

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

% Decided on: 9th November, 2016

+ **CRL.M.C. 4/2016**

K Petitioner

Represented by: Mr. Bharat Dubey, Adv.

versus

THE STATE GOVT OF NCT OF DELHI Respondent

Represented by: Ms. Rajni Gupta, APP with SI
Vishvendra, PS Seema Puri.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. The name of the petitioner/prosecutrix has not been mentioned in order to avoid her identity.
2. On the complaint of the petitioner FIR No.150/2010 under Section 376(2)(G) IPC was registered at PS Seema Puri. In her complaint the complainant stated that she was residing at Dilshad Colony for the last about 3 months and had met Amit Modi and Pushpash Aggarwal about 1½ months ago when she requested them to give her an employment. Two of them employed her in their company. Thereafter Amit Modi started frequently visiting her house. On 21st May, 2010 at about 8.00 PM, on the pretext of discussing some official work, he visited her residence and after some time called Sunil Totlani, Jai Kishore and Pushpash Aggarwal to her house. According to the petitioner, by 8.15 PM, three of them also came to her house whereafter Amit Modi started molesting her and when she freed herself from his clutches Sunil Totalani wiped out a revolver threatening her

of dire consequences. Thereafter first Amit Modi and then Sunil Totlani raped her against her wishes. She made a PCR call at 11.09 PM.

3. During the course of investigation, the complainant was medically examined, crime team inspected the spot, collected the bed sheet and broken pieces of bangles, videographed and photographed the spot and conducted enquiries. Call detail records of mobile phones of all the four accused were obtained. Statements of relevant witnesses were recorded under Sections 161 and 164 Cr.P.C. and a cancellation report was filed. The petitioner filed a complaint and protest petition. Vide order dated 19th February, 2011 the learned ACMM was of the opinion that the investigation was incomplete. The investigating officer was directed to impound hard disc of the computer of the Moti Mahal Restaurant and CCTV footage of Fun Cinema and send the same to the CFSL and after collecting the said material file the report within two weeks. Vide order dated 6th March, 2012 learned ACMM noted the statement of learned counsel of the complainant that the complainant has since married and was in the process of deciding whether to proceed with the complaint or not and sought some time. On 1st May, 2013 further investigation as directed under Section 173(8) Cr.P.C. was completed and the supplementary charge sheet was filed. The matter was listed for consideration on protest petition and cancellation report on 31st May, 2013. Vide order dated 7th October, 2014 it was also noted that the statement of the complainant under Section 164 Cr.P.C. as well as report in respect of the CD of the place of offence have been filed. Finally after hearing arguments, learned ACMM vide the impugned order dated 17th October, 2015 accepted the cancellation report and dismissed the protest petition. Learned ACMM concluded by noting:-

“ 33. The affidavits of Kavita Choudhary, Anuradha @ Anu, Sunil Sharma and Ashok Kumar have been appended with the protest petition. However, none of the said witnesses was a witness of the incident. Rather all the said witnesses had been examined by the IO to show that there was a conspiracy to falsely implicate the accused persons. The affidavits of the said witnesses also do not support the version of the complainant regarding her rape. None of the said persons is a witness to the effect that the accused were present at H.No.562, B pocket, Dilshad Garden, Delhi or that the accused Amit Modi was not present in PVR, Karkardooma or that accused Sunil Totlani was not present in Moti Mahal Restaurant, Rani Bagh, Delhi at the time of incident. As already observed, even the affidavits of the said witnesses do not have any bearing on the assertions of the complainant. In the above circumstances, even posting the matter for evidence of the complainant would not serve any useful purpose.

34. In passing, it has been observed that the IO has moved a complaint u/s 195 Cr.Pc for initiating action u/s 182 IPC against the complainant herein. Perusal of the final report shows that material has come on record to show that the complainant herein in conspiracy with other known and un-known persons had sought to falsely implicate the accused persons. The exact roles and identities of the said persons are yet to be ascertained. I deem the present case to be fit for exercise of jurisdiction u/s 155(2) of the Cr.Pc as further investigation is to be conducted for ascertaining the exact roles and identities of the said persons. SHO, P.S.

concerned is accordingly, directed to conduct further investigation in terms of section 155(2) Cr.Pc. It is clarified that IO will be at liberty to arrive at his own conclusions and it is further clarified that in case commission of any other offence comes to light, the IO will be at liberty to proceed as per law.

35. There is no material before this court to take cognizance of offence u/s 376(2) G IPC. There are no grounds to proceed further. I am satisfied with the investigation of the case. The conclusion arrived at by the IO appears to be bonafide. The cancellation is accepted and protest petition is without any merit and is dismissed. Copy of this order be sent to P.S. concerned for information and necessary compliance. File be consigned to Record Room after due compliance.”

4. In the impugned order, learned ACMM noted that though the claim of the complainant was that she was employed by the accused persons and working in their office at Indra Puram however from the statement of witnesses and record it was established that she was never employed in the said company nor was there any evidence to show that the petitioner ever received salary from the company of the accused persons. Learned ACMM also noted that as per the complainant herself the alleged incident took place between 8.15 PM and 11.09 PM on 21st May, 2010 and the locations of the four accused persons namely Amit Modi, Sunil Totlani, Jai Kishore Totlani and Pushpash Agarwal at the relevant time was far away from the residence of the petitioner. Amit Modi was present in the area of Preet Vihar, Swasthya Vihar, Jagriti Enclave, Sunil Totlani was present in the area of

New Seelampur, Shastri Park and Kohat Enclave, Jai Kishore Totlani was present at Vasundhara Enclave, Kohat Enclave, Rani Bagh whereas Pushpash Agarwal was present in the area of Noida Sector 18, Block A, Noida 15A. The CCTV footage recording of Moti Mahal restaurant at M2K Mall, Rani Bagh showed presence of Sunil Totlani and Jai Kishore Totlani dining along with their families in the restaurant from 9.00 PM onwards. The CCTV footage of Fun Cinema, Cross River Mall, Anand Vihar revealed that from about 10.00 PM onwards Amit Modi was watching movie along with his family. During the course of investigation, a slip wherein names of all the four accused were noted was recovered from underneath the kitchen slab of the complainant. The investigating agency examined Kavita Choudhary who stated that she had been offered ₹20 lakhs by Sunil Sharma to falsely implicate Amit Modi and Sunil Totlani in a rape case. Further efforts were made to trace out Sunil Sharma to whom the complainant used to refer as 'bhaiya' and her boyfriend Sandeep Sindhu but they could not be traced. Statement of the petitioner was further belied by the result of the FSL as the DNA profiling of the biological fluid present on the clothes of the complainant, cotton swab and the bed sheet etc. did not match with the DNA profiling of the either accused Amit Modi or Sunil Totlani against whom allegations were leveled that they raped the petitioner. It was thus held that the investigating agency rightly came to the conclusion that the accused were implicated falsely as a result of conspiracy hatched between the complainant, Sunil Sharma, Sandeep Sindhu and one Harish Nagpal whose wife Anjula Nagpal was one of the directors in the company of accused persons. Referring to the decision of the Supreme Court reported as AIR 1989 SC 885 M/s India Carat Pvt. Ltd. Vs. State of Karnataka it was noted that the

Magistrate had an option of adopting one out of the three courses i.e. firstly to accept the report and drop the proceedings, secondly to disagree with the same and take cognizance or direct further investigation.

5. Before the learned ACMM, learned counsel for the petitioner contended that the plea of alibi of the accused could not be considered at this stage and the electronic evidence was accepted without a certificate under Section 65B Evidence Act and that the statements of the witnesses who were the employees of the accused were partisan, taken under duress and could not have been considered. It was further argued that since an offence under Section 376 IPC was triable by the Court of Sessions, learned ACMM could not have accepted the cancellation report.

6. Before this Court learned counsel for the petitioner urges two primary grounds that at this stage the learned ACMM entered into the realm of appreciation of evidence and in doing so he ignored the version of the complainant /petitioner and accepted the version of the witnesses examined by the investigating agency and that the present case being triable by the Court of Sessions, learned ACMM could not have accepted the cancellation report/discharged the accused.

7. During investigation the role of investigator is not only to collect material only in favour of the complainant version but he has to collect all material evidence whether in favour or against the complainant and in favour or against the accused. Only on collection of the entire material available the investigating officer can form the final opinion as to whether the final report under Section 173 Cr.P.C. is to be filed for the trial of the accused or a cancellation report. He is free to form the opinion on the basis of material facts collected by him. As held by the Supreme Court in the decisions

reported as (1980) 4 SCC 631 H.S. Bains, Director, Small Saving-cum-Deputy Secretary Finance, Punjab, Chandigarh Vs. State (Union Territory of Chandigarh) and M/s India Carat Pvt. Ltd. (supra) on receipt of the final report the Magistrate has three options –

“6.....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.”

8. While accepting a cancellation report, the Magistrate does not enter into the realm of appreciation of evidence as has not been done by the learned ACMM in the present case. However, sifting of the material collected during investigation has to be carried out and if the version of the complainant is not substantiated, the Court would be within its jurisdiction to accept the cancellation report, dismiss the protest petition and drop proceedings as noted by the Supreme Court in H.S. Bains (supra).

9. The contention of learned counsel for the petitioner that since an offence under Section 376 IPC is triable by the Court of Sessions, the accused could not have been discharged by the learned ACMM deserves to be rejected for the reason firstly no order of discharge as contemplated by

Section 227 Cr.P.C. has been passed. The Court of Magistrate is a Court of first instance and being the Court of original jurisdiction it is empowered to take cognizance or decline the same even for an offence triable by the Sessions Court except in cases where the Court of Sessions is the Court of first instance as an offence under the Prevention of Corruption Act 1988. No order of discharge has been passed by learned ACMM and the impugned order passed is one of not taking cognizance and accepting the cancellation report on the basis of material collected.

10. During investigation, material which was of an impeccable character in the form of CCTV footage, call detail records and FSL report were collected. Considering the material collected during investigation, it was clear that the allegations of the petitioner were not substantiated. Learned ACMM also noted that the complainant had sought to support her version by filing affidavits of Kavita Choudhary, Anuradha @ Anu, Sunil Sharma and Ashok Kumar along with the protest petition. The Court noted that none of these deponents were witnesses to the incident nor stated about the presence of the accused at the house of the petitioner at the relevant time. Thus, the affidavits filed by the complainant had no bearing on the facts of the case.

11. Finding no error in the conclusion arrived at by learned ACMM, the present petition is dismissed. Trial Court record be sent back.

(MUKTA GUPTA)
JUDGE

NOVEMBER 09, 2016
‘v mittal’