

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

% *Reserved on: 30th May 2019*
Delivered on: 15th July, 2019

+ **W.P.(CRL) 3964/2018 & Crl.M.A.Nos.50758-59/2018**

AMAN VYAS Petitioner
Represented by: Mr. K. Singhal, Ms. Heena
Tangri and Mr. Nishat,
Advocates
versus
UNION OF INDIA Respondent
Represented by: Mr. Rajeev Sharma, Mr. Anuj
Handa, Ms. Radha Lakshmi,
Ms. Sanya Handa, Mr. Rajat
Krishna and Mr. Saket
Chandra, Advocates.

+ **W.P.(CRL) 468/2019**

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CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the writ petition being W.P.(CRL) 3964/2018 the petitioner seeks quashing of final order cum inquiry report dated 17th December 2018 passed

by the Learned Additional Chief Metropolitan Magistrate in Case no. 19546/2016 whereby the Learned Trial Court recommended the extradition of the petitioner to the requesting state that is United Kingdom for facing trial inter alia for the offence of murder and in the writ petition being W.P.(CRL) 468/2019 the petitioner seeks quashing of letter dated 4th February 2019 issued by the Ministry of External Affairs to the Petitioner whereby the Government of India decided to extradite the petitioner to United Kingdom to face trial in case No. 19546/2016 for the various offences.

2. Briefly stated the Petitioner has been accused by the requesting State with the commission of offences of murder, attempted murder, rape, sexual assault, causing grievous bodily harm, possession of an offensive weapon and possession of a bladed article. As per the Extradition request received on behalf of United Kingdom it was stated that four attacks occurred on 24th March 2009, 22nd April 2009, 29th April 2009 and 30th May 2009 at night and within a kilometer of each other just off Markethouse Road in Walthamstow, London, E17. It was further stated that all the victims were women aged between 32 and 59 years and were violently and sexually assaulted. One of the victims namely Michelle Samaraweera succumbed to her injuries.

3. During the course of investigation, a map (Ex.CB/2) was made showing the locations and addresses of the four attacks. The Petitioner was found to have been living in Walthamstow at the time of the attacks. The details of the four attacks are as follows:

A. Carol Ann Vanderhoeven: On 24th March 2009 approximately at 1:00 A.M., the victim was approached by a man outside her home

i.e. Falmouth Way, Walthamstow, E17. The man forced his way into her flat and once inside subjected Ms. Vanderhoeven to a violent assault, punching her several times in the face, causing her mouth to bleed and anally raping her. She described her attacker as an Asian, with coffee colored skin, in his early 30s, 5 feet 8 inches tall and of average build. He was soft spoken and had an accent. A photo fit of the suspect was given by her. The same is annexed as Ex.CAV/1. Medical examination of the victim was conducted later the same day during which anal swab was taken from her vide Ex.AMS/2. A number of injuries were identified by the examining doctor including bruising to her face and mouth and large dark purple bruise on her left buttock. CCTV footage obtained during the police investigation shows that she was being followed by a man along South Grove, Walthamstow prior to the incident around 12:16 A.M. The man was wearing a distinctive jacket with strips down the arms. The same man was seen again at 1:21 A.M., walking away from the direction of the scene along St. James Street.

B. Valerie Chapman: On 21st April 2009 at around 11:50 P.M., she was approached by a man outside her home in Leyton, E10. Following a discussion, she was led by the man to an alleyway off South Grove, Walthamstow, E17. She was threatened with a flick knife before being violently assaulted. During the course of the assault, she was punched in the face, vaginally, orally and anally raped twice. After ejaculating, the attacker wiped himself on Ms. Chapman's underwear. This underwear was subsequently

recovered from the scene. She described her attacker as being approximately 30-35 years of age and between 5 feet 7 inches and 5 feet 9 inches tall, with a thick cropped hair, a round face and a dark skin tone. He was thought to be darker than someone from India but was not 'jet black'. He spoke with an accent. She underwent a medical examination on the afternoon of 22nd April 2009. The examining doctor identified abrasions, bruising and swelling to her head, arms and legs. A large thrombosed haemorrhoid was found due to which she was unable to tolerate internal anal examination.

C. Nasima Dema: On 29th April 2009 shortly before 2:00 A.M., a resident of Markhouse Road, Walthamstow, E17, telephoned the police, saying that he could hear screaming and moaning coming from the churchyard of St. Saviour's Church. Police attended and on arrival at the scene found a woman lying face down in the bushes of the Churchyard. The woman was later identified as Nasima Dema. She sustained a head injury and was semi-conscious. Her trousers and underwear were around her ankles. Her face was covered in blood and the lower half of her body was covered in her own excrement. It was apparent that she had been the victim of a serious violent and sexual assault. An ambulance was called and she was taken to the hospital wrapped in a red London ambulance service blanket. This blanket was later seized and subjected to forensic examination. She was seriously injured in the attack and was hospitalized for a month and a half, before being discharged to rehabilitation unit. To this date, she has no

recollection of the attack. The last thing she remembered was being followed by an Asian man on Markhouse Road. CCTV footage obtained during the police investigation shows her entering the Cansin supermarket on Lea Bridge Road, E10 at 1:32 A.M. on 29th April 2009. A man, believed to be the suspect was seen in the store at the same time.

D. Michelle Samaraweera: On 30th May 2009 at about 5:45 A.M., her lifeless body was found in a playground at Queen's Road, Walthamstow, E17. She was lying on her back. Clothing from her lower body had completely been removed and her legs were spread wide apart. There was blood on her face and bruising around her eyes. She was pronounced dead at the scene at 6:08 A.M. A pathologist, Dr. Kenneth Shorrocks, attended three hours later and took a number of intimate samples, including a vaginal swab. The following day, a post-mortem examination was conducted. The pathologist concluded that she had been strangled. It was also apparent from both the circumstances in which the body was found and subsequent forensic examination of vaginal swab that she had been the victim of a sexual assault.

4. Thereafter, a forensic analysis was conducted on the anal swabs taken from Carol Ann Vanderhoeven, Valerie Chapman and Nasima Dema and vaginal swab taken from Michelle Samaraweera. The DNA profile obtained from the vaginal swab was referred to by the forensic scientist as "Unknown 1". DNA profiles obtained from the anal swabs matched the profile of "Unknown 1" thus showing that the same male was responsible for all four attacks.

5. During the course of investigation, two shopping bags and a till receipt were found near Michelle Samaraweera's body in the playground on Queen's Road. These items indicated that she had been in the Somerfield store on Markhouse Road, Walthamstow, shortly before she was killed. Later that afternoon, CCTV footage was seized from the Somerfield store where she was seen entering the store at 1:00 A.M. on 30th May 2009. At 1:06 A.M., an Asian male was also seen entering the store. Less than a minute and a half later he left without purchasing anything from the store after which the victim left at 1:12 A.M.

6. In October 2010, the police investigation team was set up led by DS Stephen Lynch. Pursuant to this a poster was drawn up containing three of the CCTV stills in order to seek help from the public in identification of the person.

7. On 10th November 2010, a member of the public, Kashif Siddiq saw one of the posters and recognised the male in the images as an ex-employee of his namely Aman Vyas (Petitioner herein). Kashif Siddiq used to run a number of dry-cleaning stores in the London area. He stated that the Petitioner worked in one of his stores between September 2008 and June 2009. He recognised the Petitioner from the distinctive jacket he was wearing in the CCTV images as he had seen him wear the same on multiple occasions. He then contacted the police officers and provided them a copy of the petitioner's passport. He also informed them that the petitioner had a brother namely Raja Vyas who was also his employee. Two days later on 12th November 2010, Kashif Siddiq witnessed Raja Vyas drinking from a water bottle. He decided to seize the bottle, in belief that it may contain DNA which could be linked to Aman Vyas. The bottle was handed over to a

police officer later that day.

8. DNA profiling was carried out on the water bottle and the DNA profile of Raja Vyas was thereby obtained. “Sibship” testing was then completed, comparing the profile obtained from Raja Vyas to the DNA profile obtained from the vaginal swab taken from Michelle Samaraweera. As per the report of the forensic scientist, the results provided strong support for the view that the crime stain originated from a full sibling of Raja Vyas. Y-STR profiling conducted by another scientist supported that assertion.

9. Police inquiries indicated that the petitioner had only one full brother namely Raja Vyas. Therefore a letter of request was sent to the Indian authorities requesting for taking of a sample from Aman Vyas for the purpose of comparison with the DNA profile “Unknown 1”.

10. Police Investigation revealed that the petitioner first entered the United Kingdom on 7th November 2004 on a work permit. He left the country at some stage and re-entered on 16th November 2007 on a student visa. On 1st July 2009, the petitioner purchased a one-way ticket from London to New Delhi.

11. Learned Additional Chief Metropolitan Magistrate, Delhi completed the inquiry and passed the final extradition enquiry report vide impugned order dated 17th December 2018, which was accepted by the Union of India and the same was communicated to the petitioner vide the impugned letter dated 4th February 2019.

12. Learned counsel for the petitioner challenges the final order cum inquiry report dated 17th December 2018 passed by the learned ACMM on three grounds. Firstly, that the extradition is not permissible qua a suspect. He claims that the procedure as per UK Law is that a draft indictment has to

be prepared before a request for extradition can be made. He submits that extradition is not permissible for investigation purposes but only for trial, the objective behind being not to give extraordinary power to the requesting state. He further submits that as per Article 1 of the treaty, the states are under a duty to extradite '*any person who being accused or convicted of any extradition offence*'. Thus, only an accused or a convicted person can be extradited. Article 1 nowhere provides for extradition of a suspect. While stating that there is a difference between a suspect and an accused, learned counsel places reliance on the decision of the Bombay High Court reported as 2009 SCC Online Bom 1021 Rajni Vishram Patil v.CBI and 2011 SCC Online Bom 100 Gyanchand Verma v. Sudhakar B. Pujari.

13. Learned counsel states that the intent of the Extradition Act was that arrest and interrogation is not necessary for the purpose of investigation and it is for the investigating agency to first collect material and if then there is a requirement of arrest, same should be resorted to. The petitioner in the present case is only a suspect as no chargesheet/draft indictment has been filed against him.

14. Finding of the Learned Metropolitan Magistrate is incorrect as it has been noted that Article 11(3) nowhere provides that the documents must show that the fugitive criminal should be committed for trial for the proceedings of extradition to take place qua the fugitive criminal nor does the provision contemplate any difference between the terms 'suspect' and 'convict'. He further places reliance on para 1.8 of The Code for Crown Prosecutors according to which the term "*suspect*" is used to describe a person who is not yet the subject of formal criminal proceedings. As per the Crown Prosecution Service - Drafting the Indictment, Indictment is defined

as “*the document containing the charges against the defendant for trial in the Crown Court*”

15. The second ground for challenge to the impugned inquiry report is that the documents and facts on record are not sufficient to make out prima facie an extraditable offence against the petitioner and thirdly with respect to the scope of enquiry. Learned counsel for the petitioner has made combined submissions on the second and the third issues.

16. He states that as per section 7(3) and (4) of the Extradition Act, the Court is only to satisfy itself that a prima facie case exists in support of the extradition. He further submits that as per the DNA Report, it was observed that the Y-STR profiles were not unique and it was likely that other non-paternally related men in the general population will have the same Y-STR profile as obtained from the vaginal swab and the water bottle. He further submits that the state has failed to annex any document with any alleged note of the victim identifying the petitioner as the person who committed the said offence. The respondent has only attached copy of the statement of Stephen Lynch sworn on 18th January 2012 at UK where he claims that he visited Carol Vanderhoeven who identified the petitioner as the person who committed the crime. From the statement of Stephen Lynch it is evident that a letter dated 13th December 2011 was issued by the Ministry of Internal Affairs to show a photograph of the Fugitive Criminal to all the victims. The copy of this letter has also not been made a part of the inquiry proceedings. He further submits that the email dated 17th January 2019 is not reliable as the same has not been authenticated under Section 10 of the Extradition Act. The documentary proof submitted with the extradition request is an affidavit of Craig Bradley, Detective Inspector wherein he has provided DNA link

between the appellant and the four victims of the crime. Moreover, the DNA was obtained from a water bottle produced by Kashif Siddiq, former employer of the appellant and his brother. He submits that the DNA obtained could be of his brother. Since the appellant and his brother have similar physical features there is a possibility of misidentification by the victims. Furthermore, the DNA profiling has not been done by the Indian Government to warrant the claims of the requesting state. He submits that the documents filed with the extradition request are insufficient for committal. He further relies on a document of The Crown Prosecution Service regarding Import Extradition - Outside the European Union wherein he refers to Para 4.7 on how draft extradition request is to be prepared setting out in full all charges for which extradition is sought. Reliance is placed upon the judgment of the Supreme Court reported as (1994) 3 SCC 440 Directorate of Enforcement v. Deepak Mahajan.

17. Learned counsel for the petitioner further challenges the letter of the Union of India dated 4th February 2019 on two grounds. Firstly, that at the time of considering the recommendation of the inquiry officer, the Union of India has not applied its mind independently on the issues raised in the written submissions. The Union of India issued the one page letter not citing any reasons for declining the petitioner's submissions contrary to the provisions of Section 18 of the Extradition Act. Secondly, that the Union of India has passed the final order under Chapter III of the Extradition Act whereas Chapter II applied to the present case since there is an extradition treaty that exists between the requesting and requested State. Thus there is non-application of mind by the Union of India. The impugned letter be therefore set aside. Reliance is placed on the decision of the Delhi High

Court reported as 2008 SCC Online 1048 Ram K. Mahbubani v. UOI & Anr.

18. Learned Standing Counsel for the Central Government broadly made submissions on two issues. Firstly, whether the petitioner is an accused or not as per Section 2(f) of the Extradition Act. He submitted that the word accused is used in its broadest generic sense in Section 2(f) of the Extradition Act which defines 'Fugitive Criminal' to mean a person against whom there is an accusation of having committed a crime. It would include a person who is formally charged and also someone who is not formally charged but facing an accusation. It would also include a person against whom a warrant has been issued in respect of that very accusation. He further submits that an accused would include a person against whom circumstances point towards likelihood of having committed an offence and even against whom there is a reasonable suspicion of offence. Therefore, the word 'accused' can have different meanings and the interpretation is always contextual. Reliance was placed upon the judgment of the Supreme Court reported as (1994) 3 SCC 440 Directorate of Enforcement v. Deepak Mahajan. Reliance was also placed upon the decision of the Allahabad High Court reported as AIR 1958 All 293 Amin & Anr. v. The State.

19. He further submitted that there is no difference between charge, accusation etc in the Extradition Act and those stages have not been discussed by the legislature, deliberately in the Extradition Act. He also submitted that the word 'prima facie' has been specifically used in Section 7(3) of the Extradition Act and the law is set into motion by way of a requisition and no reference is made to a charge or an indictment. Furthermore, Section 19 in Chapter IV of the Extradition Act does not talk of a charge but only an accusation of having committed a criminal offence is

required. In his reply to the petitioner's submission with respect to para 42 of the Bombay High Court judgment in Rajni Vishram Patil v. CBI (supra) he stated that the word 'suspect' as referred to in the judgment would come under the purview of Section 2(f) of the Extradition Act. He further quoted Sections 41(1)(b), 42(1), 169, 227, 273 and 436 of the Code of Criminal Procedure to show that the word 'accused' has been used in the broadest sense even in these provisions. He states that the petitioner in the present case is not a suspect but an accused which is made clear from the letter dated 4th February 2019 received from the UK authorities clarifying his status as an accused.

20. Secondly, he dealt with the issue of the standard of proof in an inquiry under Section 5 and 7 of the Extradition Act. He submitted that test to be applied is whether a prima facie case is made out as laid down under Section 7(3) of the Extradition Act and by the Supreme Court in the decision reported as (2008) 2 SCC 417 Sarabjit Rick Singh v. Union of India. He submitted that the evidence on record against the petitioner satisfies the prima facie case as per the requirement of Section 7(3) of the Extradition Act and as prescribed under Sarabjit Rick Singh (supra).

21. He further submitted that the direction to the petitioner to file his written submission under Section 17(3) of the Extradition Act was a typographical error and the inquiry was in fact conducted under Chapter II by the Magistrate.

22. Heard learned counsel for the parties.

23. Section 2(f) of the Extradition Act defines a 'fugitive criminal' as under:

“2 (f) “fugitive criminal” means a person who is accused or

convicted of an extradition offence within the jurisdiction of a foreign State and includes a person who, while in India, conspires, attempts to commit or incites or participates as an accomplice in the commission of an extradition offence in a foreign State”

24. Learned counsel for the petitioner to contend that he is merely a suspect and thus, not liable to be extradited, has vehemently relied upon decision of the Bombay High Court in Rajni Vishram Patil v.CBI (supra) wherein it was held:

“42. There is a fine distinction in law between a suspect and an accused. A suspect is a person against whom evidence and circumstances point towards the likelihood of a commission of an offence. An accused is a person against whom the investigating agency has sufficient material to show, at least prima facie, that he is involved in the crime and has committed an offence punishable under the provisions of the IPC. The Wednesbury principle has often been applied by courts in civil and/or writ jurisprudence. In Holgate-Mohammed v. Duke,¹⁴ the House of Lords considered various aspects of criminal investigation and tested them on the touch-stone of the Wednesbury principle. It was held thus-

”.....Lord Green M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223, that have become too familiar to call for repetitious citation. The Wednesbury principles, as they are usually referred to, are applicable to determining the lawfulness of the exercise of the statutory discretion of a constable under section 2(4) of the Criminal Law Act 1967, not only in proceedings for judicial review but also for the purpose of founding a cause of action at common law for damages for that species of trespass to the person known as false imprisonment, for which the action in the instant case is brought.

The first of the Wednesbury principles is that the discretion

must be exercised in good faith. The judge in the county court expressly found that Detective Constable offin in effecting the initial arrest acted in good faith. He thought that he was making a proper use of his power of arrest. So his exercise of that power by arresting Mrs. Holgate-Mohammed was lawful, unless it can be shown to have been "unreasonable" under Wednesbury principles, of which the principle that is germane to the instant case is: "He [sc. the exerciser of the discretion] must exclude from his consideration matters which are irrelevant to what he has to consider."

As Lord Devlin, speaking for the Judicial Committee of the Privy Council in Hussien v. Chong Fook Kam [1970] A.C. 942, 948, said:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.' Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage...."

i.e. bringing the suspect before a magistrates' court upon a charge of a criminal offence. The other side of the same coin is where the investigation, although diligently pursued, fails to produce prima facie proof which, as Lord Devlin in the same case also pointed out (p.949), must be in the form of evidence that would be admissible in a court of law. When the police have reached the conclusion that prima facie proof of the arrested person's guilt is unlikely to be discovered by further inquiries of him or of other potential witnesses, it is their duty to release him from custody unconditionally: Wiltshire v. Barrett [1966] 1 Q.B. 312."

[Emphasis supplied]

25. In AIR 1958 All 293 Amin & Anr. v. The State (supra) it was held:

"89. We will take up these questions one by one. The term 'accused' or 'accused of an offence' is not defined either in the Evidence Act or the Criminal Procedure Code. The Dictionary

meaning of the word accused is to bring a charge against or to blame. In the Law Lexicon of British India by P. Ramanatha Aiyar 1940, 'accusation' is defined as the charging of a person with a crime. It is further mentioned in the Lexicon that 'to accuse' or 'threaten to accuse' of a crime is not restricted to the narrow meaning of accusation by course of law.

90. To place a person in the position of an accused, an oral accusation is not necessary for circumstances alone might point a finger towards him. In our opinion where evidence whether oral or circumstantial points to the guilt of a person and he is taken in custody and interrogated on that basis, he becomes a person accused of an offence. The mere fact that his name was not mentioned as an accused in the first information report will not take him out of the category of persons accused of an offence.

91. A confession made by such a person stands on the same footing as the confession made by a person specifically named in the first information report. In Phipson on Evidence (7th Edition) the opening paragraph of Chapter XXI dealing with confessions runs as follows:

"In criminal cases, a confession made by the accused voluntarily is evidence against him of the facts stated. But a confession made after suspicion has attached to or a charge been preferred against him, and which has been induced by any promise or threat relating to the charge and made by, or with the sanction of, a person in authority, is deemed not to be voluntary and is inadmissible."

92. It would thus appear that the moment suspicion attaches to a person, he for all purposes becomes an accused person and any self-incriminatory statement made by him subsequently is inadmissible in evidence against him, if it is induced by any promise, threat or violence. That these two appellants were persons accused of an offence, when they made disclosures against themselves cannot be doubted."

26. In (1994) 3 SCC 440 Directorate of Enforcement v. Deepak Mahajan (supra) it was held:

“81. The essence of the above decisions is that to bring a person within the meaning of ‘accused of any offence’, that person must assimilate the character of an ‘accused person’ in the sense that he must be accused of any offence.

92. A thorough and careful study of all the provisions of the Code manifestly discloses that the word ‘accused’ in the Code denotes different meanings according to the context in which it is deployed; in that sometimes the said word is employed to denote a person arrested, sometimes a person against whom there is an accusation, but who is yet not put on trial and sometimes to denote a person on trial and so on.”

102. From the foregoing discussion, it is clear that the word ‘accused’ or ‘accused person’ is used only in a generic sense in Section 167(1) and (2) denoting the ‘person’ whose liberty is actually restrained on his arrest by a competent authority on well-founded information or formal accusation or indictment. Therefore, the word ‘accused’ limited to the scope of Section 167(1) and (2) — particularly in the light of Explanation to Section 273 of the Code includes ‘any person arrested’. The inevitable consequence that follows is that “any person is arrested” occurring in the first limb of Section 167(1) of the Code takes within its ambit “every person arrested” under Section 35 of FERA or Section 104 of the Customs Act also as the case may be and the ‘person arrested’ can be detained by the Magistrate in exercise of his power under Section 167(2) of the Code. In other words, the ‘person arrested’ under FERA or Customs Act is assimilated with the characteristics of an ‘accused’ within the range of Section 167(1) and as such liable to be detained under Section 167(2) by a Magistrate when produced before him.”

27. Extradition Act does not contemplate that a person against whom a

charge-sheet has been filed only can be extradited. The word ‘Accused’ used in Section 2(f) of Extradition Act is a generic word and does not contemplate only a person against whom a charge-sheet has been filed and is facing trial. Even in Rajni Vishram Patil (supra) relied upon by learned counsel for the petitioner it was held that there being a fine distinction between a suspect and an accused, there is a thin line between the two of them and in the case of suspect it may not be capable of proof but in the case of an accused there may be a prima facie proof at the end, once the police investigation is complete. In Amin (supra) Allahabad High Court held that the moment suspicion attaches to a person, he for all purposes becomes an accused. From the documents produced before the Magistrate it is evident that the reference to the petitioner is as an accused and merely because in one document he has been referred to as a suspect it would not take the petitioner out of the ambit of Section 2(f). Further, para 1.8 of the Code of Crown Prosecutors notes that in the said Code, the term ‘suspect’ is used to describe a person who is not yet the subject of formal criminal proceedings; the term ‘defendant’ is used to describe a person who has been charged or summoned, the term ‘offender’ is used to describe a person who has admitted his or her guilt to a police officer or other investigator or prosecutor or who has been guilty in the court of law. It is thus evident that under the Code of Crown Prosecutors the term ‘suspect’ is used for a person against whom though no formal charge-sheet has been filed however he is accused of an offence. In Deepak Mahajan (supra) the Supreme Court dealing with the word ‘accused’ held that even in Section 167(1) & (2) Cr.P.C. the word ‘accused’ is used in a generic sense denoting the “person” whose liberty is actually restrained on his arrest by a competent authority on

well founded information of formal accusation for indictment. The word 'accused' denotes different meanings. Sometimes it is implied to denote a person arrested or not arrested, sometimes a person against whom there is an accusation but who is not yet put to trial and sometimes to denote a person on trial and so on. Even a person against whom there is a reasonable suspicion of having committed an offence would be an accused, even though the investigating agency may not be requiring him to arrest for completion of investigation.

28. Article 11(3) of the Extradition Treaty states that *“If the request relates to an accused person, it must also be accompanied by a warrant of arrest issued by a judge, magistrate or other competent authority in the territory of requesting state and by such evidence as, according to the law of the requested state, would justify his committal for trial if the offence had been committed in the territory of the requested state, including evidence that the person requested is the person to whom the warrant of arrest refers”*. Thus even as per Article 11(3) of the Extradition Treaty the requirement is not that a chargesheet has been filed, but the material placed is sufficient to justify committal for trial i.e. there is prima facie material to satisfy the requested state that the fugitive is involved in the offence/offences.

29. Contention of learned counsel for the petitioner that intent of Extradition Act was that arrest and interrogation is not necessary for the purpose of investigation and it is for the investigating agency to first collect material and if then there is any requirement of arrest, the same should be resorted to deserves to be rejected for the reason it would depend on case to case and in case some material can be collected without a formal arrest, the

investigating agency in such a situation may not go ahead with the arrest of the accused however if the material/evidence is not forthcoming without the arrest of the accused or the offence is very serious in nature or there is a likelihood of the accused person absconding, the arrest would have to be resorted to. Merely because no charge-sheet/draft indictment has been filed by the requesting State the same would not keep the petitioner in the realm of a suspect but an accused in terms of the law in India and liable to be extradited even if no charge-sheet/draft indictment has been filed. Learned counsel for the petitioner's reliance on the guidelines of the CBI to contend that request for an accused/fugitive can be initiated after charge-sheet is filed overlooks the initial paras of the guidelines which notes that the extradition of a fugitive from India to a foreign country or vice versa is governed by the provisions of the Indian Extradition Act, 1962. Thus contention of learned counsel for the petitioner at this stage that since no charge-sheet has been filed against him, he is only a suspect and thus cannot be extradited, deserves to be rejected.

30. The scope of inquiry by the Extraditing State has been laid down by the Supreme Court in Sarabjit Rick Singh v. Union of India (supra) as under:

“38. Section 10 of the Act provides that the exhibits and depositions (whether received or taken in the presence of the person, against whom they are used or not) as also the copies thereof and official certificates of facts and judicial documents stating facts may, if duly authenticated, be received as evidence. Distinction must be borne in mind between the evidence which would be looked into for its appreciation or otherwise for a person guilty at the trial and the one which is required to make a report upon holding an inquiry in terms of the provisions of the Act. Whereas in the trial, the court may look into both oral and documentary evidence which would enable it to ask

question in respect of which the accused may offer explanation, such a detailed procedure is not required to be adopted in an inquiry envisaged under the said Act. If evidence stricto sensu is required to be taken in an inquiry forming the basis of a prima facie opinion of the court, the same would lead to a patent absurdity. Whereas in a trial the court for the purpose of appreciation of evidence may have to shift the burden from stage to stage, such a procedure is not required to be adopted in an inquiry. Even under the Code of Criminal Procedure existence of strong suspicion against the accused may be enough to take cognizance of an offence which would not meet the standard to hold him guilty at the trial.

42. Existence of prima facie case or bringing on record credible evidence at the stage of commitment is again a requirement of a statute. Section 7 speaks of manner, the jurisdiction and power of the Magistrate. It does not set the standard of proof. What is necessary for passing a judicial order may not stricto sensu be necessary for making a report.

45. Consistent view of the courts of India in this behalf, however, appears to be that an inquiry conducted pursuant to the order of the Central Government is only to find out whether there was a prima facie case against the fugitive criminal for extradition to the treaty country. Mode and manner of inquiry has nothing to do with the rule in regard to standard of proof. (See Charles Gurmukh Sobhraj v. Union of India [(1986) 29 DLT 410 : 1986 RLR 7] and Nina Pillai v. Union of India [1997 Cri LJ 2358 (Del)] , Cri LJ paras 9 and 11.)

Information vis-à-vis evidence

50. The provisions of a statute, it is trite law, must be harmoniously construed. When a statute is required to be read with an international treaty, consideration of the provisions contained in the latter is also imperative. On a conjoint reading of Section 7 and Section 10 of the Act read with Paras 2 and 3 of Article 9 of the Treaty, we are of the opinion that the word “information” occurring in Section 7 [Ed.: The word “information” occurs in Article 9 of the Treaty. See para 17 supra. However, Sections 9 and 16 of the Extradition Act, 1962

do contain the word “information”, on the basis of which the Magistrate may issue an arrest warrant or a provisional warrant for apprehension as provided for under Sections 9 and 16, respectively.] could not mean an evidence which has been brought on record upon strict application of the provisions of the Evidence Act. The term “information” contained therein has a positive meaning. It may in a sense be wider than the words “documents and the evidence”, but when a document is not required to be strictly proved upon applying the provisions of the Indian Evidence Act or when an evidence is not required to be adduced strictly in terms thereof, the use of the word “information” in Section 10 of the Extradition Act as also Articles 9(2) and 9(3) of the Treaty becomes relevant. Documentary evidence, no doubt forms part of a judicial record; but then even in a court governed by the Criminal Procedure Code, 1973 documents are to be supplied only when the cognizance of the offence is taken. At this stage, therefore, the requirement of sub-section (5) of Section 173 of the Code of Criminal Procedure was not necessary.”

31. During the course of inquiry Union of India examined Shri D.K.Ghosh (PW-1) who proved the documents received from the requesting State which are as under:

- (a) Ex.PW-1/A is the Order No.T-413/53/2011 u/s 5 of the Indian Extradition Act, 1962.*
- (b) Ex.PW-1/B is the Extradition Treaty between the Government of Republic of India and the Government of United Kingdom of Great Britain and Northern Ireland, and other applicable laws.*
- (c) Ex.PW-1/C is the request through Note Verbale No.CH/667/2011 dated 24.08.2011 received from the Requesting State, i.e. United Kingdom for Extradition of FC Aman Vyas.*
- (d) Ex.PW-1/D is the Note Verbale accompanied by the duly authenticated documents received from the Requesting State through diplomatic channels.*

- (e) *Ex.PW-1/E is the certificate from Mr.Julian Gibbs, Extradition Section, Home Office, certifying that all the documents annexed therein were authenticated under the Seal of the Secretary of State Ex.PW-1/E1 to PW-1/E159 are the documents along with.*
- (f) *Ex.PW-1/F is the under giving details of the descriptions of the documents.*
- (g) *Ex.PW-1/G is the Note Verbale No.CH/96/2012 dated 30.01.2012 wherein the Requesting State forwarded supplementary/additional documents in the Extradition case of the FC.*
- (h) *Ex.PW-1/H is the letter dated 20.01.2012 from Emma Kelly, Extradition Section.*
- (i) *Ex.PW-1/J is the certificate of Mr.Julian Gibbs, Extradition Section, Home Office, dated 20.01.2011 certifying that all the documents are authenticated under the Seal of the Secretary of State.*
- (j) *Ex.PW-1/K are the documents including the picture of the FC.*
- (k) *Ex.PW-1/L is the Note Verbale No.CH/643/2012 dated 17.08.2012 sent by the Requesting State forwarding additional documents.*
- (l) *Ex.PW-1/M is the certificate dated 15.08.2012 of Rob McMorran, Extradition section certifying that all the documents are authenticated under the Seal of the Secretary of State.*
- (m) *Ex.PW-1/N are the documents along with its index and ribbon seal. Ex.PW-1/N1 are the nine documents including photograph of FC.”*

32. The case of the petitioner that even his brother could be an accused because of the purported DNA samples matching is an issue to be gone into during the trial, when the petitioner raises the said defence. An affidavit of

Andrew Northrop, Police Officer, Metropolitan Police has also been attached with the extradition request which contains the details of the CCTV footage of the night of the incident wherein the victim Michelle Samaraweera and the appellant have been captured. From the material as noted above, it is evident that prima facie there is sufficient material to charge-sheet and extradite the petitioner. Section 226 Cr.P.C. also contemplate that when there is a strong suspicion against an accused, charge be framed against him. Thus, even at the stage of framing of the charge the accused is in the realm of suspicion till the stage of conviction, whereafter charge can be said to be proved against him beyond reasonable doubt.

33. In 2008 SCC Online 1048 Ram K. Mahbubani v. UOI & Anr. (supra) it was held:

“12. This question was raised and clarified by the Division Bench in Charles Gurmakh Sobhraj v. Union of India, 29(1986) DLT 410, Maninder Pal Singh Kohli v. Union of India, 142(2007) DLT 209 (DB): 2007 (97) DRJ 178[DB] and by a Single Bench in Nina Pillai v. Union of India, 1997 I AD (Delhi) 463. Kamlesh Babulal Aggarwal v. Union of India, 2008 VI AD (Delhi) 37 was recently decided by a Division Bench of which one of us (Vikramajit Sen, J.) was a member holding, inter alia, that (a) Section 7 is independent of Section 17, (b) the enquiry under Section 7 is similar to an indictment or the framing of charges under Section 228 of the CrPC and (c) under Section 7(3) and (4) of the Extradition Act the Court is only to satisfy itself that a prima facie case exists in support of the requisition for extradition. The Special Leave Petition against this Judgment has been dismissed by the Supreme Court on 15.5.2008. In Sarabjit Rick Singh v. Union of India, 2008 I AD (Cr.) (S.C.) 161 : 2008 (100) DRJ 257[SC], the request of the USA for extradition of the Petitioner was ‘recommended’ by

the learned ACMM, Delhi, which Order was affirmed by the Division Bench of this Court. Their Lordships have opined that in extradition proceedings “no witness is examined for establishing an allegation made in the requisition of the foreign state..... No formal trial is to be held. whereas the contents of a documents is to be proved for the purposes of trial but not for the purposes of arriving at an opinion in regard to the existence of a prima facie case in an enquiry. Strict formal proof of evidence in extradition proceedings is not the requirement of law”. By virtue of Section 7, the Magistrate has the power, inter alia, to take such evidence as may be produced in support of the requisition of the foreign state on the one hand and on behalf of the fugitive criminal on the other.”

34. From the evidence as noted above, collected scientifically from the matching of the DNA profiling as also the CCTV footages including copies whereof have been sent along with the statements of the relevant witnesses, this Court is of the considered opinion that the material produced before the learned Metropolitan Magistrate was sufficient to make out a prima facie case against the petitioner for having committed the alleged offences and keeping itself within the confines of requirement of law to conduct the enquiry, the learned ACMM committed no error in passing the final order-cum-enquiry report dated 17th December, 2018.

35. Challenging the impugned letter dated 4th February, 2019 of the Union of India, learned counsel for the petitioner primarily challenges the same on the ground that there is non-application of mind and in detail the written submissions of the petitioner have not been dealt by way of a reasoned order and a half page letter citing no reasons have been issued. In the letter dated 4th February, 2019 it is clearly noted that the pleas taken by

the petitioner in the written submissions were the same which were taken by the petitioner before the learned ACMM and have been dealt in detail. Thus, the petitioner cannot claim that the letter of the Union of India fails to consider his written submissions or suffers from non-application of mind and is thus liable to be set aside.

36. As regards the letter having been issued under Chapter III and the petitioner being asked to furnish written statements under Section 17 of the Extradition Act as noted above, learned counsel for the Union of India has fairly stated that to the facts of the case Chapter II would apply and Chapter III, since there is an extradition treaty between requesting and the requested State and the use of Section 17 was a typographical error.

37. This contention was also repelled by the Supreme Court in Ram K. Mahbubani (supra) wherein it was held:

“15. We do not find any provision in the Extradition Act which renders it applicable only if a Treaty or an Arrangement has been entered into between India and the said foreign countries. A requisition for extradition can always be made, but in the absence of a Treaty or an Arrangement, India has the unfettered right not to accede to the request for extradition. The Indo-US Treaty, in terms, notifies that the provisions of the Extradition Act, other than Chapter-III, shall apply. It is indeed paradoxical that Mr. Mathur, learned Senior Counsel for the Petitioner, contends before us that it is Chapter-III which must be complied with in the present case. As we have already analysed. Chapter-III expects almost negligible exercise of judicial mind, which no fugitive criminal would want if another choice is available. If Chapter-III were to apply, and Mr. Mathur's arguments necessarily implies that Chapter-II does not apply, the Magistrate would not be required even to form a prima facie opinion, that the case as contained in the Requisition, is made out. All that is expected of the Magistrate is to ensure the existence of an endorsed warrant for the

apprehension of the Petitioner, and that it is duly authenticated, and that the offence of which the petitioner is accused is an extradition offence. As per Section 17 he would then have no discretion but to commit the Petitioner to prison to await his return regardless of whether there is or is not any substance in the charges or indictment.

16. Extradition offence has been defined in Section 2(c) of the Extradition Act to mean (i) in relation to a foreign State, being a Treaty state, an offence provided for in the Extradition Treaty with that State; (ii) in relation to a foreign State other than a Treaty State an offence punishable with imprisonment for a term which shall not be less than one year under the laws of India or of a foreign State. Since the powers of the Magistrate are much wider as envisaged in Section 7 than what is contemplated by Section 17, it is conceivable that when a requisition is received, to which Chapter-III applies, the Magistrate concerned would be expected to do no more than to ascertain that the offence in the Requisition is also an offence in both countries attracting imprisonment for a term of not less than one year; or that it is in fact an offence mentioned in the Treaty exchanged between India and the requisitioning State. The Magistrate would not have to conclude that a prima facie case has been made out. In actual terms, the fugitive criminal would not be prejudiced if the provisions of the Chapter-II rather than Chapter-III of the Extradition Act are applied. A writ of Habeas Corpus would normally not issue where no prejudice is caused to the Petitioner and, to the contrary, he has received protection or consideration which is much wider and meaningful than what is provided under the statute. We have perused the documents filed by the Respondents in the Court of learned ACMM, all of which have been authenticated in the manner provided by law, viz., a certificate of authentication has been issued by the Embassy of India in the USA. So far as the existence of an endorsed warrant is concerned as soon as the Government of India makes a request under Section 5 of the Extradition Act, the endorsement would be deemed to have come into effect. The Order dated 7.5.2007, as corrected by

Corrigendum dated June 11, 2007, constitutes such an endorsement. In any event, the discussion is academic and of little consequence since it is Chapter-II and not Chapter-III which is relevant to the case in hand.”

[Emphasis supplied]

38. In view of the discussion aforesaid, this Court finds no ground to interfere either with the impugned order or inquiry report of the learned Trial Court dated 17th December, 2018 or the letter of the Union of India dated 4th February, 2019.

39. Petitions and the applications are accordingly dismissed.

JULY 15, 2019
‘ga’

(MUKTA GUPTA)
JUDGE

न्यायमेव जयते