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

+ CRL.REF. 4/2017

COURT ON ITS OWN MOTION

..... Petitioner

Through: Mr. Pramod Kumar Dubey (Amicus Curiae) along with Mr. Vivek Jain, Mr. Hitesh Saini, Mr. Nitin Saluja & Mr. Anurag Andley, Advocates.

versus

STATE

..... Respondent

Through: Mr. Rahul Mehra, Standing Counsel along with Mr. Rajesh Mahajan, ASC for the State.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE P.S.TEJI

ORDER
27.10.2017

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1. We have heard learned Amicus Curiae as well as Mr. Mehra, learned Standing Counsel for the State.
2. The present is a reference made by the learned Chief Metropolitan Magistrate, East District, Karkardooma Courts, Delhi, under Section 395(2) Cr.P.C. The question of law, as framed for determination by this Court, reads as follows:

“Whether a Metropolitan Magistrate can examine the discretion exercised by the IO for arresting or non-arresting the accused persons, while considering the charge-sheet at the stage of taking of cognizance and if it is found that the IO has not exercised his discretion lawfully, whether the court of MM can return the charge-sheet for further investigation on the point of arrest of accused persons.”

3. The aforesaid question has been framed by the referring Court in the background that the investigating agency, i.e. the Central Bureau of Investigation (CBI) filed the charge-sheet under Section 173 Cr.P.C. without arresting the accused persons, who are alleged to be involved in offence under Sections 420/ 467/ 468/ 471/ 120-B IPC. The accused were not arrested by the investigating agency since the investigating agency did not consider it necessary to arrest them, as they cooperated in the investigation.

4. It appears that the referring Court was not satisfied with the fact that the investigating agency had not arrested the accused. According to the referring Court, the accused should have been arrested and the reasons why they should have been arrested, according to the learned Magistrate, are set out as under:

- *“It encourages accused persons to further indulge in criminal activities with more zeal.*
- *Some of the accused persons (mostly the master minds or king- pins) abscond and they are declared proclaimed offenders (P.O.) but they are rarely traceable due to lack of infrastructure with police agency.*
- *Generally such accused persons are white collar criminals having battery of lawyers and they adopt all sorts of dilatory tactics to delay the trial by challenging all interlocutory*

orders or proceedings time and again. On account of such reasons, it takes many years to conclude trial.

- *With the passage of time, either the witnesses become not traceable or they settle cases under duress, resulting in acquittal of cases.*
- *If anyhow some of the accused persons are convicted by trial court, they prefer appeals and in some cases upto the level of Hon'ble Supreme Court. During this process, mostly the accused persons either die or attain age of 70-80 years and files various medical certificate (with natural or artificial diseases) and this way, they escape the required punishment.*
- *It is also observed that whenever such matters are investigated by the local police i.e. Delhi Police, the accused persons are mostly arrested not only in cheating cases but also in all small cases of theft or possession of stolen gas cylinder, electric motor, mobile phone, vehicles, etc. But when the matter is investigated by the CBI, such white collar criminals committing very serious offences of cheating and embezzlement of crores of rupees enjoy the liberty throughout their lives.*
- *Although under law, all criminal are equal but the above scenario shows different approach for rich and poor criminals.*
- *The above phenomenon shows different approach being adopted by two different agencies despite the fact that both are following the same criminal investigation system as provided in Cr.P.C.”*

5. The question of law referred for consideration of this Court by the learned Magistrate has been settled by a learned Single Judge of this Court in ***Court On Its Own Motion Vs. Central Bureau of Investigation***, 109 (2003) DLT 494 : (2004) ILR 1 Delhi 47. In fact, the reference order takes

note of the said decision.

6. Since there is an authoritative determination by this Court of the question raised by the learned Magistrate, in our view, there was no scope for making such a reference in the first place. In any event, we find ourselves in complete agreement with the view taken by the learned Single Judge in the aforesaid case. In this decision, the learned Single Judge, *inter alia*, observed:

“19. It appears that the learned Special Judge was labouring under a misconception that in every non-bailable and cognizable offence the police is required to invariably arrest a person, even if it is not essential for the purpose of investigation.

20. Rather the law is otherwise. In normal and ordinary course the police should always avoid arresting a person and sending him to jail, if it is possible for the police to complete the investigation without his arrest and if every kind of co-operation is provided by the accused to the Investigating Officer in completing the investigation. It is only in cases of utmost necessity, where the investigation cannot be completed without arresting the person, for instance, a person may be required for recovery of incriminating articles or weapon of offence or for eliciting some information or clue as to his accomplices or any circumstantial evidence, that his arrest may be necessary. Such an arrest may also be necessary if the concerned Investigating Officer or Officer-in-Charge of the Police Station thinks that presence of accused will be difficult to procure because of grave and serious nature of crime as the possibility of his absconding or disobeying the process or fleeing from justice cannot be ruled out.

21. The liberty of a citizen is of paramount importance and a constitutional guarantee and cannot be incised and therefore the police or Investigating Agencies should not remain under

the impression that in every cognizable and “non-bailable” offence they should invariably arrest the offender. Power to arrest is altogether different than the need for arrest. Unless a person is required for custodial interrogation and investigation cannot be completed without his arrest, arrest may be necessary. In case investigation can be completed without his arrest and he extends all kind of co-operation, he should not be arrested. No authority howsoever powerful or mighty can be allowed to deny a person his liberty as it hits at the very foundation of democratic structure. In this regard, I cannot resist the temptation of reproducing the observations made by the Supreme Court in Joginder Kumar v. State of UP, (1994) 4 SCC 260 which are very pithy and have force in law. These are as under:—

“No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter.”

22. *Because of the view taken by the Special Judge and return of the charge-sheet by forcing the CBI to arrest the accused which it otherwise never felt the necessity of arresting*

him even for the purpose of investigation, and apprehension of the accused being denied the benefit of bail in spite of offence being devoid of high magnitude and severe punishment this Court feels constrained to give certain directions based on the legal position and several judgments including those delivered by me recently {(i) Suresh V. Chaturvedi v. AES Control Pvt. Ltd., CrlM.(M) 2970/2003 decided on 24th July, 2003, (ii) Pratap Singh Gaekwad v. State of NCT of Delhi CrlM.(M) 1848/2003 decided on 30th October, 2003, (iii) Sudhir Nathani v. Central Bureau of Investigation, Crl.M.(M) 2848/2003 decided on July 24th, 2003} to the police and the investigating agencies as well as to the courts competent to take cognizance of the offence and try the accused for guidance and compliance. These are:—

Directions to the Police/Investigating Agencies like CBI etc.:—

(1) Investigating Officer, be of police station or special agency like CBI shall not arrest any person accused of having committed a cognizable and non-bailable offence until it is very necessary for the purpose of investigation or custodial interrogation say for recovering incriminating articles or weapons of offence or eliciting information as to his accomplices etc. or for any other purpose that may help in gathering evidence to prove his guilt.

(2) Arrest should always be avoided if the investigation can be completed even otherwise and the accused gives full co-operation in completing the investigation.

(3) Arrest may be necessary, if the offence alleged is of grave nature and prescribes severe punishment and there is a likelihood of an offender either absconding or not appearing on being summoned or his fleeing away from justice or

judgment.

23. *For instance it is the experience of this court that in offences under Sections 498A/406 IPC which are much abused provisions and exploited by the police and the victims to the level of absurdity and are of such nature which can be investigated without arrest and do not fall under the aforesaid category viz. being of highest magnitude and prescribing severest punishment or minimum punishment, every relative of husband, close or distant, old or minor is arrested by the police. By arresting such relatives whose arrest may not be necessary for completing the investigation as it can be completed by recording the statement of victim, her parents and other witnesses, police assumes the role of breaker of homes and not the maker as once any relative of the husband is sent to jail, the marriage ends for all practical purposes and divorce and other miseries are bound to follow. Unless the allegations are of very serious nature and highest magnitude arrest should always be avoided.*

24. *In this court everyday ten to twenty matters for quashing the FIRs under Sections 498A/406 IPC are taken up as all marriages end in divorce where relatives of husband or other are sent to jail. Unfortunately, sufferers are young girls between the ages 20 to 28 years. Very few cases end up in full trial and conviction. These are the offences whose deterrence has proved worse than remedy.*

25. *It was in view of this malady that this Court had strongly recommended to make the offence under Section 498A IPC bailable and compoundable if society wants to salvage and save the institution of marriage. This Court again reiterate its recommendations to the Government.*

26. *Arrest of a person for less serious or such kinds of offence or offences those can be investigated without arrest by the police cannot be brooked by any civilized society.*

Directions for Criminal Courts:—

(i) Whenever officer-in-charge of police station or investigating agency like CBI files a chargesheet without arresting the accused during investigation and does not produce the accused in custody as referred in Section 170 Cr.P.C. the Magistrate or the court empowered to take cognizance or try the accused shall accept the chargesheet forthwith and proceed according to the procedure laid down in Section 173 Cr.P.C. and exercise the options available to it as discussed in this judgment. In such a case the Magistrate or court shall invariably issue a process of summons and not warrant of arrest.

(ii) In case the court or Magistrate exercises the discretion of issuing warrant of arrest at any stage including the stage while taking cognizance of the chargesheet, he or it shall have to record the reasons in writing as contemplated under Section 87 Cr.P.C. that the accused has either been absconding or shall not obey the summons or has refused to appear despite proof of due service of summons upon him.

(iii) Rejection of an application for exemption from personal appearance on any date of hearing or even at first instance does not amount to non-appearance despite service of summons or absconding or failure to obey summons and the court in such a case shall not issue warrant of arrest and may either give direction to the accused to appear or issue process of summons.

(iv) That the Court shall on appearance of an accused in a bailable offence release him forthwith on his furnishing a personal bond with or without sureties as per the mandatory provisions of Section 436 Cr.P.C

(v) The Court shall on appearance of an accused in non-bailable offence who has neither been arrested by the police/Investigating agency during investigation nor produced in custody as envisaged in Section 170 Cr.P.C. call upon the accused to move a bail application if the accused does not move it on his own and release him on bail as the circumstance of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. Reason is simple. If a person has been at large and free for several years and has not been even arrested during investigation, to send him to jail by refusing bail suddenly, merely because chargesheet has been filed is against the basic principles governing grant or refusal of bail.

(vi) That the Court shall always keep the mandatory provisions of Section 440 Cr.P.C. in mind while fixing the amount of bail bond or surety bond which provides that the amount of bond shall never be “excessive” amount and take into consideration the financial condition, the nature of offence and other conditions, as “Excessive” amount of bond which a person is not in a position to furnish amounts to denial of bail in a non-bailable offence and conversion of bailable offence into non-bailable offence as the fundamental concept of granting bail on bond is security of appearance of the accused person to answer the charges and face the trial. Nothing more nothing less.

Principles that govern the grant or refusal of bail in other kinds of cases and shall be followed in letter and spirit are as under:—

(a) Bail should not be refused unless the crime charged is of the highest magnitude and the

punishment of it prescribed by law is of extreme severity;

(b) Bail may be refused when the court may reasonably presume, some evidence warranting that no amount of bail would secure the presence of the convict at the stage of judgment;

(c) Bail may be refused if the course of justice would be thwarted by the person who seeks the benignant jurisdiction of the Court to be freed for the time being;

(d) Bail may be refused if there is likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice; and

(e) Bail may be refused if the antecedents of a man who is applying for bail show a bad record, particularly a record which suggests that he is likely to commit serious offences while on bail.

(f) Similarly, the Court shall not while releasing a person on bail put any condition, say in the form of deposit of extra amount or FDR etc. of any amount which is beyond the conditions permissible under Section 439 Cr.PC.”

7. The learned Single Judge also observed in the said decision that, time and again, the subordinate Courts have waived from the well-settled law on the subject. In paragraphs 27 & 28, His Lordship has observed:

“27. This Court has laid down aforesaid law in various cases decided from time to time for the guidance and compliance of the subordinate courts but it is with great anguish and pain that this Court observes that it has come across a large number of orders passed by the subordinate courts in complete violation of the law laid down by this Court and Supreme Court in many

more other cases.

28. There is no gain saying the fact that the disobedience or disregard of the law laid down by the High Court by the subordinate courts is not only against the very concept of rule of law but also verges on contempt of court as subordinate courts are, by way of constitutional provisions, bound by the decision of the local High Court as is every court of the country including the High Courts, bound by the decisions of the Supreme Court by virtue of provisions of Article 141 of the Constitution. If the subordinate courts start ignoring the law laid down by their High Courts and start acting contrary thereto, then not only the legal anarchy will set in but the democratic structure of the country, rule of law and concept of liberty of citizens will be the first casualty.”

8. Pertinently, after the aforesaid decision was rendered by the learned Single Judge in the year 2004, the Supreme Court laid down the principles in relation to arrest of accused in ***Arnesh Kumar Vs. State of Bihar & Another***, (2014) 8 SCC 273, in relation to offences, the sentence wherefor can run up to seven years.

9. The view taken by the learned Magistrate that in offences, whereof the sentence is beyond seven years, the investigating agency should necessarily arrest the accused and produce the accused in custody at the time of filing the charge-sheet under Section 173 Cr.P.C. before the Magistrate, has no basis and is contrary to the statutory scheme. In this regard, reference may be made to Sections 2(c), 41, 41(1)(b), 41(1)(b)(a), 157(1), 173(2)(e), 173(2)(f) & 173(2)(g) of the Code, which put the matter beyond any doubt that the investigating agency is not obliged to arrest the accused whenever a cognizable offence is registered. The discretion to arrest the accused has to be exercised by the investigating agency by applying the

principles laid down in the Code itself.

10. The aforesaid position has been reiterated by this Court in *Udit Raj Poonia Vs. State (Govt. of NCT of Delhi)*, 2017 SCC Online Del 6997 : (2017) 238 DLT 212; as also in *Rajesh Dua Vs. State*, Bail Application No.778/2017 decided on 09.08.2017. Thus, the Metropolitan Magistrate cannot examine whether the discretion of the IO to arrest, or not to arrest the accused, has been properly exercised. He is only concerned with the charge-sheet, as filed. He may return the charge-sheet if he finds that the investigation is not complete, or the charge is not borne out from the evidence collected and filed with the charge-sheet. But he cannot return the same merely because the accused has not been arrested and produced in custody at the time of filing the charge-sheet.

11. The reference stands answered, accordingly.

VIPIN SANGHI, J

P.S.TEJI, J

OCTOBER 27, 2017
B.S. Rohella