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

RESERVED ON : NOVEMBER 03, 2016

DECIDED ON : FEBRUARY 01, 2017

+ **CRL.REV.P. 204/2016 & Crl.M.A.4322/2016 (Stay)**

RAHUL YADAV & ANR Petitioners
Through : Ms.Geeta Luthra, Sr.Advocate, with
Ms.Shivani Luthra Lohiya and
Mr.Prateek Yadav, Advocates.

VERSUS

STATE Respondent
Through : Ms.Meenakshi Dahiya, APP.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The instant Revision petition has been preferred by the petitioners Rahul Yadav (P-1) and Amrish Kumar Shrivastav (P-2) to challenge the legality and propriety of an order dated 18.12.2015 of learned Additional Sessions Judge, by which charge under Section 376 D/34 IPC was framed against them. Revision petition is contested by the State.

2. I have heard the learned Senior counsel for the petitioners and the learned Addl. Public Prosecutor for the State and have examined the file.

3. Learned Senior counsel urged that the impugned order cannot be sustained as the prosecutrix has leveled vague and baseless allegations. She herself was not sure if incident of commission of rape had taken place.

Material discrepancies and infirmities occurring in the statements of the prosecutrix at various stages of the investigation have been overlooked by the Trial Court. Statement of the prosecutrix has remained uncorroborated and is not supported by medical or scientific evidence. Soon after the incident, the prosecutrix was medically examined and no injuries, whatsoever, were found on her body. Various exhibits were sent to Forensic Science Laboratory for examination and no semen or blood was detected on it. No male DNA profile could be generated from the source of exhibits. In her 164 Cr.P.C. statement, the prosecutrix has made vital improvements. The prosecutrix concealed the factum of mobile No.9540233789 to be in her possession. Perusal of the supplementary charge-sheet reveals that this phone number was continuously used by the prosecutrix. She had contacted petitioner No.1 at 6.26 p.m. from that number. She was on internet at 7.03 p.m., 9.52 p.m. and 11.04 p.m., during the period when she was allegedly in unconscious state. Learned Trial Court did not consider the materials available on record. After viewing the footage from CCTV camera, it was clear that the complainant did not exit the restaurant in unconscious state. As per FSL report dated 7.4.2015, no alcohol was found in victim's blood sample. She was also in continuous touch from her mobile No.9540233789 with her husband and had made 31 calls to him during the relevant period. Merely because the petitioner No.2 had declined to participate in the TIP proceedings, no adverse view can be taken as he was shown at the police station. As per medical jurisprudence, the victim was not expected to be in intoxication state after consuming such a small quantity of vodka. Reliance has been placed on *State TR.Insp.of Police vs.Arun Kumar & Anr.* CrI.A.2602/2014.

4. Learned APP while controverting the contentions urged that the statement of the prosecutrix cannot be suspected at this stage.
5. Admitted position is that the prosecutrix and the petitioner No.1 were acquainted with each other for the last about three or four years.
6. Occurrence took place on the night intervening 23/24.9.2014. On 24.09.2014, the victim lodged the complaint forming basis of registration of the FIR in question. In her complaint, she disclosed that on 23.09.2014 in the evening the petitioner No.1 had called her on phone to discuss his family problem. He had come to take her at Ramesh Nagar Metro Station from where they both went to Pind Balluchi restaurant at Rajouri Garden. There she consumed two pegs of vodka and became unconscious. On regaining her senses, she found herself present at Rahul Yadav's apartment. She noticed that her clothes were disheveled, she felt pain in her private part. The petitioner along with his associate (later on identified as Amrish Kumar Shrivastav, P-2) was present there. They both put her in the vehicle and dropped her at Ramesh Nagar Metro Station at around 3.00 a.m.
7. In her 164 Cr.P.C. statement recorded on 27.09.2017 she reiterated her version implicating both the petitioners for committing rape upon her. She further elaborated that when she came to senses at around 2.30-3.00 a.m. she found herself present at Rahul Yadav's flat. There were scattered nail marks on her body. She further disclosed that ₹3,000/- and watch were missing from her purse; her chain was broken.
8. The victim was medically examined by MLC (Annexure P-4). As per MLC, some abrasions were noticed on her body. During investigation, statement of victim's husband Rahul Ranjan was recorded under Section 161 Cr.P.C. on 25.09.2014. He disclosed that on 23.9.2014 in

the evening 'X' had left to meet her friend, Rahul Yadav. When she did not return till late night, he made calls on her mobile but there was no response. At around 2.00 a.m. 'X' received his phone call but her voice was not clear. When he talked to Rahul Yadav, he informed that he was going to Ramesh Nagar Metro Station to drop 'X'. At around 3.00 a.m. when 'X' was being dropped at Ramesh Nagar Metro station, he gave a call but the petitioners did not stop and hurriedly went away taking U-turn. Her wife was weeping bitterly and she disclosed that after consuming two pegs at Pind Balluchi restaurant, she was not in her senses. She suspected that the petitioners had committed rape upon her when she was unconscious. He further disclosed that he had lodged a 'missing person report' at police station Kirti Nagar.

9. On the basis of the materials referred above, the Trial Court has framed the charges to proceed against the petitioners for commission of offence under Sections 376-D/34 IPC. I find no irregularity or material infirmity in the impugned order. The victim's statement coupled with medical evidence and statement of her husband recorded under Section 161 Cr.P.C. cannot be brushed aside at this stage. In the petition, the petitioners have pointed out various discrepancies, infirmities in the prosecution case but have not denied if the prosecutrix/victim was not called at Pind Balluchi restaurant, Rajouri Garden. CD was played in the court where both the prosecutrix and petitioner No.1 were seen in the restaurant as well as exiting from it. It was noted that the petitioner No.1 was holding the victim's arms. Apparently, P-1 was in the victim's company at the said restaurant. Subsequently, she was taken to his residence. The petitioners have no explanation as to how and under what circumstances, the prosecutrix was taken far away at their residence without the consent/permission of her

husband. It is also not explained as to how the victim found her clothes disheveled and pain in her private parts. The prosecutrix has given various circumstances indicating physical relationship with her and these indicators cannot be ignored at this stage. No specific defence has been urged by the petitioners if relationship (if any) with 'X' was consensual. No ulterior motive has been assigned to the prosecutrix and her husband for implicating the petitioners in such a serious case. No plausible explanation has been offered as to why and how both the petitioners were in the company of the prosecutrix at odd hours from 7.00 p.m. to 3.00 am (night). Petitioner No.2 did not offer any explanation regarding his presence at Petitioner No.1's residence that time.

10. The prosecutrix has leveled specific and definite allegations against the petitioners. The averments made on behalf of the petitioners for discharge are in the nature of defence which cannot be considered at this stage as the veracity of the prosecution case is yet to be decided during trial. The materials on record definitely disclose grave suspicion against the petitioners and the order framing charge cannot be faulted.

11. At the stage of framing of charge, the court has no jurisdiction to go into the merits of the allegations, and is only required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all ingredients constituting the alleged offence. The Trial Court was not required to weigh the evidence as if it was for conviction or acquittal.

12. In a recent judgment '*State vs. A. Arun Kumar and Another*', **2015(2) SCC 417**, the Supreme Court has discussed the law on this aspect:

*“The law on the point is succinctly stated by this Court in **Sajjan Kumar v. CBI**: (2010) 9 SCC 368 wherein after referring to **Union of India v. Prafulla Kumar Samal** (1979) 3 SCC 4 and **Dilawar Balu Kurane v. State of Maharashtra**: (2002) 2 SCC 135, this Court observed in para 19 thus:*

It is clear that at the initial stage, if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the prosecution proposes to adduce prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.”

13. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage.

14. In **P.Vijayan vs. State of Kerala and another** MANU/SC/0058/2010 : 2010 (2) SCC 398, Supreme Court held :

“At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In

other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

If on the basis of the materials on record, a Court could come to the conclusion that commission of the offence is a probable consequence; a case of framing of charge exists. For the purpose of framing charge under Section 228 Cr.P.C., the Court is to consider judicially whether on consideration of the materials on record, it can be said that the accused has been reasonably connected with the offence alleged to have been committed and that on the basis of the said material there is a reasonable probability or chance of the accused being found guilty of the offence alleged. If the answer is in the affirmative, the Court will be at liberty to presume "that the accused has committed an offence" as mentioned in Section 228 of the Code for the purpose of framing charge."

In Crl.A.Nos.285-287 of 2015 (Arising out of S.L.P.(Crl.) Nos.300-302 of 2013) 'Sonu Gupta vs. Deepak Gupta & ors.' decided on 11.02.2015, Supreme Court held :

"It is also well settled that cognizance is taken of the offence and not the offender. Hence at the stage of framing of charge an individual accused may seek discharge if he or she can show that the materials are absolutely insufficient for framing of charge against that particular accused. But such exercise is required only at a later stage, as indicated above and not at the stage of taking cognizance and summoning the accused on the basis of prima facie case. Even at the stage of framing of charge, the sufficiency of materials for the purpose of conviction is not the requirement and a prayer for discharge can be allowed only if the court finds that the materials are wholly insufficient for the purpose of trial. It is also a settled proposition of law

that even when there are materials raising strong suspicion against an accused, the court will be justified in rejecting a prayer for discharge and in granting an opportunity to the prosecution to bring on record the entire evidence in accordance with law so that case of both the sides may be considered appropriately on conclusion of trial.”

16. Reliance placed on *State TR.Insp.of Police vs.Arun Kumar & Anr.*(supra) is of no assistance as the facts and circumstances of the said case were entirely different.

17. In view of the above, the petition lacks in merits and is dismissed. All pending application(s) stand disposed of.

18. Observations in the order shall have no impact on the merits of the case.

(S.P.GARG)
JUDGE

FEBRUARY 01, 2017/sa