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

% Date of Decision: September 21, 2017

+ **CRL.M.C. 3931/2017**

VARINDER KAUR Petitioner

Through: Mr.V.Elanchezhian and
Mr.Nasim Anwar, Advocate
with petitioner in person.

versus

THE STATE (NCT OF DELHI) & ANR. Respondents

Through : Mr.Sanjeev Sabharwal, APP for
the State with SI Amit Sehrawat
and ASI Shri Ram, PS Hari
Nagar.

PRATIBHA RANI, J. (Oral)

Crl.M.A. No.15868/2017

1. Exemption allowed subject to all just exceptions.
2. Application is disposed of.

Crl.M.C. No.3931/2017

1. The petitioner, who is complainant in case FIR No.623/2014 initially registered under Section 509 IPC at PS Hari Nagar, has invoked the inherent power of this Court under Section 498 CrPC with the following prayer:-

*'To set aside the judgment order to the extent of
discharging the respondent No.2/accused with respect to
S.354 passed by the learned ASJ-03, Tis Hazari (West),
Delhi in Criminal Revision No.54592/2016 & Criminal*

Revision No.56393/2016 dated 07.09.2017 and frame charge under S.354 IPC and direct the respondent No.2 to face the trial under Section 354 and Section 509 IPC.'

2. Mr.Sanjeev Sabharwal, APP for the State accepts notice.
3. Heard.
4. When the matter was taken up for hearing, learned counsel for the petitioner not only read the FIR but also other documents considered relevant and annexed with the petition. Learned counsel for the petitioner sought adjournment but instead of adjourning the matter, learned counsel for the petitioner was directed to file brief written submissions and the matter was directed to be taken up at 2.15 pm.
5. At 2.15 pm again arguments were heard and the written submissions filed by the counsel for the petitioner were also read by him in the Court. Learned counsel for the petitioner has relied on two decisions reported as State of Punjab vs. Major Singh 1967 AIR 63 and Samar Singh Puri vs. The State (NCT of Delhi) in CrI.Rev.P. No.129/2009 decided on 09th May, 2011 in support of his contentions.
6. The written submissions filed by the petitioner are extracted hereunder:-

*'No Court in the civilised world has two views with respect to **Touch a women** without her permission, with knowledge that her sex is delicate enough to be outraged falls under S.354 IPC.*

*The statement recorded under S.164 Cr.P.C., which unequivocally mentions that the **accused touched her breast** while pushing her out of the room. Whether the accused committed the actus reus without any malum has*

to be proved only through trial. Nevertheless, touching the breast, which is intimate private part of the women cannot be discounted with insufficiency of knowledge. FIR also mentions pushing the prosecutrix. Given the fact that the FIR is not an encyclopaedia, the statement under S.164 Cr.P.C., has a legal sanctity and the same cannot be discarded lightly at the stage of framing of charges.

Further, the trial Court and the revisional Court discharged the accused on the basis of two views, one which gives rise to the mere suspicion and another grave. The Court will only frame charges if there is grave suspicion. Which is principle of law laid down under Section 227 of the Cr.P.C. falling under Chapter XVIII of Cr.P.C. Trial in Sessions case, whereas the present case falls under Chapter XIX of Cr.P.C. Trial of Warrant cases by Magistrate. The First Schedule of Cr.P.C. the offences under S.354 and 509 IPC is trial by magistrate and the provision that attracts for discharge is S.239 Cr.P.C.

There is marked difference in provisions of S.227 and S.238 Cr.P.C. the former can be invoked only if there is no sufficient grounds, whereas the later can be invoked only if the charge against the accused is found groundless. Hence both the trial Court and the revisional Court committed serious miscarriage of justice by applying wrong provision.

The role of the victim after the Criminal Amendment Act, 2008(No. 5 of 2009) inducted victim's right to participation and to be heard. This Hon'ble Court in predisposition without hearing the merits of the case, within one minute, dismissed the petition, giving liberty to file written synopsis, which is violation of all

principles of Natural Justice and a convention unheard of.

The petitioner who is present in this Hon'ble Court, is a victim of offences that carry moral stigma, demands by virtue of the inherent powers to be heard modicum. Predisposition of mind without hearing is antithesis of the Judicial Convention, hence beg this Hon'ble Court to be heard.

“Injustice is easy to bear, but what stings is justice.”

7. Mr.V.Elanchezhiyan, learned counsel for the petitioner has submitted that although at the time of registration of FIR the petitioner did not make any allegation which constituted an offence under Section 354 IPC but in her statement under Section 164 CrPC she did make such allegation. The FIR is not an encyclopedia and for purpose of framing of charge, the statement which formed basis for registration of FIR as well the statement under Section 164 CrPC should have been considered by the Court. It has also been submitted that in the statement under Section 164 CrPC, she has specifically mentioned that accused touched her breast while pushing her out of the room and whether such an act was with the requisite intention to outrage her modesty, is a subject matter of trial. It has also been contended that while exercising the revisional jurisdiction, the learned ASJ ought not to have confirmed the order of learned MM discharging the accused for the offence punishable under Section 354 IPC. It has been contended that the offence punishable under Section 354 IPC and Section 509 IPC being triable by the Court of Magistrate, at the stage of framing of charge the relevant provisions governing the stage of charge before the Magistrate are Section 238 and 239 CrPC and not

Section 227 CrPC which is applicable in cases triable by the Court of Sessions. Thus, the impugned order which has been passed citing the provisions relating to sessions trial cases i.e. under Section 227 Cr.P.C., has caused serious miscarriage. Learned counsel for the petitioner has relied upon State of Punjab vs. Major Singh 1967 AIR 63 and Samar Singh Puri vs. The State (NCT of Delhi) in CrI.Rev.P. No.129/2009 decided on 09th May, 2011 and submitted that the decision in criminal revision petition is binding on this Court.

8. Before dealing with the submissions advanced by learned counsel for the petitioner, it is necessary to refer to the contents of the FIR, the allegations made in the statement recorded under Section 164 CrPC as well the reasons for which the learned MM preferred to discharge the accused for the offences under Section 354/509 IPC. The learned ADJ while affirming the order on discharge in respect of the offence punishable under Section 354 IPC, directed the accused to be tried only for the offence punishable under Section 509 IPC.

9. As per the FIR, on 11th June, 2014 on receipt of PCR call vide DD No.20-A, it was marked to HC Jagdish Kumar No.167/West, which was kept pending for inquiry. Thereafter the complaint (LC No.812/SHO/HN/11/06/14) written in Hindi was received by the police.

10. In the said complaint, which forms basis of registration of FIR No.623/2014, PS Hari Nagar, the complainant reported that on 11th June, 2014 at about 8.00 am pursuant to the stay order passed by the High Court, she went to the school to join her duty. She was waiting for the Principal but as she had not reached, she talked to the

Chairman at 11.00 am and handed over the copy of the stay order to the Chairman. She requested the Chairman with folded hands but he said that he was not bound by the order of High Court, she could go wherever she wanted. He mentally tortured her staring at her and abused her. He also called the Peon and directed him to push her out and himself also started speaking in abusive language. She told him that she was an employee and at the work place why he was abusing and misbehaving with her but he did not listen to her. He continued speaking and she was sent outside the school gate. She called the PCR and when Ct.Harjiwan responded to the call, **she apprised him about the incident and also played the recording by her of the incident about the abusive misbehavior.** Ct.Harjiwan advised her to meet the SHO and play the recording in his presence and lodged the FIR. Thereafter she visited the police station and got the FIR registered. She also made request that legal action be taken against the person who has abused her (*Maa Bahen Ki Galiyan Di*).

11. Copy of the chargesheet annexed with the petition reveals that on 20th June, 2014 the complainant was produced for getting her statement under Section 164 CrPC recorded and on the basis of allegations made therein i.e. touching of breast, Section 354 IPC was also added in the FIR.

12. On 27th September, 2016 after hearing the parties including the complainant who was present with counsel, learned Trial Court, after extracting the provisions of Section 354 IPC and 509 IPC, discharged the accused for the offence punishable under Section 354/509 IPC for the following reasons:-

‘Therefore, both under section 354 IPC and section 509 IPC, the act of the accused should be with the intention to outrage the modesty of a woman or with the knowledge that by his act, the modesty of a woman will be outraged.

I have heard the conversation as took placed between complainant and accused at the time of the incident. The said conversation recorded by the complainant on her mobile phone and has been placed on record in the form of CD. The recorded conversation reflects that complainant started recording the conversation, the moment she entered in the room of the accused and the recording continued even after she left the room of the accused. The live conversation reflects that accused refused to accept the court order and asked the complainant to leave his room. When the complainant refused to do so, he started shouting on the complainant and he kept on asking her as to how she entered into his room without his permission. The entire conversation reflects that the accused used abusive language only once and that to, in the context of the court and not the complainant. The accused used the abusive language for court, however, no abusive words have been used for the complainant in the entire conversation. The conversation also reflects that accused did not push the complainant. He called his peon to move the complainant out of his room. The peon also kept on requesting the complainant to leave the room and it is clear from the conversation that she, herself left the room and she was not pushed either by the accused or by the peon. In the conversation, the complainant kept on asking the accused to accept the court order and not to use the abusive language, but at no point of time, she has requested or asked the accused not to misbehave with her by touching her breast or by touching her private part or by twisting her hand. It is highly inconceivable that the complainant did not utter anything or protested against the above alleged act of the

accused, when she was otherwise regularly quarreling with the accused and asking him to accept the court order and not to use the abusive words and she was conscious of the fact the entire conversation is getting recorded on her mobile phone. The fact that the accused refused to accept the court order is not subject matter of present case. The fact that accused shouted on the complainant and asked her to leave the room does not constitute any offence, in the absence of any word act or gesture on the part of the accused intending to outrage the modesty of the complainant. Therefore, no prima facie case is made out against the accused. Accused is discharged in the present case.'

13. Aggrieved by the order on discharge, the complainant preferred criminal appeal which was treated as revision petition by the learned ASJ. State had also preferred a Criminal Revision Petition No.12/1/2017 challenging the order on discharge passed by the learned MM. Both the revision petitions i.e. CrI.Rev.No.121/2017 (preferred by the State) and CrI.Rev.No.32/2/2016 (preferred by the complainant) were disposed of by the learned ASJ vide common order dated 7th September, 2017 and allowed to the extent that accused was sent to face trial for the offence punishable under Section 509 IPC.

14. The prayer to direct the accused to face trial for the offence punishable under Section 354 IPC has been rejected by the learned ASJ for the following reasons:-

- (i) There was not an iota of allegations towards the offence punishable under Section 354 IPC.
- (ii) The learned Trial Court has discussed the recorded conversation in respect of the entire incident recorded by the complainant from the time she entered the room of the Chairman of the school/accused

which continued even she left.

(iii) The recorded conversation reflected that the accused refused to comply with the Court order and asked her to leave the room.

(iv) On her refusal to do so, the accused started shouting at her and kept on asking her that how she entered his room without his permission.

(v) In the entire conversation, the accused has used the abusive language only at one time that too in the context of a Court order.

(vi) There is initial statement of the complainant lodged by the complainant whereby the FIR was registered.

(vii) There is CD regarding conversation and its transcript, recorded by the complainant regarding the incident.

(viii) There is a delay of nine days in getting the statement under Section 164 CrPC recorded.

(ix) There was not an iota of allegations regarding offence under Section 354 IPC in the initial complaint or in the CD recording.

15. After discussing the settled legal position at the stage of charge and relying on the decision reported as Dilawar Balu Kurane vs. State of Maharashtra (2007) 2 SCC 135, the learned ASJ was of the view that the evidence produced by the prosecution gives rise only to some suspicion and not grave suspicion against the accused for the offence punishable under Section 354 IPC, hence the order of learned Trial Court discharging the accused for the offence punishable under Section 354 IPC was upheld.

16. At the time of consideration of charge, the learned Trial Court was required to satisfy itself whether a prima facie case for

committing the offence punishable under Section 354 IPC is made out and relying on the recording done by the complainant herself and placed by her on record which was duly referred even in the FIR, the learned Trial Court was of the view that it was not a case of outraging the modesty of a woman and the abusive behavior or refusal to comply with the Court order cannot be a ground to frame a charge under Section 354/509 IPC.

17. In the revision petition filed by the complainant, the learned ASJ has taken the view that the ingredients of Section 354 IPC are not satisfied. The recording made by the complainant herself has been referred to in the context that in the FIR no such allegation was made.

18. The submission made by learned counsel for the petitioner that the Court was required to consider the provisions of Section 238 & 239 CrPC and not 227 CrPC, cannot be taken as a ground to interfere with the orders impugned.

19. In the decision reported as State of Maharashtra Etc. Etc. Vs. Som Nath Thapa Etc. JT 1996 (4) SC 615, one of the question of law to be examined by the Apex Court was “When can charge be framed?”. After reproducing Sec. 227, 228 in so far as session trial is concerned and Sec. 239, 240 relatable to the trial of warrant cases and section 245 (1) & (2) qua the trial of summon cases, in para 29 to 33 of the judgment held as under :-

“29. Before advertng to what was stated in Antulay's case, let the view expressed in State of Karnataka Vs. L. Muniswamy, 1977(3) SCR 113 be noted. Therein, Chandrachud, J. (as he then was) speaking fore a three Judge Bench stated at page 119 that at the stage of

framing charge the Court has to apply its mind to the question whether or not there is any ground for presuming the commission of the offence by the accused. As framing of charge affects a person's liberty substantially, need for proper consideration of material warranting such order was emphasised.

30. *What was stated in this regard in Stree Alyachar Virodhi Parishad' case, which was quoted with approval in paragraph 79 of State of West Bengal Vs. Mohd. Khalid, 1995 (1) SCC 684 is that what the Court has to see, while considering the question of framing the charge, is whether the material brought on record would reasonably connect the accused with the crime. No more is required to be inquired into.*

31. *In Antulay's case, Bhagwati, CJ, opined, after noting the difference in the language of the three pairs of section, that despite the difference there is no scope for doubt that at the stage at which the Court is required to consider the question of framing of charge, the test of "prima facie" case has to be applied. According to Shri Jethmalani, a prima facie case can be said to have been made out when the evidence, unless rebutted, would make the accused liable to conviction. In our view, better and clearer statement of law would be that if there is ground for presuming that the accused has committed the offence, a court can justifiably say that a prima facie case against him exists, and so, frame charge against him for committing that offence.*

32. *Let us note the meaning of the word "presume". In Black's Law Dictionary it has been defined to mean "to believe or accept upon probable evidence". (Emphasis ours). In Shorter Oxford English Dictionary it has been mentioned that in law "presume" means "to take as proved until evidence to the contrary is forthcoming", Stroud's Legal Dictionary has quoted in this context a certain judgment according to which "A presumption is a probable consequence drawn from facts (either certain,*

or proved by direct testimony) as to the truth of a fact alleged.” (Emphasis supplied). In Law Lexicon by P. Ramanath Aiyer the same quotation finds place at page 1007 of 1987 edition.

33. *The aforesaid shows that if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the Court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of charge probative value of the materials on record cannot be gone into, the materials brought on record by the prosecution has to be accepted as true at that stage.”*

20. Reliance placed by the petitioner on the decision reported State of Punjab vs. Major Singh (Supra) and Samar Singh Puri vs. The State (NCT of Delhi) (Supra) is misplaced as it is a case where the complainant herself was recording the entire event and playing not only before the SHO but also before the Court. It was only on the basis of the recording made by the complainant that both the Court below have given a concurrent finding that even prima facie the ingredients of Section 354 IPC are not satisfied.

21. It is worth mentioning that in the garb of petition under Section 482 CrPC, the petitioner has filed second revision petition which is not maintainable. In the case **Wajid Mirza vs. Mohammed Ali Ahmed & Ors. 1982 CriLJ 890**, the High Court of Andhra Pradesh has observed as under :-

‘23. *This Court in Re Puritipati Jagga Reddy, (1979) 1*

AJLJ 1 : AIR 1979 Andra Pra 146 at p. 149 (FB) held :

The language of sub-section (3) of Section 397 contains no ambiguity. If any person had already chosen to file a revision before the High Court or to the Sessions Court under sub-section (1), the same person cannot prefer a further application to the other Court. To put it in other words, sub-sec.(1) and (3) make it clear that a person aggrieved by any order or proceeding can seek remedy by way of revision either before the High Court or the Sessions Court. Once, he has availed himself of the remedy, he is precluded from approaching the other forum. It is equally manifest from the provisions of sub-section (3) that this bar is limited to the same person who has already chosen to go either to the High Court or to the Sessions court seeking a remedy and that it does not apply to the other parties or persons.'

22. The Bombay High Court has taken the same view in the case ***Inayatullah Rizwi v. Rahimatuallah & Ors. 1981 CriLJ 1398*** and observed that :

'We are, therefore, of the view that a revision to the High Court would be tenable at the instance of a party who is unsuccessful before the Sessions Judge, or who is aggrieved by his order. In other words, a concurrent finding of the Sessions Judge and of the Courts below become final, but when the Sessions Judge reverse the order of the Court below in revision the defeated party is not precluded from moving the High Court. The consensus of judicial opinion as can be seen supports only this view.'

23. It is pertinent to note that in the garb of Crl.M.C. under Section 482 Cr.P.C impugning the order passed by the learned ASJ in Criminal Revision No.29/2012 is a second revision petition which is barred under Section 397(3) Cr.P.C. being filed by the same persons,

who had already invoked the revisional jurisdiction of the Sessions Court. This Court cannot act as the second revisional Court in the garb of exercising inherent power. A Division Bench of this Court in W.P.(Crl.) No.80/2010 Anur Kumar Jain vs. Central Bureau of Investigation has observed as under:-

“(e) The exercise of power either under Section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution of India should be sparingly and in exceptional circumstances be exercised keeping in view the law laid down in Siya Ram Singh (supra), Vishesh Kumar (supra), Khalil Ahmed Bashir Ahmed (supra), Kamal Nath & Others (supra), Ranjeet Singh (supra) and similar line of decisions in the field.

(f) It is settled law that jurisdiction under Section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution of India cannot be exercised as a “cloak of an appeal in disguise” or to re-appreciate evidence. The aforesaid proceedings should be used sparingly with great care, caution, circumspection and only to prevent grave miscarriage of justice.”

15. Finding no illegality or perversity in the impugned orders so as to call for any interference by this Court in exercise of inherent power under Section 482 Cr.P.C., the petition is dismissed.

Crl.M.A.No.15867/2017

Dismissed as infructuous.

**PRATIBHA RANI
(JUDGE)**

SEPTEMBER 21, 2017

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