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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: September 12, 2017

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CRL.REV.P. 504/2017

STATE

..... Petitioner

Through: Ms.Kusum Dhalla, APP for the
State with Inspector Usha
Sharma PS Hari Nagar.

versus

ANJUM KHANNA & ANR

..... Respondents

Through: Mr.C.P.Malik, Advocate.

PRATIBHA RANI, J. (Oral)

CrI.M.A. No.11230/2017

1. For the reasons stated in the application, 26 days' delay in filing the revision petition is condoned.
2. Application is disposed of.

CrI.Rev.P.No.504/2017

1. The State has invoked the revisional jurisdiction of this Court under Section 397/401 CrPC feeling aggrieved by the order dated 18th March, 2017 whereby respondents/accused persons have been discharged for the offence punishable under Section 376/506 IPC in case FIR No.347/2016, PS Hari Nagar.
2. As against respondent No.2 Mona Katyal (wife of main accused Anjum Khanna/respondent No.1), in the chargesheet it is mentioned that during investigation no proof in respect of the offence punishable under Section 506 IPC could be collected against her. She was not

even arrested in this case.

3. Ms.Kusum Dhalla, learned APP for the State has submitted that the State is not aggrieved so far as discharge of respondent No.2 Mona Katyal for the offence punishable under Section 506 IPC is concerned. The State is aggrieved by the order dated 1^{8th} March, 2017 to the extent that the main accused Anjum Khanna – respondent No.1 has been discharged.

4. Ms.Kusum Dhalla, learned APP for the State has submitted that the complainant ‘R’ (name withheld to conceal her identity) has specifically stated not only in the FIR but also in her statements recorded under Section 161 CrPC and under Section 164 CrPC that her consent to have physical relations was obtained by the respondent No.1 on promise to marry. Later on, from someone she came to know that the respondent No.1 was already married. It has been submitted that while passing the impugned order on discharge, the learned Trial Court has not correctly interpreted the ratio of Dilawar Balu Kurane vs. State of Maharashtra 2002 (1) JCC 172, hence the impugned order to the extent of discharge the respondent No.1, may be set aside and respondent No.1 may be directed to face trial.

5. The respondents, in addition to the oral submissions, have also filed written synopsis.

6. Mr.C.P.Malik, learned counsel for the respondents has submitted that the reasons given by learned Trial Court for discharging the accused persons are based on appreciation of the three different statements made by the complainant/prosecutrix i.e. the original complaint and statements recorded under Sections 161 and 164 CrPC

and other material placed on record. It has been submitted that the complainant was an educated lady and since beginning she knew that the respondent was already married. Hence there was no occasion for respondent No.1 to obtain her consent for physical relation by concealing his marital status. Hence, no prima facie case for framing the charge for commission of the offence punishable under Section 376/506 IPC was made out.

7. In the written synopsis filed by the respondents, following submissions have been made:-

(i) The complainant being well aware of the marital status of the respondent No.1 with respondent No.2, there was no question of obtaining her consent by respondent No.1 by concealing his marital status.

(ii) **No physical relations were ever there.**

(iii) The chargesheet contains e-mails and SMS showing that the complainant owed money to the respondent No.1 and the financial transactions have been verified at the stage of seeking anticipatory bail.

(iv) Even as per the complainant, physical relations were not established forcefully or by extending any threat.

(v) The allegations of extending threat by respondents no.1 and 2 are unspecific and false.

(vi) The respondents have rightly been discharged relying on the decision of *Dilawar Balu Kurane vs. State of Maharashtra* 2002 (1) JCC 172 as the facts of the case did not give rise to grave suspicion against the respondents.

(vii) The complainant has made various improvements in her original complaint and subsequent statements recorded under Section 161 and 164 CrPC to cover her deficiencies.

(viii) Forged hotel bills have been placed on record by the Investigating Officer.

(ix) The complainant failed to answer the ten questions served on her in the form of questionnaire by the Investigating Officer.

(x) The purported CD filed by the prosecutrix is not supported by the certificate under Section 65-B of Indian Evidence Act.

(xi) There is a delay in lodging the FIR.

(xii) The respondents No.1 and 2 have a small child aged about 5 years and no useful purpose would be served by prosecuting this case.

8. I have considered the rival contentions and carefully gone through the record.

9. The brief facts necessitating the disposal of present petition are that on 2nd April, 2016 the complainant lodged the report that the respondent No.1 Anjum Khanna promised to marry her and made relations with her. She also stated that later on through someone she came to know that he was married and when she confronted him on this issue, he admitted that he was already married but informed that he would take divorce from his wife and marry her. The physical relations continued even after the respondent shifted to Bangalore. He even took money from the complainant to pay his wife to settle the divorce issue.

10. In her statement recorded under Section 161 CrPC also, the complainant stated about her consent for physical relations being

obtained on promise to marry. She also stated that later on she came to know through someone that the respondent No.1 was already married and when she questioned him on this issue, she was told that he was in the process of taking divorce from his wife and will get divorce in September, 2015 and then marry her. Subsequently she came to know that no divorce proceedings were pending.

11. Almost on similar lines, the complainant made the statement under Section 164 Cr.P.C.

12. The learned Additional Sessions Judge while passing the impugned order on discharge has discussed the testimony of the complainant/prosecutrix as under:-

'12. In the present case, in the entire complaint lodged by the prosecutrix as well as the statement of the prosecutrix recorded under Section 164 CrPC she has nowhere stated that physical relations, which were established between her and accused Anjum Khanna, were either without her consent or they were made against her wish or Will. In the entire FIR as well as in the statement under section 164 Cr.P.C. of the prosecutrix, she has nowhere stated that accused Anjum Khanna had used any force against her on any person was put under fear of death or hurt due to which physical relations were forcibly established by the accused. It is also not the case of the prosecutrix that at the time of establishing physical relations, she was not in the position to convey her consent or that she was unable to give any consent.

13. A bare reading of complaint as alleged by the prosecutrix clearly shows that on 18/04/2014, accused came to her house for the very first time and established relations with her. She has not stated that these relations established by the accused were either forceful or against

her wishes. The only force exerted by the accused, as per complaint, is for coming to the house of prosecutrix when her mother allegedly was not at home. She had specifically stated that she refused the accused to come to her house but he stated that he will go back within some time and he insisted to come to her place. But prosecutrix has not uttered even a single word at any point of time that physical relations were established between her and accused forcefully by the accused or by putting her under fear of death or by making her incapacitated to give consent or against her wishes. In the absence of any such allegation/averment regarding the consent of the prosecutrix being absent or the act of the accused being forceful, I am of the opinion that allegations as made against accused Anjum Khanna does not fall within the definition of term 'rape', as described in section 375 IPC.

14. Further, in the complaint, prosecutrix had stated that accused had called her to Bangalore and told her that he had seen a house where they will be living after marriage and in the statement under Section 164 Cr.P.C. she had specifically stated that she had stayed with the accused in resort for 3-4 days at Bangalore and she had also stayed with him in rented flat at Bangalore. On both occasions, prosecutrix has again not stated that she was forced to live with the accused or physical relations were established with her by the accused against her wishes or that accused had committed any sexual assault upon her at either of these places.

15. The only contention of the prosecutrix in the entire case has been that accused had told her that he will take divorce from her earlier wife and thereafter he will marry the prosecutrix. Even, to this extent, there is no allegation of the prosecutrix that, since the accused, had promised her to marry", therefore, she had established physical relations with him. The prosecutrix is silent

about the absence of her consent or her consent being forcefully obtained by the accused or obtained by the accused under mis-conception or mis-guidance. Admittedly, prosecutrix was aware since beginning that accused is already married, as is clear from her complaint and allegation that accused took money from her for giving divorce to his wife. '

13. The issue before this Court is whether on the basis of the complaint/FIR and the subsequent statements recorded under Section 161 CrPC and under Section 164 CrPC of the complainant/prosecutrix, the learned Trial Court could have discharged respondent No.1 observing that from the very beginning the prosecutrix was aware that the respondent no.1 was married and that she has nowhere stated that physical relations were established between her and the accused Anjum Khanna without her consent or made against her wish or will or Anjum Khanna used any force against her or any person was under fear of death or hurt due to which physical relations were forcibly established by Anjum Khanna.

14. In the decision reported as Dilawar Balu Kurane vs. State of Maharashtra (Supra) referred to by the learned Addl. Sessions Judge in the impugned order, the Apex Court, while observing that in exercise of jurisdiction under Section 227 of the Code of Criminal procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but **should not make a roving enquiry into the pros and cons of the matter and weigh the**

evidence as if he was conducting a trial.'

15. In the case State of Bihar Vs. Ramesh Singh, 1977 SCC (Cri) 533, the scope of Section 227 and 228 of Code of Criminal Procedure was discussed by the Apex Court and it was held:-

'Reading Sec. 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at the stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Sec. 227 or 228 of the Code. At that stage, the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in the conviction.

Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But 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.

If the evidence which the prosecutor proposes to adduce to 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.

If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then on the theory of the benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Sec. 227 or Sec. 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Sec. 228 and not under Sec. 227.'

16. In the report Sheoraj Singh Ahlawat & Ors. vs. State of U.P. & Anr. 2013 CrL.L.J. 331 the Apex Court had an occasion to deliberate upon the scope of the power of the Court at the stage of charge in warrant trial cases and also in the context of sessions trial cases. While declining the prayer for discharge, it was observed as under:-

“Whether or not those allegations are true is a matter which cannot be determined at the stage of framing of charges. Any such determination can take place only at the conclusion of the trial. This may at times put an innocent party, falsely accused of commission of an offence to avoidable harassment but so long as the legal requirement and the settled principles do not permit a discharge the Court would find it difficult to do much, conceding that legal process at times is abused by unscrupulous litigants especially in matrimonial cases where the tendency has been to involve as many members of the family of the opposite party as possible. While such tendency needs to be curbed, the Court will not be able to speculate whether the allegations made against the accused are true or false at the preliminary stage to be able to direct a discharge.”

17. The reasoning given by learned Trial Court to discharge respondent No.1 Anjum Khanna does not appear to be in consonance with the three statements made by the complainant i.e. the original

complaint and the statements recorded under Section 161 CrPC and 164 Cr.P.C. The complainant has consistently stated that her consent was obtained on promise to marry her and that she came to know later on about the marital status of respondent No.1 Anjum Khanna through someone and that when she confronted him about he being already married, he promised to marry her after getting divorce from his wife and even going to the extent of assuring her that his divorce would be in September, 2015. Delay in such type of matter cannot be a ground for discharge.

18. The submission made on behalf of respondent No.1 that there are improvements in the statement of the complainant recorded under Section 161 and 164 CrPC has to be rejected as it is settled legal proposition that FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. In case, the complainant fails to give entire particulars in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused. (Vide: Rohtash v. State of Rajasthan (2006) 12 SCC 64; and Ranjit Singh and Ors. v. State of Madhya Pradesh JT 2010 12 SC 167).

19. In my considered view, the entire approach of the learned Trial Court is erroneous. The learned Trial Court was only required to consider whether a prima facie case for framing a charge under Section 376/506 IPC is made out against respondent No.1 and not to appreciate the evidence as if arriving at the conclusion as to whether the material placed was sufficient to base the conviction.

20. As the impugned order dated 18th March, 2017 to the extent of discharging respondent No.1 of the offence punishable under Section

376/506 IPC has been passed against the settled legal position, the same is set aside. The respondent No.1 shall face trial for the offences complained of.

21. Parties are directed to appear before the Court of learned Sessions Judge, West District, Tis Hazari Court, Delhi on 25th September, 2017.

22. A copy of this order be sent to the learned Sessions Judge, West District, Tis Hazari Court who may try the case herself or assign the same to Addl. Sessions Judge having jurisdiction to try the same.

23. Revision petition allowed in above terms.

As prayed, copy of the order be given *dasti* to learned counsel for the parties.

SEPTEMBER 12, 2017
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PRATIBHA RANI, J.

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