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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : JULY 17, 2015

DECIDED ON : SEPTEMBER 17, 2015

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CRL.REV.P. 637/2014 & CRL.M.A.No.15956/14

SHIWANI

..... Petitioner

Through : Ms.Kamini Jaiswal, Advocate with
Mr.Sandeep D.Das, Ms.Shilpi Dey
& Mr.Abhimanue Shrestha,
Advocates.

versus

STATE NCT OF DELHI & ORS

..... Respondents

Through : Mr.Amit Ahlawat, APP.
Ms.Geeta Luthra, Sr.Advocate with
Mr.Bachan & Ms.Naina Dubey,
Advocates for R2 & R3.
W/SI Rajesh.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Instant revision petition has been preferred by 'X' (assumed name), the victim, to challenge the legality and propriety of an order dated 03.07.2014 of learned Additional Sessions Judge whereby respondent

Nos.2 and 3 were discharged of the offences under Sections 376(2)/109/34 IPC. The revision petition is contested by the respondents.

2. On 'X's complaint lodged on 24.04.2013 at Police Station Connaught Place, FIR No.61/13 under Section 376 (2)/109/34 IPC was registered. In her complaint 'X' aged 27/28 years levelled serious allegations of sexual abuse since her childhood by her uncles Shashi Kumar Thakur, Mukul Thakur (in Short : R-3). She implicated Meera Thakur (in Short : R-2), her real Mausi, for abetting the crime. It was further alleged that during her stay in Delhi in October, 2003, Shashi Thakur used to make frequent visits and committed rape upon her at Western Court (Janpath) and Khirki Extension (Malviya Nagar). R-3 used to criminally intimidate her on phone to insist her to come to Mujaffarpur (Bihar) to satisfy his sexual urge. R-2 was aware of her sexual abuse. She used to force her to sleep with her husband Shashi Thakur in the same room pretending his fatherly affection towards her.

3. Statements of witnesses conversant with the facts were recorded during investigation. After collecting relevant materials and upon completion of investigation, a charge-sheet under Section 173 Cr.P.C. was filed against all of them. It is relevant to note that Shashi

Thakur and R-3 were arrested during investigation. The Investigating agency, however, did not arrest R-2.

4. After taking cognizance by an order dated 22.02.2014, under Section 376(f)/109 read with Section 34 IPC against all the accused, the case was committed to Sessions Court. After hearing arguments, R-2 and R-3 were discharged by the impugned order.

5. Learned counsel for the petitioner urged that the Trial Court did not appreciate the evidence in its true and proper perspective. Serious allegations of sexual abuse against R-2 were over-looked. It was specifically alleged that she had abetted and provoked the commission of crime by her husband. She used to force 'X' to sleep in her husband's room. She was named in the FIR and specific role in the crime was assigned to her. 'X' had genuine reasons to believe that R-2, her 'mausi', had abetted, aided and facilitated commission of rape and sexual harassment at the hands of her husband. She was sexually abused by the family members for a period of almost fifteen years and it is not believable that R-2 would be ignorant of all this. Trial Court took erroneous view that cognizance against R-2 was not permissible as her name did not figure in the charge-sheet.

Learned counsel for the petitioner urged that the Trial Court committed grave error to discharge R-3 for lack of territorial jurisdiction. The Trial Court misread the complaint to form an opinion that instances of sexual abuse and rape over a period of 15 years were isolated incidents and had no bearing on each other. Emphasizing that offences committed by the accused persons were part of the 'same transaction' learned counsel would urge that there was no impediment to try all of them jointly at Delhi. It is evident from the confessions in the CD that R-3 and Shashi Thakur were perpetrator of the crime and had common intention to sexually exploit 'X' a minor, that time. It was further contended that the petitioner can't be subjected to harassment to make similar statements at various judicial forums for the incidents in question. Reliance has been placed on *Purushottamdas Dalmia vs. The State of West Bengal* AIR 1961 SC 1589; *Rohit Chauhan vs. State* Bail Appl.No.311/2013; *Nirmal Vaid vs. State* Bail Appl.No.1760/2012; *Jagdish Nautiyal vs. State* Bail Appln.1317/2012; *Kishan Singh vs. Gural Singh* 2010 (8) SCC 775; *Deepak Gulati vs. State of Haryana* 2013 (7) SCC 675; *Bhagirath Singh vs. State of Gujarat* 1984 (1) SCC 284; *Jagannivasan vs. State of Kerala* 1995 Supp (3) SCC 204.

6. Controverting the contentions, learned Senior counsel for R-2 and R-3 urged that there is no illegality in the impugned order based upon fair appreciation of evidence. The State has not assailed the order dated 3.07.2014. There is not an iota of evidence to infer if R-2 abetted sexual abuse upon the prosecutrix. A false and motivated complaint has been lodged by the prosecutrix after an inordinate delay of ten years. After attaining majority in 2003, she waited till 24.04.2013 to lodge the report. Even during investigation, no incriminating material was found against R-2 to charge her. The Trial Court did not have territorial jurisdiction to prosecute R-3 as no offence allegedly committed by him occurred within its jurisdiction. Reliance has been placed on *Hardeep Singh vs.State of Punjab & Ors.* (2014) 3 SCC 98; *Raj Kishore Prasad vs.State of Bihar & Anr.* (1996) 4 SCC 495; *Ajay Kumar Parmar vs.State of Rajasthan* (2012) 12 SCC 406; *Dharampal vs. State of Haryana* AIR 2013 SC 3018; *Anju Chaudhary vs.State of Uttar Pradesh & Anr.* (2013) 6 SCC 384; *Abraham & Ors.vs.Inspector of Police, Chennai & Ors.*(2004) 8 SCC 100.

7. Perusal of charge-sheet under Section 173 Cr.P.C. reveals that Shashi Thakur and R-3 were put in column No.11 (A and B) whereas R-2 was put in column No.11(C). At nowhere it mentions that R-2 was not being sent as an 'accused'. Seemingly charge-sheet has not been

drafted properly and contrary to record R-2 has been erroneously shown to be in 'custody' from the date of her arrest on 30.11.2013. In my considered view R-2 was never exonerated of the crime by the investigating agency. Relevant portion of charge-sheet reads: "from the investigation conducted so far, statements of witnesses and other evidences placed on file sufficient documentary and oral evidences have been come on record against the accused persons Shashi Shekhar Thakur, Mukul Thakur mentioned in column No.11 (A and B), and Meera Thakur wife of accused Shashi Shekhar Thakur, mentioned in column No.11(c) to prosecute under Section 376 (2) f/109/34 IPC." Apparently, the Trial Court misunderstood that in the absence of R-2 being arrayed as an 'accused', the learned Metropolitan Magistrate was not legally competent to take cognizance against her. Since R-2 was sent as an 'accused', the Trial Court committed error to observe that cognizance by the learned Metropolitan Magistrate was beyond jurisdiction in view of *Hardeep Singh vs.State of Punjab*, (2014) 3 SCC 92. Besides it, cognizance was taken by learned Metropolitan Magistrate under Section 190 Cr.P.C. which specifically empowers him/her even to take cognizance against the accused not sent for trial by the police. In *Dharampal vs.State of Haryana* AIR 2013 SC 3018, The Supreme Court held:

“23. The view expressed in Kishun Singh's case, in our view, is more acceptable since, as has been held by this Court in the cases referred to hereinbefore, the Magistrate has ample powers to disagree with the Final Report that may be filed by the police authorities under Section 173(3) of the Code and to proceed against the accused persons de hors the police report, which power the Session Court does not have till the Section 319 stage is reached. The upshot of the said situation would be that even though the Magistrate had powers to disagree with the police report filed under Section 173(3) of the Code, he was helpless in taking recourse to such a course of action while the Session Judge was also unable to proceed against any person, other than the accused sent up for trial, till such time evidence had been adduced and the witnesses had been cross-examined on behalf of the accused.

24. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(3) Code of Criminal Procedure. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column No. 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter.

8. In a recent judgment ‘*Sunil Bharti Mittal vs. Central Bureau of Investigation*’, 2015 (1) SCALE 140, Supreme Court held :

“44. Person who has not joined as accused in the charge-sheet can be summoned at the stage of taking cognizance Under Section 190 of the Code. There is no question of

applicability of Section 319 of the Code at this stage (See SWIL Ltd.. v. State of Delhi : (2001) 6 SCC 670). It is also trite that even if a person is not named as an accused by the police in the final report submitted, the Court would be justified in taking cognizance of the offence and to summon the accused if it feels that the evidence and material collected during investigation justifies prosecution of the accused (See Union of India v. Prakash P. Hinduja and Anr. : (2003) 6 SCC 195). Thus, the Magistrate is empowered to issue process against some other person, who has not been charge-sheeted, but there has to be sufficient material in the police report showing his involvement. In that case, the Magistrate is empowered to ignore the conclusion arrived at by the investigating officer and apply his mind independently on the facts emerging from the investigation and take cognizance of the case. At the same time, it is not permissible at this stage to consider any material other than that collected by the investigating officer.”

9. Allegations of abetment against R-2 in the complaint are vague and uncertain and she has been implicated on mere ‘suspicion’. ‘Abetment’ under the Code involves active complicity on the part of the abettor at a point of time prior to commission of the offence and it is of the essence of crime of abetment that the abettor should substantially assist the principal culprit towards commission of the offence. The commission of the act must be the act of dominant intention of the person who aids it. In the instant case, ‘X’ was allegedly sexually exploited by R-2’s husband Shashi Thakur for number of years at various places. She never directly assisted, aided or incited her husband to commit rape upon

‘X’ in any manner during her stay in their house for number of years. Merely because on certain occasions ‘X’, then a child was asked in good faith to sleep in the room where Shashi Thakur used to stay, no inference can be drawn that R-2 was aware of the objectionable activities of her husband and was privy to it. Transcript of conversation recorded in CD does not reflect if she was aware about the objectionable relations between ‘X’ and Shashi Thakur, her husband. The conversation with Shashi Thakur and Mukul Thakur was recorded without any inkling to her at a time when she was busy imparting tuition to her students. ‘X’ has alleged commission of rape upon her at Delhi and Darbhanga by Shashi Thakur; she has also alleged rape by R-3. There are no allegations if R-2 was present at the time of alleged commission of rape at Delhi or Darbhanga or that she had abetted the commission of rape by R-3. In the complaint ‘X’ herself stated that she had ‘genuine reasons to believe’ that R-2 was aware of her husband’s activities and intentionally aided or facilitated the doing of an offence. This conclusion is not based upon cogent material. R-2 an educated lady in the profession of teaching, mother of two children (a daughter and son) is not expected to permit her husband to sexually abuse her close relative for number of years without demur. Mere suspicion, however strong it may be, is not enough to frame

charge against her under Sections 227 Cr.P.C. in the absence of legal and acceptable evidence. There is, thus, no cogent and convincing material against R-2 to frame charge for commission of offence under Section 376 (2)/109/34 IPC.

10. Admitted position is R-3 is a resident of Mujaffarpur (Bihar). He allegedly sexually exploited 'X' there. He never visited Delhi to commit rape upon the prosecutrix. Apparently, no part of cause of action to initiate proceedings under Section 376 IPC arose in Delhi against him. Allegations in the charge-sheet to confer territorial jurisdiction on Delhi Courts are that he (R-3) used to criminally intimidate 'X' by making telephone calls in Delhi and insisted her to come to Mujaffarpur (Bihar) to satisfy his sexual urge. The Trial Court has rightly recorded that no call detail records have been collected during investigation to substantiate it. Besides mere making of telephone calls from Mujaffarpur (Bihar) is not enough to attract territorial jurisdiction of Delhi Courts to initiate proceedings for commission of rape against him.

11. It is not 'X's case in her complaint, if both Shashi Thakur and R-3 ever shared common intention to commit rape upon her. On scanning the complaint in its entirety it reveals that specific allegations of commission of rape pertain to Shashi Thakur. He allegedly started

abusing her when she was nine years old since 1994. Initially, it was Shashi Thakur who was the perpetrator of the crime. R-3 was not in picture that time. He allegedly started abusing the prosecutrix subsequently, when she attained age of 13 years and was in 8th standard. Allegations of rape upon the prosecutrix by R-3 are restricted to Mujaffarpur (Bihar) only. 'X' accused Shashi Thakur to have committed rape upon her at Darbhanga and Delhi also besides Mujaffarpur. He allegedly administered her a pill to abort her pregnancy. Apparently, sexual abuse (if any) by the brothers were their individual/independent acts and were not in furtherance of their common intention or criminal conspiracy. It is alleged that R-3 exploited 'X' because he was aware of the nefarious activities between her and Shashi Thakur. The alleged incidents (of rape) happening at different dates and places are distinct offences and did not form part of the same/single transaction. Merely because Shashi Thakur is being prosecuted for rape in Delhi, R-3, his brother, cannot be tried for his alleged criminal acts at Mujaffarpur (Bihar) as there is no nexus between the two and they were not interlinked. Their joint trial under Section 220 Cr.P.C. is not permissible. Section 220 Cr.P.C reads 'if, in one series of acts so conducted together as to form the same transaction, more offences than one are committed by

the same person, he may be charged with, and tried at one trial for, every such offence’.

12. In *Anju chaudhary vs.State of U.P.&Anr.*(2013) 6 SCC 384

the Supreme Court held:

40. It is true that law recognizes common trial or a common FIR being registered for one series of acts so connected together as to form the same transaction as contemplated Under Section 220 of the Code. There cannot be any straight jacket formula, but this question has to be answered on the facts of each case. This Court in the case of Mohan Baitha v. State of Bihar : (2001) 4 SCC 350, held that the expression 'same transaction' from its very nature is incapable of exact definition. It is not intended to be interpreted in any artificial or technical sense. Common sense in the ordinary use of language must decide whether or not in the very facts of a case, it can be held to be one transaction.

41.It is not possible to enunciate any formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. Such things are to be gathered from the circumstances of a given case indicating proximity of time, unity or proximity of place, continuity of action, commonality of purpose or design. Where two incidents are of different times with involvement of different persons, there is no commonality and the purpose thereof different and they emerge from different circumstances, it will not be possible for the Court to take a view that they form part of the same transaction and therefore, there could be a common FIR or subsequent FIR could not be permitted to be registered or there could be common trial.

42. Similarly, for several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause

and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction".

(Emphasis given)

13. Section 177 to 186 deal with venue and place of trial.

Section 177 reiterates that the proper and ordinary venue for the trial of a crime is the area of jurisdiction in which, on the evidence, the facts occur and which are alleged to constitute the crime. In the instant case there is not even a whisper of allegations about commission of rape or commission of any act constituting rape at Delhi against R-3.

14. In *Purushottamdas Dalmia vs. State of West Bengal* AIR 1961 SC 1589 relied upon by the petitioner to buttress her arguments, relevant paras are worth-noting:

11. The jurisdiction of the Calcutta High Court to try an offence of criminal conspiracy under s. 120B, Indian Penal Code, is not disputed. It is also not disputed that the overt acts committed in pursuance of the conspiracy were committed in the course of the same transaction which embraced the conspiracy and the acts done under it. It is however contended for the appellant, in view of s. 177 of the Code of Criminal Procedure, that the Court having jurisdiction to try the offence of conspiracy cannot try an offence constituted by such overt acts which are committed beyond its jurisdiction and reliance is placed on the decision

in *Jiban Banerjee v. State*: AIR1959Cal500. This case undoubtedly supports the appellant's contention. We have considered it carefully and are of opinion that it has not been rightly decided.

12. The desirability of the trial, together, of an offence of criminal conspiracy and of all the overt acts committed in pursuance of it, is obvious. To establish the offence of criminal conspiracy, evidence of the overt acts must be given by the prosecution. Such evidence will be necessarily tested by cross-examination on behalf of the accused. The Court will have to come to a decision about the credibility of such evidence and, on the basis of such evidence, would determine whether the offence of criminal conspiracy has been established or not. Having done all this, the Court could also very conveniently record a finding of 'guilty' or 'not guilty' with respect to the accused said to have actually committed the various overt acts. If some of the overt acts were committed outside the jurisdiction of the Court trying the offence of criminal conspiracy and if the law be that such overt acts could not be tried by that Court, it would mean that either the prosecution is forced to give up its right of prosecuting those accused for the commission of those overt acts or that both the prosecution and the accused are put to unnecessary trouble inasmuch as the prosecution will have to produce the same evidence a second time and the accused will have to test the credibility of that evidence a second time. The time of another Court will be again spent a second time in determining the same question. There would be the risk of the second Court coming to a different conclusion from that of the first Court."

14 "In these circumstances, unless the provisions of the Code of Criminal Procedure admit of no other construction than the one placed upon them by the Calcutta High Court, they should be construed to give jurisdiction of the Court trying the offence of criminal conspiracy to try all the overt acts committed in pursuance of that conspiracy. We do not find any compelling reasons in support of the view

expressed by the Calcutta High Court.”

(Emphasis given)

15. What emerges from the principles laid down by the Supreme Court are that the offences which consist of series of acts connected together so as to form the same transaction and more offences than one are committed by the same person, he may not only be charged and tried at one trial, but also be tried at any one of the places where such offence is committed by him. In other words, the main ingredients necessary for a trial of such a person at one of the places, are the series of acts which constitute an offence or offences must form the same transaction. The acts alleged against the accused must be connected in some way which spells out a continuity of action followed by its consequences and incidents until the series of acts or group of connected acts come to an end either by attainment of the object or by being put an end to or abandoned.

16. The petitioner further relied upon another judgment *Emperor vs. Mir Mazarali Inayat Ali Kureshi* AIR 1933 Bom 266. The said judgment is of no assistance to the petitioner as the facts are at variance. Para No.17 is relevant to note.

“ The facts alleged here, as has been already briefly stated, are that the accused, finding themselves alone in the Sub-Inspector's office at Ghodnadi at night, the fourth person present being asleep at the time, went in succession and raped the girl Chandrabhaga, and the argument has been that, rape being essentially an individual act, it cannot be said, in the absence of a charge of abetment in the proceedings, that the two separate rapes were a single transaction. There seems to us, however, to be a difficulty about holding that these separate acts do not form part of a single transaction. It is obvious in the circumstances that the separate acts of rape alleged could not have been severally committed unless they had been either tacitly agreed to or reciprocally connived at by each of the accused in his turn. It seems to us, on these facts, that, even in the absence of any evidence of an act of abetment on the part of each accused by the other, there was either a tacit agreement between them ; or, an acquiescence on the part of each in what the other did, which was an understanding that there would be no interference on the part of either of them against the other, if a similar degree of acquiescence was exercised, by the other in his turn. Though for different reasons, therefore, we think in fact that the learned Sessions Judge, as also the trial Judge, before whom the objection was taken at the earliest moment, were right in finding that the transaction was essentially single, and that the joint trial was proper in the circumstances of the case.”

(Emphasis given)

17. Inevitable conclusion is that no cause of action qua R-3 arose in Delhi and thus the Courts below had no territorial jurisdiction to deal with the matter. The impugned order qua R-3 cannot be faulted and

no intervention is called for.

18. In the light of the above discussion, the present petition lacks merit and is dismissed. Observations in the order will have no impact on the merits of the case.

19. Trial Court record be sent back immediately along with the copy of the order.

(S.P.GARG)
JUDGE

SEPTEMBER 17, 2015/sa