

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% CRL. REV. P. NO. 378/2010

+ Date of Decision: 5th November, 2012

NEHA MONGA Petitioner

! Through: Mr. Vivek Sood, Advocate

Versus

\$ STATE & ORS. ...Respondents

Through: Mr. M.N. Dudeja, APP for the State
with ASI Rishali Yadav PS Tilak Nagar
Ms. Rebecca M. John, Mr. Kushdeep
Gaur & Mr. Abhishek Batra, Advocates
for R-5

WITH

% CRL. REV. P. NO. 402/2010

MAMTA AGGARWAL & ANR. Petitioners

! Through: Mr. Vinod Kumar, Advocate

Versus

\$ STATE ...Respondent

Through: Mr. M.N. Dudeja, APP

WITH

% CRL. REV. P. NO. 660/2010

POOJA GUPTA & ANR. Petitioners

! Through: Mr. P.S. Goindi, Advocate

Versus

\$ STATE

...Respondent

Through: Mr. M.N. Dudeja, APP

AND

%

CRL. REV. P. NO. 332/2011

GOVT. OF NCT OF DELHI

....Petitioner

!

Through: Mr. M.N. Dudeja, APP

Versus

\$ ASHWANI AGGARWAL & ORS.

...Respondents

Through: Ms. Rebecca M. John, Mr. Kushdeep
Gaur & Mr. Abhishek Batra, Advocates
for R-4

CORAM:

*** HON'BLE MR. JUSTICE P.K.BHASIN**

ORDER

P.K.BHASIN, J:

These petitions have been filed against the order dated 23rd April, 2010 passed by the learned Additional Sessions Judge whereby one out of the ten charge-sheeted accused, who is the mother of the prosecutrix, was charged for the commission of the offence punishable under Section 506(II) IPC and four other were charged under Section

376 read with Section 109 IPC while five were discharged. The accused who have been ordered to be tried under Section 376 read with 109 IPC have sought their discharge by filing two revision petitions (being Crl. Rev. P. Nos. 402/2010 & 660/2010) while the State as well as the victim of rape filed separate revision petitions, being Crl. Revn. P. Nos. 332/2011 & 378/2010 respectively, challenging the discharge of five accused persons who are the respondents in these two petitions. Since all the four petitions were heard together and common submissions were made from both sides the same are being disposed of together by this common order.

2. The relevant facts leading to the filing of these four petitions are that the prosecutrix had lodged a complaint with the police on 21st July, 2006 that she had been raped by her own father (who could not be arrested during investigation and was declared proclaimed offender) on 5th December, 2005 and then again after some days and one day in January, 2006 she was raped by all the five discharged accused. Other accused, including her mother, had abetted the commission of rape upon her and had also extended threats to her. The prosecutrix had also claimed in her statement under Section 164 Cr.PC. that her parents were in fact running a sex racket and her brother was very much aware of that racket in which couples used to come from outside Delhi and they used to indulge in spouse swapping and in that racket Ashwani (discharged accused) and his wife Mamta (who has been

charged) were also involved and her parents wanted her(the prosecutrix) also to join them in that business.

3. The learned trial Judge in the impugned order noticed the allegations levelled against the accused persons and one judgment of the Supreme Court reported as AIR 1979 SC 366, "Union of India vs Prafulla Kumar & anr.", wherein the guidelines to be followed by Courts at the stage of consideration of charge in criminal cases were laid down and was held that the Courts at the stage of consideration of charge are not expected to make a roving enquiry into the *pros* and *cons* of the matter and to weigh the evidence as if a full fledged trial is being conducted, and then discharged all the male accused who had allegedly committed gang rape and charged all the female accused for abetting the rape of the prosecutrix. The relevant parts of the impugned order are re-produced below:-

"7. The prosecutrix is an educated girl of 20 years and is a student of B.Com. (IInd year). In her detailed complaint dated 21.07.2006 she has stated about being raped by her father in December, 2005 and then again in the first week of January, 2006 and about her mother accused Praveen Monga threatening her to keep the rape a secret otherwise she would be killed. As regards the subsequent event which took place in January, 2006 itself she has categorically stated that her mother sent her to give kadi to C-11/1, Ganesh Nagar, New Delhi-18 which belongs to Ashwani Aggarwal and that as she knocked the door, Mona D/o Dharampal came to open the door. The prosecutrix told her that her mother had sent the kadi for her. Mona told her to go upstairs and give it. She went upstairs then at that very moment Mona locked the door from inside. She reached upstairs when Kiran Aggarwal w/o Ashok Aggarwal from Batala and Puja w/o Rajiv Gupta from Qadian pulled her inside holding her from her arms. Mamta Aggarwal w/o Ashwani Aggarwal and Mona took off her clothes. After which an unknown person came there and took her to another room when

she was in a naked position, Kiran Aggarwal threatened her that she would be killed she raised her voice. Puja covered her face with a towel after which she got raped. Mona and Kiran Aggarwal were making video film and taking pictures. At that time there were two other unidentified persons who were also present and were not known to her. She came home and narrated the incident to her parents who told her that she should not tell about the incident to anybody otherwise, she would be killed.

8. The prosecutrix in her detailed complaint dated 21.7.2006 which was lodged after six months of her being allegedly raped has stated about her father raping her twice however she has not mentioned a word about the accused persons Ashwani Aggarwal, Rajeev Gupta, Shiv Kumar, Lakhvinder Singh and Satender Kumar @ Sona raping her along with the three unidentified persons. Where she was allegedly gang raped by five known persons it cannot be imagined that she would have forgotten to write about being raped by them in her complaint. This is especially so where she has written in detailed about what allegedly happened on the day her mother sent her to give kadi at C-11/1, Ganesh Nagar, New Delhi. It is only in her statement recorded u/s 161 CrPC on 6.9.2006 eight months after the incident that she for the first time has come up with the involvement of the five above named accused persons. Significantly in her statement u/s 161 CrPC she has mentioned about being raped also by Satender Singh @ Sona however in her statement u/s 164 Cr.PC recorded after one year on her application where she has stated about accused Ashwani Aggarwal, Rajiv Gupta, Shiv Kumar, Lakhvinder Singh and two other unidentified persons raping her on the said day she has claimed that Sonu @ Satender Singh who is running a Photo Studio in Qadian was telling Mona and Kiran Aggarwal to take her obscene pictures. There is no allegation of rape against Satender Singh @ Sona in her statement u/s 161 CrPC.

9. It is obvious that in case the said persons who have been named for the first time in her statement u/s 161 CrPC had a role to play or were involved in any way with the alleged incident which took place in flat no. C-11/1, Ganesh Nagar, New Delhi, their role would have been explicitly set out in the complaint itself. It is not the case of the prosecutrix that she did not mention the name of the said persons in her complaint and about them raping her because she was threatened in any way. The fact that despite being allegedly criminally intimidated by her mother Praveen Monga, she has stated about being raped twice by her father in her complaint only goes to prove that the prosecutrix was under no pressure and there was no reason for her not to have stated about the alleged role of the said persons. Her subsequently naming them and stating that she was raped by them

after nearly nine months of the incident in her statement u/s 161 CrPC is an obvious after thought. It cannot be imagined that where she did not hesitate to put serious allegations of rape against her father in her complaint, she would have for any reason forgotten to mention the names of the above mentioned five persons who were already known to her. There is no medical evidence on record in support of the claim of the prosecutrix being gang raped by seven persons. There is no public person examined as a witness who has stated about the accused visiting the house no. C-11/1, Ganesh Nagar, New Delhi in the fourth week of January as claimed or about her leaving the said premises and about the state she was in, even if her allegations were to be believed. Her own brother Prince Monga won her confidante, in his statement to the police and his statement under Section 164 CrPC recorded by the Magistrate on 8.8.2006 has not supported the case of the prosecutrix and has denied the involvement of the said persons.

10. *Taking one from the above cited judgments and for the reasons cited above I do not find any reasonable ground to proceed against the accused persons namely Ashwani Aggarwal, Rajeev Gupta, Shiv Kumar, Lakhvinder Singh, @ Sona Satender and they are accordingly discharged.*

11. *Regarding the role of Praveen Monga the allegation against her in the complaint of the prosecutrix is that of threatening her that she would be killed in case she disclosed about her father raping her, prima facie case against her u/s 506 Part II IPC is made out. With regard to Mamta Aggarwal, Kiran Aggarwal, Pooja and Mona considering the allegations against them in the complaint as set out above a prima facie case u/s 376 read with 109 IPC is made out against them. Charge accordingly be framed against the accused persons.”*

4. From these observations of the learned trial Judge it is clear that the version of the prosecutrix that she was raped on three occasions out of which twice she was raped by her father singly and then gang raped by other persons has not been found to be doubtful and that is why a charge under Section 376 read with 109 IPC has been ordered to be framed against the alleged abettors. However, the allegations against the five male accused persons who had allegedly gang raped her have

been found by the trial Court to be doubtful and so they have been discharged.

5. It was submitted by the learned counsel for the four female accused who have been ordered to be tried for the offence of abetting commission of rape upon the prosecutrix and the learned counsel for the discharged accused that there was no material placed on record with the charge-sheet from which it could be said that these female accused had abetted the commission of the offence of rape and the trial Judge had failed to notice that the prosecutrix was pregnant at the time of her alleged rape and she had falsely implicated the accused under the influence of a *tantrik* baba. It was also contended that the entire allegations made by the prosecutrix that her father had raped her twice were so improbable that no Court could ever accept them and, therefore, the trial Court committed a material irregularity in coming to the conclusion that the four female accused had abetted the commission of rape upon the prosecutrix. It was also argued that total falsity of the prosecution case was evident from the fact prosecutrix's own brother had claimed in his statement that his sister was under the influence of a tantric against whom their parents had levelled some allegations and he wanted to take revenge and so he used his influence over the prosecutrix and made her agree to level such baseless and highly improbable allegations against her parents and other accused persons.

6. On the other hand, learned Additional Public Prosecutor and the learned counsel for the prosecutrix submitted that the trial Court was not at all justified in discharging the male accused persons who had all raped the prosecutrix and all of them had been named as accused not only in the initial complaint to the police(FIR) but also in her statements under Sections 161 and 164 Cr.P.C. which could not be rejected at the stage of consideration of charge on the grounds on which it had been rejected by the trial Court and, therefore, those five accused also were liable to be charged for their having committed the offence of gang rape. It was also submitted that the four female accused who have filed revision petitions seeking their discharge were rightly ordered to be tried for their having abetted the commission of the offence of rape.

7. In the opinion of this Court the learned trial Court, even after noticing the judgment of the Supreme Court wherein it has been held that at the stage of charge detailed and minute appreciation of the evidence which the prosecution proposes to adduce during the trial is not permissible, has gone much beyond its jurisdiction which it possessed at the stage of charge by considering the effect of nothing having been said against the discharged accused in the FIR and their being named as the rapists only in her subsequent statements under Sections 161 and 164 Cr.P.C. The question as to why names of the accused persons discharged by the trial Court were not mentioned in

the body of the FIR, though their names were stated there as the accused persons, could to be gone into at the time of trial only and should not have been answered by the trial Court at the stage of charge. The subsequent statements under Sections 161 and 164 Cr.P.C. of the prosecutrix claiming the discharged accused also to be the rapists were sufficient to accept the allegations against them at the stage of charge. And as far as the submission made on behalf of the charged accused that the allegations of rape are highly improbable is concerned the same has also no merit as there is nothing improbable about those allegations.

8. For the aforesaid reasons, the revision petitions filed against the order of the trial Court discharging five accused persons are allowed and they are ordered to charged and tried under Section 376(2)(g) IPC and the two revision petitions filed by the accused who were ordered to be charged under Sections 376 read with 109 IPC are dismissed. The discharged accused who have now been ordered to be charged and tried shall now appear before the trial Court on 4th December, 2012 at 2 p.m. for receiving further instructions in the matter.

P.K. BHASIN, J

NOVEMBER 5, 2012