is consistent opinion of all three Doctors that the applicant was not able to understand the consequences of his act. The Doctors had also observed that the accused cannot defend himself independently on his own without anybody's assistance. In the cross-examination P.W. 1 - Dr. Arvind had specifically stated that he is of the firm opinion on the point that the patient is not able to defend himself on his own. Deposition of PW 2- Dr. Satish Bhagat also shows that the I.Q. count of the applicant was 68. In his examination-in-chief, the said witness has stated that the applicant was not able to defend himself in criminal case. PW3 – Dr.

Virendra Bante, in his examination-in-chief, specifically avers that the applicant/accused is not in a position to understand the questions and give it rational answers. He further states that the applicant/accused cannot answer comprehensive questions and his physical age at the time of examination was 20 years, whereas the mental age was around 14 years at that time. The admission given by PW 3- Dr. Virendra Bante shows that the applicant/accused cannot understand what is modesty and does not understand what is outraging of modesty. Perusal of the questions shows that there was consistency in the depositions of three Doctors, who had examined the applicant/accused that the applicant is of unsound mind and as such this aspect has been ignored by the learned Trial Court while rejecting the application for discharge under Section 227 of the Code of Criminal Procedure vide order dated 04/08/2025.

10. A single Judge of the Madras High Court in the case of *Kaliyappan* (supra) after considering the entire law on the point of provisions of Sections 328, 329 and 330 of Cr.P.C., has observed as under :-

“33. Even though Section 329(2) Cr.P.C. contemplates a discharge, it is necessary to notice that this expression has been used rather loosely. As pointed out supra, Section 329 Cr.P.C. operates only at the stage of trial, i.e., post the stage of framing charges. Under the Code, provisions to discharge an accused

from the prosecution are available in Sections 227, 239 and 245 Cr.PC. These powers are available to the trial Court only prior to the framing of charges. However, Section 329(2) Cr.PC. operates at the stage of trial and contemplates a discharge of the accused even after the framing of charges.”

11. Section 329 of Cr. P.C. outlines the procedure In Case Of Person Of Unsound Mind Tried Before Court. Perusal of the provision of Section 329(1) shows that If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it, is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case.

12. The provision of Section 329(1A) provides that if during trial, the Magistrate or Court of Sessions finds the accused to be of unsound mind, he or it shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist. Section 329 (2) of the Code of Criminal Procedure reads as under :-

“329. Procedure in case of person of unsound mind tried before Court .-.....

(2) If such Magistrate or Court is informed that the person referred to in sub-section (1-A) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no prima facie case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused and deal with him in the manner provided under section 330:

Provided that if the Magistrate or Court finds that a prima facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused.”

13. The provision of Section 329(2) Cr.PC. provides that if the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no

prima facie case is made out against the accused, he or it shall, instead of postponing the trial, **discharge the accused and deal with him in the manner provided under section 330**. Section 330 of Cr.P.C. deals with release of person of unsound mind pending investigation or trial. Section 330(3) of Cr.P.C. reads as under :

“Section 330. Release of person of unsound mind pending investigation or trial.-.....

(3) Whenever a person is found under section 328 or section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be, shall keeping in view the nature of the act committed and the extent of unsoundness of mind or mental retardation, further determine if the release of the accused can be ordered.”

14. After going through the testimonies of three Doctors, who had examined the applicant as well as psychiatric assessment report, which has categorically stated that the applicant is suffering from mild intellectual disability, it appears that the application for discharge on the ground of mental incapacitation was wrongly rejected by the learned Trial Court. The learned Trial Court has failed to apply its mind to the psychiatric assessment report as well as to the questions put to three Doctors, who were examined on the directions of the Court itself. The

findings of the learned Trial Court that there is no consistent opinion of all Doctors, who were examined before the Court that the applicant was of unsound mind, appears to be perverse to the depositions of all three Doctors. The learned Trial Court has failed to apply the provisions of Section 329 (3) and 330 of Cr.P.C.

15. Thus in my opinion, a case is made out by the Applicant for consideration of his case on merits and discharge of the accused as per provision of Section 329(2) of Cr.P.C., as it appears that the Applicant is incapable of entering defence. This exercise as provided under Section 329(2) of Cr.P.C. ought to have been undertaken by the trial Court to find out that whether or not a *prima facie* case is made out against the accused from the record of evidence. The aforesaid task is necessary to be undertaken before postponing the trial or discharging the accused so as to deal with him in the manner provided under Section 330 of Cr.P.C. The findings recorded by the learned Additional Sessions Judge in its impugned order dated 04/08/2025 that there is no consistent opinion of all the doctors examined before the Court that the applicant is of unsound mind is perverse. The learned Trial Court also failed to record any satisfaction as to whether there are sufficient grounds to proceed against the applicant on merits as per the charge-sheet. Section 227 of Cr.P.C. provides for discharge before framing of charge, the discharge referred under Section 329 (2) of Cr.P.C. operates even after framing of

charge. However, the discharge application under Section 329 (2) of Cr.P.C. will have to be necessarily adjudicated with the same parameters as laid down in Section 227 of Cr.P.C. and the procedure laid down under Section 330 of Cr.P.C. The Magistrate will have to therefore necessarily examine whether there is sufficient evidence in the charge-sheet to prosecute and frame the charge even against the accused who is of unsound mind and determine whether release of accused can be ordered as per Section 330 of Cr.P.C. That exercise is not undertaken by the learned Trial Court while passing the impugned order. Hence, I am inclined to remand back the matter with a direction to the Trial Court to determine whether release can be ordered taking into consideration the nature of the act committed and the extent of unsoundness of mind as per Section 330 (3) of Cr.P.C. Hence, the following order :-

ORDER

(i) The impugned order dated 04/08/2025 passed by the learned Additional Sessions Judge, Bhandara below Exh.6 is hereby quashed and set aside.

(ii) The matter is remanded to the learned Trial Court to *prima facie* form an opinion as to whether there is sufficient material to proceed in the charge-sheet filed by the prosecution and thereafter deal with the accused in the manner contemplated under Section 330(3) of Cr.P.C.

(iii) The aforesaid application for discharge be decided within two months from the date of receipt of this order.

(iv) Criminal Revision Application is allowed in the aforesaid terms and disposed off accordingly.

(v) Fees of the appointed Counsel for the respondent No.2 shall be paid by the High Court Legal Services Sub-Committee, Nagpur, as per rules.

(MEHROZ K. PATHAN, J.)

Wadkar/Najeeb