

IN THE HIGH COURT OF DELHI

Crl.Rev.P. No.193 /2009

Reserved on 11th September 2009

Date of decision: 23rd September, 2009

Shamshad & Another Petitioners
through: Mr. Haneef Mohd., Adv. with
Mr. Mustafa, Adv. & Mr. Anil Vyas, Adv.

VERSUS

State (NCT of Delhi) Respondent
through: Mr. Manoj Ohri, APP for the State.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

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| 1. Whether reporters of local papers may be allowed to see the Judgment? | No |
| 2. To be referred to the Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

GITA MITTAL, J

1. The petitioners Shamshad and Mohd Rashid by way of the present revision have prayed for setting aside of the order dated 20th January, 2009 passed by the learned Additional Sessions Judge, Rohini, Delhi framing charges under Sections 376/343 of the Indian Penal Code against the Shamshad-petitioner no.1 and under Section 363 read with Section 340 of the Indian Penal Code against Mohd Rashid-petitioner no.2.

2. The case of the prosecution to the extent necessary for the purposes of the present case is briefly set out hereafter. On 10th February, 2005, a

missing report was lodged by Noor Ahmed, father of Sadma as well as Mohd Ayub, father of Taranum. These two girls were recovered vide D.D. No.17 dated 13th February, 2005 from the house of a relative of Mohd Rashid in Roorkie, Uttar Pradesh. Statements of the two girls and their fathers were recorded in which they made no allegations whatsoever against anybody. Custody of the two girls was therefore handed over to their parents.

3. Subsequently, on or about 16th March, 2005, Mohd Ayub, father of Taranum made a complaint to the court of Chief Metropolitan Magistrate complaining of commission of offences under Sections 363/364/376 of the Indian Penal Code against the petitioners and one Salim with regard to the occurrence on the 9th February, 2005 and thereafter. The complainant stated that he had also made a written complaint dated 4th March, 2005 to the higher authorities of the police complaining the non-action of the police in the matter. As nothing was done pursuant thereto, he was filing the complaint before the court making a prayer that the accused persons be summoned and punished.

4. On this complaint, the learned Metropolitan Magistrate passed an order dated 11th May, 2005 directing the SHO, Police Station Punjabi Bagh to register an FIR under the appropriate provisions of law; to get the same investigated and file a report at the earliest. As a result, the police registered FIR No.384/2005 under the provisions of Sections 376/363/342/34 of the Indian Penal Code on 18th May, 2005 against Shamshad-petitioner no.1 and one Salim. It is noteworthy that no case was registered against the accused Mohd Rashid, petitioner no.2.

5. On 28th May, 2005, during the course of investigation, the police recorded statements of Mohd Ayub the complainant, the two girls as well as Noor Ahmad, father of Sadma.

6. These statements were followed with the recording of the statement of Taranum and Sadma on 6th June, 2005 by the learned Magistrate under Sections 164 of the Code of Civil Procedure.

7. My attention is drawn thereafter to the detailed order dated 26th August, 2006 recorded by the learned Magistrate complaining of the manner in which the investigation of the case proceeded. The order notes that the investigating officer was not present with the final report which had taken more than one year and three months for submission. The investigating officer had filed the final report in the case in court on that day. The chargesheet was filed only against Shamshad-petitioner no.1 herein. He had placed the name of the accused Salim in Column no.2 and in the body of the chargesheet, had mentioned that there was no evidence against Salim. The learned Magistrate observed that the chargesheet was completely silent about Mohd Rashid. It was observed that nothing has been found mentioned even on a query made by the court. The investigating officer orally informed the court that Rashid had married Sadma who was a friend of Taranum the prosecutrix in the case, and had accompanied her.

The learned Magistrate considered the statements given by the two girls before the learned Magistrate under Section 164 of Cr.P.C. and observed that the prosecutrix Taranum had given a statement on oath

assigning a specific role to Salim as well as Rashid. The court was of the view that despite the statement of the prosecutrix Taranum with regard to implication of Rashid for serious offences of kidnapping and other offences, the accused person had been deliberately let off by the investigating agency.

8. The learned Judge placed reliance on the judicial pronouncements reported at **2004 (1) JCC 611 Jagadish Ram Vs. State of Rajasthan & Anr.; (2003) 4 SCC 139 Dy. Chief Controller of Imports and Exports Vs. Roshan Lal Aggarwal & Ors.; (2002) 1 SCC 241 S.W. Palanltkar & Ors. Vs. State of Bihar & Ors. & 1967 (3) SC 668 = AIR 1968 SC 117 = 1968 CLJ 97 Abhinandan Jha & Ors. Vs. Dinesh Mishra** in which it was held that even though a final report stands filed by the police, the Magistrate has ample powers to give directions to the police under Section 156(3) of the Cr.P.C. to make further investigation. It was further observed that even if the process may have been issued against some of the accused, in exercise of power under Section 190 of the Cr.P.C. the Magistrate can on the next date, issue process to other persons against whom there is material on record and whose name was not included as an accused person in the chargesheet. It was observed that there was sufficient material to issue non-bailable warrants against the accused Salim whose name has been placed in Column No.2 but for the reason that no parentage or the address of Mohd Rashid was on record, process could not be issued against him. In this background, the court directed the police station Punjabi Bagh to take up further investigation in the case with regard

to the role of Mohd Rashid and directed non-bailable warrants against the accused Salim to issue for the next date.

No challenge has been laid to this order dated 26th of August, 2006 by any person.

9. A supplementary charge sheet was then filed on 9th February, 2007 against the accused Mohd Rashid by the investigating officer. Counsel for the complainant submitted that he is not pressing any other sections besides the section in which cognizance was taken by the court on 19th February, 2006 nor he is pressing the complaint case for any other accused. Thereafter by an order passed on 12th September, 2007, it was observed that the offences under Section 363/373 of the Indian Penal Code were exclusively triable by the court of session and the case was committed to the sessions court.

10. The material placed by the investigating agency before the court and by the order dated 20th January, 2009, the trial court directed that the material placed by the prosecution prima facie discloses commission of offences under Section 363 of the Indian Penal Code by all the three accused and commission of offences under Section 376/342 of the Indian Penal Code against the accused Shamshad.

11. Before this court, learned counsel for the petitioner has assailed the order dated 20th January, 2009 primarily on the ground that the first statements made by the two girls as well as their fathers on 13th February, 2005 were totally exculpatory and did not disclose commission of any offence by the petitioners. It is further contended that the statements

made by the girls and fathers were witnessed and signed by several relatives and other persons as well and that the police also recorded D.D. No.17 on 13th February, 2005 with regard to the recording of such statements. The police specifically noted that the two girls left their home for checking the result in the Hansraj School and from there they left for touring and bathing in Haridwar with their friends without informing their families. The police also noted that there was no disclosure of any misbehaviour against these boys and that the girls did not want to be medically checked up. For this reason, the custody of the girls was handed over in good health to their fathers.

12. Mr. Haneef Mohd, learned counsel for the petitioner has vehemently contended that in the light of these statements duly signed not only by the two girls and their fathers, the complaint allegedly made on 14th March, 2005 to higher authorities as well as the complaint filed on 16th March, 2005 under Section 156(3) of the Cr.P.C. before the court of the learned ACMM deserve to be totally rejected. It is also urged that the statements attributed to the prosecutrix under Section 161 of the Cr.P.C. made on 6th June, 2005 are totally fabricated and concocted. The submission is that the contradictions with the first statement and the delay in making the subsequent inculpatory statements renders them as totally suspect and unworthy of any credence.

13. It is further urged that Sadma, the other girl who is alleged to have been kidnapped, has not supported the prosecutrix or the complainant at all. In view of the contradiction between the statement of the two girls who

were allegedly kidnapped, the accused persons are entitled to the benefit of doubt and are bound to be discharged.

14. Learned counsel for the petitioner points out yet another circumstance in support of the prayer for quashing of the order framing charges against the petitioners and the prosecution. It is urged that in the original statements made by all these persons, the accused Salim was not named as even present or involved in any manner. Further that even in the complaint filed by Mohd Ayub, he has not implicated Salim at all. It is only in the statement of the prosecutrix recorded under Section 164 of the Cr.P.C. that she has for the first time stated that Salim was waiting in the auto rickshaw outside her school. The submission is that in this background itself, the petitioners deserve to be discharged.

15. I have heard learned counsel for the parties at length. It cannot be disputed that at the stage of consideration of the award, this court is only required to consider whether the allegations in the complaint and the material placed on record, prima facie give rise to grave suspicion of the implication of the accused persons for the commission of offences for which they have been arraigned to stand trial.

16. The main plank of the petitioner's contention before this court is based on the first exculpatory statements made by the complainant, the prosecutrix and all other witnesses on 13th February, 2005. So far as this statement is concerned, the complainant as well as the prosecutrix have stated that their signatures were taken on blank papers by the police. They have also made allegations of police collusion with the accused

persons. The complainant has further stated that he was insisting upon the police to register a case and to get the prosecutrix medically examined but the police did not do so.

17. So far as the veracity and correctness of these submissions is concerned, the same would require to be tested in the statement which shall be made on oath before the court and shall require to stand the test of cross-examination. However, at this stage, there is nothing on record which would enable this court to discredit the explanation given by the complainant or the prosecutrix. They have rendered an explanation for the first statement which is attributed to them and made other allegations with regard to the police inaction. The petitioners would have an opportunity to challenge the statements made by the complainant and the prosecutrix more than one month after the commission of the alleged offence on the ground that the same was an after thought as has been urged before this court.

18. In the statement under Section 164 of the Cr.P.C., the prosecutrix has stated on oath that when the prosecutrix and her friend Sadma came out of the school, they found Shamshad and Salim waiting in an auto rickshaw. Mohd Rashid with two other boys was also waiting in another auto rickshaw. Shamshad and Salim forcibly separated the two girls and seated them in the two auto rickshaws. The complainant was placed in Shamshad's auto rickshaw. The two girls were taken to Inter State Bus Terminus (ISBT) and from there to Haridwar and thereafter to Roorkee to the residence of relatives of Mohd Rashid. The prosecutrix has specifically stated that

Sadma and she were locked in different rooms and that Shamshed raped her for three days.

It is stated by the prosecutrix that the physical relations were forcibly established by Shamshad.

19. Sadma has not given any evidence of rape. In her statement under Section 164 of the Cr.P.C. also recorded by the Magistrate on 19th December, 2006, she had stated that the girls knew Rashid and Shamshad before 9th February, 2005 and had respectively fallen love with them. She also stated that after leaving their school on the 10th of February, 2005, the girls sat with the boys in the park and apprehensive of being scolded by the parents, accompanied the boys to Haridwar. Sadma stated that she had married Mohd Rashid on 25th February, 2005 and had a son from this marriage. She stated that neither her parents nor she has any complaint against him and that she does not want legal action to be taken against him.

20. The impact of this statement and the refusal to join the complainant or Taranum in the allegations which have been made, would be examined during trial. It is the case of the prosecution that the girls were minors at the time of the incident and were taken out of the custody of their guardians without their consent. In the face of the allegations in the complaint; the statements given by the complainant and the prosecutrix Taranum, it cannot at all be held that there is no prima facie evidence of implication of the petitioners before this court for commission of the offences with which they have been charged.

21. Learned counsel for the petitioner has contended that it was not open for the learned Magistrate to summon any person other than those who have been arrayed in the chargesheet filed by the police.

22. My attention has been drawn to the pronouncements of the Apex Court reported at **AIR 2001 SC 3524 = 2002 Crl. L.J. 90 Rajinder Prasad Vs. Bashir & Ors.** wherein it is stated that Section 190 of the Code of Criminal Procedure empowers the magistrate to take cognizance of any offence against such persons also who have not been arrested by the police as accused persons, if it appears from the evidence collected by the police that they were prima facie guilty of offences alleged to have been committed. Section 209 of the Code provides prescribed procedure to be followed by the Magistrate where the accused appears and is tried before the Magistrate and if it appears to the Magistrate that the offence is triable exclusively of the category of sessions, after compliance with the provision of Sections 207/209 as the case may be, he shall transfer the case to the court of sessions and subject to the provisions of the Code, pass appropriate orders.

The Apex Court placed reliance on its earlier pronouncements reported at **1967 (2) SCR 43 Raghubans Dubey Vs. State of Bihar** and further held that the cognizance taken by the Magistrate was of the offence and not of the offender. Having taken cognizance of the offence, a Magistrate can find out the real offender and if he comes to the conclusion that apart from the persons sent by the police, some other persons were also involved, it is his duty to proceed against those persons as well.

23. In **2001 Cr.L.J. 4173 : 93 (2001) DLT 8 Swil Limited Vs. State of Delhi & Ors. (Supra)**, the Apex Court has held that as per Section 190 of the Cr.P.C., under Section 204 Cr.P.C. the Magistrate is empowered to issue process to the accused. At the stage of issuing process, it is for the Magistrate to decide whether process should be issued against the person/persons named in the chargesheet and also not named therein. The Magistrate is required to apply independent mind not only from the facts emerging from the investigation but by taking into account the statements recorded by the police as well other documents tendered along with the chargesheet.

24. On receipt of the complaint, even if a Magistrate orders investigation under Section 156(3), the Magistrate has jurisdiction to apply independent mind to the complaint which is placed before the court. In this behalf, the observations of the Apex Court in the judgment reported at **(1980) 4 SCC 631 H.S. Bains, Director, Small Saving-Cum-Deputy Secretary Finance, Punjab, Chandigarh Vs. State (UT of Chandigarh)**, can be usefully adverted to and read as follows:-

“5. Chapter XV (Sections [200 to 203](#)) of the Code deals with "complaints to Magistrates". A Magistrate taking cognizance of an offence on complaint is required by Section [200](#) to examine the complainant and the witnesses present, if any. Section [202](#) provides that a Magistrate taking cognizance of a case upon complaint, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. Section [203](#) empowers the Magistrate to dismiss the complaint, if, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of

the enquiry or investigation (if any) under Section 202, the Magistrate is of the opinion that there is no sufficient ground for proceeding. Chapter XVI deals with "commencement of proceedings before Magistrate" and Section 204 enables a Magistrate to issue summons or a warrant as the case may be to secure the attendance of the accused if in the opinion of the Magistrate taking cognizance of the offence there is sufficient ground for proceeding.

6. It is seen from the provisions to which we have referred in the preceding paragraphs that on receipt of a complaint a Magistrate has several courses open to him. He may take cognizance of the offence and proceed to record the statements of the complainant and the witnesses present under Section 200. Thereafter, if in his opinion there is no sufficient ground for proceeding he may dismiss the complaint under Section 203. If in his opinion there is sufficient ground for proceeding he may issue process under Section 204. However, if he thinks fit, he may postpone the issue of process and either enquire into the case himself or direct an investigation to be made by a Police Officer or such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. On the other hand, in the first instance, on receipt of a complaint, the Magistrate may, instead of taking cognizance of the offence, order an investigation under Section 156(3). The police will then investigate and submit a report under Section 173(1). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and straightaway issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The Police report under Section 173 will contain the facts discovered or unearthed by the police and the conclusion drawn by the police therefrom. The Magistrate is not bound by the conclusions drawn by the Police and he may decide to issue process even if the Police recommend that there is no sufficient ground for proceeding further. The Magistrate after receiving the Police report, may, without issuing process or dropping the proceeding decide to take cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statements upon oath of the complainant and the witness-

es present under Section 200 Criminal Procedure Code and thereafter decide whether to dismiss the complaint or issue process. The mere fact that he had earlier ordered an investigation under Section 156(3) and received a report under Section 173 will not have the effect of total effacement of the complaint and therefore the Magistrate will not be barred from proceeding under Sections 200, 203 and 204. Thus, a Magistrate who on receipt of a complaint, orders an investigation under Section 156(3) and receives a police report under Section 173(1), may, thereafter, do one of three things : (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence under Section 190(1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report : (3) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.”

25. In view of the above, the objection of the learned counsel for the petitioners that the Magistrate had no power to direct summoning of the petitioner no.2 or the other co-accused despite the final report presented by the police, is wholly misconceived.

26. It has to be held that the statement made by the prosecutrix was categorical. The two girls who were taken from Delhi to Haridwar have been stated to be minors. The question of consent of their guardians would be a material consideration during the trial. In view of the statements on record, the present case is not a case where the material placed by the prosecution raises only suspicion. The complainant has given an explanation for the delay and attributed collusion to the police which would be examined during trial. The first statement relied upon by the petitioners

is denied by the complainant and the prosecutrix. In this background, the challenge by the accused persons to the order dated 20th January, 2009 framing charges against the petitioners and the order summoning the petitioner no.2 is untenable and wholly devoid of legal merit.

This petition is accordingly dismissed.

Let the record of the trial court be returned to the trial court without any delay.

September 23, 2009
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Gita Mittal, J.