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

+ **CRL.M.C. 4857/2016**

DINESH GUPTA

..... Petitioner

Through: Mr. Ravi Varma, Advocate.

versus

STATE

..... Respondent

Through: Mr. Mukesh Kumar, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER
14.02.2017

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1. The petitioner has preferred the present petition under Article 227 of the Constitution of India read with Section 482 Cr.P.C. to assail the order dated 16.12.2016 passed by the learned Additional Sessions Judge West-04, Tis Hazari Courts, Delhi in Crl. Revision No.131/3/16, as well as the order dated 06.12.2016 passed by the learned MM – 05 (West), Delhi. The petitioner also seeks a direction that he be released on bail in case FIR No.648/2016 registered at PS – Tilak Nagar under Section 376/ 506 IPC in terms of Section 167(2) Cr.P.C. on terms & conditions that this Court may consider appropriate in the facts & circumstances of the case.

2. The background in which the present petition has been preferred is

that the aforesaid FIR came to be registered on 21.08.2016 against the petitioner under Section 376/ 506 IPC. The petitioner was arrested on 22.08.2016. He was remanded to custody by the learned Magistrate. The petitioner states that he spent 90 days in confinement as on 19.11.2016 and on the same day, i.e. on 19.11.2016, the charge-sheet was filed. The learned MM directed that the same be checked and registered. He observed that he has been deputed as Duty MM (West District), Tis Hazari Courts, Delhi on the said date. The I.O. was also not present and was represented through a Sub-Inspector. The learned Magistrate adjourned the proceedings to 24.11.2016 for consideration of the charge-sheet.

3. On 24.11.2016, the I.O. was again absent. The learned Magistrate observed that the challan is incomplete. He also observed that e-challan has also not been filed. Consequently, bailable warrants were issued against the I.O. in the sum of Rs.1,000/- with one surety in the like amount returnable for 08.12.2016.

4. On 08.12.2016, the bailable warrants were received back unexecuted on the ground that she was on medical rest since 14.09.2016. On the said date, the learned Magistrate took cognizance against the petitioner/ accused for the alleged offence. The learned Magistrate also directed to supply copies of the charge-sheet and its annexures to the accused on the next date of hearing, which was fixed as 22.12.2016.

5. The petitioner then moved an application under Section 167(2) Cr.P.C. to seek grant of statutory bail on the ground that though the charge-sheet had been filed on 19.11.2016, i.e. on the 90th day of the petitioner

being taken into custody, however, the same was incomplete. In this regard, reference was also made to the observation made in the order dated 24.11.2016 that the charge-sheet was incomplete. This application was rejected by the impugned order dated 06.12.2016 passed by the learned Magistrate. The relevant extract from the impugned order dated 06.12.2016 reads as follows:

“ The chargesheet in the present case has been filed on 19.11.2016 i.e. within 90 days as prescribed in Section 167 of CrPC. However, on 19.11.2016, I.O. W/SI Renuka was not present before the Court and the chargesheet was filed by SI Santosh Kumar on behalf of W/SI Renuka. The matter was ordered to be put up for consideration for 24.11.2016 as IO of the case was not present in person. On 24.11.2016, IO was absent. On perusal of the file, it was revealed that e-challan (soft copy of the chargesheet) was not filed by the IO. The matter is pending before this Court for compliance of Section 207 CrPC as the matter pertains to a Sessions Triable Case. Therefore, the observation that the challan was incomplete was made by the Court. As accused was produced from JC and e-challan was not available, B/Ws against IO have been issued by this Court.

The investigation of the present matter is at initial stage. The allegations made against accused are serious in nature. No ground for grant of statutory bail is made out. Keeping in view the serious nature and gravity of offence, application for grant of bail u/s 167(2) CrPC is dismissed.”

6. The petitioner then preferred CrI. Rev. No.131/3/16 to assail the said order dated 06.12.2016 passed by the learned MM dismissing his application under Section 167(2) Cr.P.C. The learned ASJ dismissed the said revision petition on the ground that the charge-sheet in question, which had been filed on 19.11.2016, i.e. within the prescribed period of 90 days, was

complete and the learned Magistrate had observed that the same is incomplete only on account of the fact that e-challan had not been filed by the I.O. He observed that the mere non-filing of the e-challan would not render the charge-sheet incomplete.

7. The learned ASJ also observed that merely because 20 witnesses had been named in the list of witnesses, whereas copies of statements of only 6 witnesses recorded under Section 161 Cr.P.C. have been attached with the charge-sheet, it does not render the same incomplete as it is not always necessary that the statements of all the witnesses are recorded under Section 161 Cr.P.C. He observed that it has to be assumed that the I.O. recorded the statement of only 6 witnesses under Section 161 Cr.P.C. and attached copies of the same with the charge-sheet. The learned ASJ held that no prejudice has been caused to the petitioner/ accused as he was present before the Court on 19.11.2016. The Court also held that the petitioner had not been able to make out a reasonable ground for interference with the impugned order dated 06.12.2016 passed by the learned Magistrate.

8. The submission of learned counsel for the petitioner is that mere filing of the charge-sheet within 90 days was not sufficient and it was also essential that within the said period of 90 days, the Court should have taken cognizance on the charge-sheet. Learned counsel submits that in the present case, apart from the fact that the charge-sheet was found to be incomplete, the record itself shows that cognizance was taken by the learned Magistrate only on 08.12.2016, i.e. well after the expiry of the period of 90 days, which expired on 19.11.2016.

9. In support of this proposition, learned counsel for the petitioner has placed reliance on the decision of the Bombay High Court in ***Khimbadhur Palshiram Thapa Vs. State of Maharashtra***, 1989 (3) Crimes 543. The facts in that case show that the charge-sheet had been filed in the Court of the learned MM on 09.01.1989, i.e. well within the period of 90 days. However, the learned Magistrate, on account of absence of the accused, adjourned the case to 19.01.1989. In the meantime, on 17.01.1989, i.e. on the 91st day, the petitioner, who was in custody, moved an application under Section 167 Cr.P.C. to seek statutory bail. The said application was rejected by the learned Magistrate and the order was also upheld by the Sessions Court. The petitioner then moved the High Court to seek bail. The Bombay High Court in this decision, *inter alia*, observed as follows:

“5. Undoubtedly, under Section 167, sub-section (2) of the Criminal Procedure Code, if no chargesheet has been filed within 90 days, the petitioner accused becomes entitled to be released on bail. However, if a chargesheet is filed, it is open to the learned Magistrate to remand him to further custody, if it could be said that the learned Magistrate has taken cognizance of the offence under Section 309, sub-section (2) of the Code of Criminal Procedure. Therefore, the question is what is the meaning of the words “taking cognizance of an offence”. Mr. Solkar submitted that when the learned Magistrate took the chargesheet on record and kept the matter on 19-1-1989, it could be said that the learned Magistrate had taken cognizance of the offence. Mr. Ponda, on the other hand, has drawn my attention to the case of *Gopal Das v. State of Assam*, 1961 (2) Cril.L.J. 39, wherein it has been expressly held that it is only when a Magistrate applies his mind, not for the purpose of proceedings under the various section of Chapter XVI, but for taking action of some other kind, e.g., ordering investigation under Section 156(3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken

cognizance of any offence. In fact, there is a passage in this Judgement, which can usefully be quoted and it is as follows:

“The following observation of Mr. Justice Das Gupta in the case of Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee, A.I.R. 1950 Cal. 437.

“What is taking cognizance has not been denied in the Criminal procedure and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under Section 190(1) (a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter – proceeding under Section 200 and thereafter for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he can not be said to have taken cognizance of the offence.”

were approved by this Court in R.R. Chari v. State of Uttar Pradesh, 1951 S.C.R. 312: (A.I.R. 1951 S.C. 207).”

6. Therefore, what is required is the application of mind on the part of the learned Magistrate for the purpose of taking cognizance of the offence and there is a purpose behind such an interpretation. If on application of mind, the offence disclosed is an offence triable exclusively by the Sessions Court, then obviously the learned Magistrate will have to commit the case to the Court of Sessions. On the other hand, if on such application of mind, the learned Magistrate comes to the conclusion that the case is not exclusively triable by the Sessions Court or that the offence disclosed is such as cannot be punished with death or life imprisonment, then it becomes a bailable offence and in that case the accused automatically get a right to seek bail. Mere mechanical adjournment of a case after a chargesheet is filed is neither an enquiry nor taking cognizance of the case within the meaning of Section 309, sub-section (2) of Code of Criminal Procedure or within the meaning of Section 2(g) of Code of Criminal Procedure.

7. In fact, Mr. Ponda is right when he pointed out that in the case of *State of Uttar Pradesh v. Lakshmi Brahman* (supra) the Supreme Court has categorically stated that it is not open to the learned Magistrate to commit the case straightaway to the Sessions Court, unless he applies his mind and an enquiry is held. It has been stated in that case that mere filing of a chargesheet would not automatically result in committing the case to the Court of Sessions.

8. Mr. Solkar submitted that in this case when the chargesheet was filed on 19th January 1989, the accused were not brought before the learned Magistrate. The accused were also not given the statements of witnesses as required under Section 207 of the Code of Criminal Procedure. The case was just adjourned to 19th January 1989. It is for the learned Magistrate to be satisfied that the statements of the witnesses and the police report were all supplied as required under Section 207 of the Code of Criminal Procedure, to the Accused. That is how the learned Magistrate still retains the matter with him and begins an enquiry for the purpose of taking cognizance of the offence. Mr. Solkar submitted that in the present case,

the statements have been given to the accused on 17-1-1989, which submission has been disputed by Mr. Ponda. But I think that that should not make any difference, inasmuch as on 17-1-1989 the detention of the Accused had crossed the limit of 90 days and as on that day the Accused was entitled to go on bail, for which he made an application on that very day.”

10. The aforesaid decision squarely applies in the facts of the present case. Without getting into the issue whether the charge-sheet was complete, or incomplete, and whether, or not, the petitioner was supplied the copy of the complete charge-sheet on 19.11.2016, it is clear from the record that cognizance had not been taken by the learned Magistrate till 08.12.2016, which was well beyond the period of 90 days. In my view, therefore, the petitioner became entitled to statutory bail in the facts of this case.

11. I have also perused the FIR, as filed on the complaint of the prosecutrix. From the same, it does not appear to be a case of brutal and forceful rape.

12. In these circumstances, the petition is allowed. The petitioner is directed to be released on bail, subject to:

- (i) The petitioner furnishing personal bond with one surety in the sum of Rs.25,000/- to the satisfaction of the Trial Court, i.e. Ms. Shail Jain, ASJ (West), Tis Hazari Courts, Delhi;
- (ii) The appellant shall provide his mobile phone number to the Trial Court, which shall be kept in working condition at all times and the same shall not be changed without prior intimation to the Trial Court; and
- (iii) The appellant shall not contact the prosecutrix or any of the witnesses

or tamper with the evidence in the matter.

FEBRUARY 14, 2017
B.S. Rohella

VIPIN SANGHI, J