

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

% *Date of decision: 28.08.2017*

+ **CRL. REV. PETITION 634/2017**

STATE Petitioner
Through Ms.Aashaa Tiwari, APP for State.

versus

AJAY KUMAR VERMA Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J. (Oral)

1. This Criminal Revision Petition has been filed by the State against the impugned order dated 06.04.2017 by which the Trial Court in Session Case No.138/17 vide FIR No.484/16 under Sections 342/376/511 of the Indian Penal Code (in short 'IPC') and Section 8 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 (in short 'POCSO Act') discharged the respondent.
2. FIR No.484/16 was registered on 08.11.2016 on the statement of the prosecutrix who alleged that on 08.11.2016 she had gone to work in place of her mother to sweep in a 'dhabha' where the accused was also working as a sweeper. While she was sweeping, the accused told her to clean the toilet. As soon as she went to the toilet, the accused pulled her inside the toilet

and bolted the door from inside, pushed her against the wall and grabbed her. The prosecutrix tried to release herself by slapping and punching the accused but the accused did not leave her and tried to remove her clothes and commit rape on her. After some struggle she managed to unbolt the door and came outside. She went straight to her home and narrated the entire incident to her mother and thereafter the matter was reported to the police.

3. Accused was subsequently arrested and charge-sheeted under Section 342/376/511 of the IPC and Section 8 of the POCSO Act.
4. Statement of the prosecutrix under Section 164 of the Code of Criminal Procedure, 1973 (in short 'the Code'). English translation of this statement is reproduced below:

“I reside in a village. About one month ago I came to Delhi from my village. My mother do the work of sweeping, moping and cleaning in Angithi Dhaba. My father is paralytic and for this reason in October, my mother took my father to village for his treatment. One boy namely Ajay used to do work of cleaning at the Dhaba. Yesterday, when I was sweeping, Ajay asked me to pick up the diaper lying in toilet. I told him that I am getting late and I want to go home quickly after taking money. On this issue, I quarrelled with him. He grabbed my hand and I shouted loudly. I slapped him and ran away from there and out of fear called police.”

5. On the basis of the material contradictions in the allegations in the FIR and in the statement of the prosecutrix under Section

164 of the Code, the Trial Court discharged the accused as it found that there was no strong suspicion against the accused.

6. Learned APP for the State had contended that this order of discharge of the accused is not sustainable in the eyes of law and based on conjectures and surmises.
7. Learned APP further contended that even if the statement of the prosecutrix under Section 164 of the Code is to be believed, it establishes the fact the accused was present with the prosecutrix at the time when the alleged incident happened and caught hold of her hand which prima facie raises a strong suspicion against the accused.
8. Learned APP relied upon the judgment of this Court in **Sushil Ansal and Ors. V State of Delhi, 2009 IX AD (DELHI) 240 (para 37), State of Maharashtra v Priya Sharan Maharaj and others, (1997) 4 SCC 393 (para 8), Niranjan Singh Karam Singh Punjabi, Advocate v Jitendra Bhimraj Bijjaya and others, (1990) 4 SCC 76 (para 7) and State of M.P v S.B Johari and others, 2000 SCC (Cri) 311 (para 4)** to contend that at the stage of framing of charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused and not appreciate the evidence to arrive at a conclusion whether the material on record are sufficient or not for convicting the accused.

9. Learned APP further contended that the report submitted by the official of the NGO who did the victim's counselling had also supported the allegations in the FIR in her report.
10. Learned APP argued that the prosecution should be given an opportunity to examine the victim in witness box after framing of charge so that the real version of what had happened on the fateful day can be deciphered. She submits that discharging the accused would not allow justice to take its own course.
11. After hearing the learned APP, the only issue which remains to be decided is whether the Trial Court was correct in discharging the accused on the basis of the material contradictions in the allegations in the FIR and the statement of the prosecutrix under Section 164 of the Code.
12. It is important at this juncture to refer to Sections 227 and 228 of the Code: -

“227. Discharge.

If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

228. Framing of charge.

(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order,

transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub- section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

13. The procedure to be followed and factors to be considered while deciding the point of charge was laid down by the Hon’ble Supreme Court in **State of Bihar v. Ramesh Singh, (1977) 4 SCC 39** as follows:

“4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If “the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing”, as enjoined by Section 227. If, on the other hand, “the Judge is of opinion that there is ground for presuming that the accused has committed an offence which— ... (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused”, as provided in Section 228. **Reading the two provisions 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 that 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 Section 227 or Section 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 his 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.** The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. **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.** An exhaustive list of the circumstances so indicate as to

what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. 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 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 Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227.”

(emphasis supplied)

14. The Hon’ble Supreme Court of India in **P. Vijayan v. State of Kerala, (2010) 2 SCC 398** while laying down the factors to be considered before an accused can be discharged held as under:

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If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words “not sufficient ground for proceeding against the accused” clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.”

(emphasis supplied)

15. Before framing of charges, the Court after hearing the prosecution as to the evidence it proposes to produce to bring home the guilt of the accused, the Court is to form a *prima facie* opinion whether the evidence sought to be produced raises a strong suspicion that the accused committed the offence.
16. After going through the allegations in the FIR and the statement of the victim under Section 164 of the Code, the inconsistencies are so glaring and contradictory that a strong suspicion that the accused might have committed the offence does not arise. The statement of the prosecutrix in her statement under Section 164 of the Code in fact does not disclose any offence at all. These contradictions *prima facie* do not disclose a strong suspicion but actually disclose that the FIR was registered only due to a petty quarrel on the issue of the prosecutrix getting late at work. As has been held in **P. Vijayan's case (supra)**, if the evidence only discloses a suspicion as opposed to a strong suspicion, then the Judge will be well within his powers to discharge the accused.
17. Hence, in light of the facts and circumstances of the case and the law laid down by the Hon'ble Supreme Court, this Revision Petition is dismissed.

VINOD GOEL, J.

AUGUST 28, 2017

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