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

CRL.REV.P. 291/2018

Date of Decision: 09.12.2019

IN THE MATTER OF:

STATE

..... Petitioner

Through: Ms. Radhika Kolluru, APP.

versus

RAKESH

..... Respondent

Through: Mr. Dushyant Chaudhary and Mr. Jaiveer, Advocates.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

MANOJ KUMAR OHRI, J. (ORAL)

1. The present revision petition has been filed by the State assailing the impugned order of discharge dated 15.12.2017 passed by Addl. Sessions Judge, Karkardooma Courts, Delhi in SC No. 37/2017 arising out of FIR No.55/2013 registered U/s 363/376 IPC read with Section 3 & 4 POCSO Act, Police Station Vivek Vihar.

2. Ms. Radhika Kolluru, learned APP for the State has submitted that the impugned order was passed only on the basis of variance between the

statements of the prosecutrix recorded u/s 161 Cr.P.C and u/s 164 Cr.PC. It was submitted that the trial court erred in holding that in view of the statement recorded u/s 164 Cr.P.C, the previous statement recorded u/s 161 Cr.P.C cannot be read.

3. Learned counsel for the respondent has submitted that there is no infirmity in the impugned order. He has submitted that the date of birth of prosecutrix is not supported by any certificate. He further submitted that statement recorded u/s 164 Cr.P.C will prevail over the statement recorded u/s 161 Cr.PC.

4. I have heard the learned counsel for the parties and have gone through the case record.

5. A perusal of the statement of the prosecutrix u/s 161 Cr.P.C reveals that the prosecutrix has stated that she was student of Class XI and the respondent, being her *Jija* (husband of paternal aunt's daughter), came to school on 29.1.2013 and took her to see temple and Tajmahal. Thereafter she was taken to the respondent's maternal uncle home Mokhai Pur where they stayed on 31.01.2013 and 01.02.2013 during which time the respondent made forcible physical relation with her. On 02.02.2013 the prosecutrix was taken by respondent to his home at Faridabad and threatened not to tell the facts to anyone. In between the father of the prosecutrix has lodged a missing report on 29.01.2013. In her statement recorded U/s 164 Cr.P.C, the prosecutrix did not level any allegation of forcible physical relation.

6. During course of the investigation, the investigating officer had seized various exhibits as well as the clothes of the victim and sample of the accused and sent them to FSL for analysis. At the time of filing of *Crl. Rev. P. 291/2018*

the chargesheet, it was stated that the FSL report is awaited and will be filed as and when received.

7. During investigation, the IO collected a certificate from the school of the prosecutrix where date of birth is recorded as 02.04.1997. It was further stated that on 02.08.2002 the prosecutrix was admitted in class I vide admission serial No. **7966** and passed her class V on 26.03.2007.

8. The FSL report has been placed on record. As per the DNA analysis, the alleles from the source of exhibit 3 (blood stained gauze cloth piece of respondent) are accounted (matching) in the alleles from the source of exhibit of clothes and microslides of vaginal secretion of the prosecutrix.

9. The prosecutrix was medically examined on 02.02.2013. As per medical examination, the hymen was found 'torn'.

10. It is settled law that at the stage of charge, the test is of strong suspicion. The Supreme Court in the case of Dipakbhai Jagdishchandra Patel v State of Gujarat and Anr., reported as **2019 SCC OnLine SC 588**, reiterated the test at the stage of charge laid down in State of Bihar v. Ramesh Singh reported as **(1977) 4 SCC 39**, in which it was held as under: -

"Reading SS. 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at the beginning and 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 S.227 or S.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.

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 S.227 or S.228, then in such a situation ordinarily and generally the order which will have to be made will be one under S.228 and not under S.227."

11. Similarly, in the case of Union of India v. Prafulla Kumar Samal & Anr. reported as (1979) 3 SCC 4, it was held follows:-

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a

Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

12. In the present case, the trial court without appreciating the MLC and without awaiting the FSL report committed grave error in discharging the respondent. As per the FSL report, the DNA analysis of the exhibits supports the prosecution case. Further, the MLC also mentions that the hymen of the prosecutrix was torn. At the stage of framing of charge, all that is required to be done by the Court is that it must be satisfied that on the material available on record whether prima facie case is made out against the accused or not. When there is strong suspicion that the accused has committed an offence, then the Court will be obliged to proceed against the accused.

13. Accordingly, the impugned order of discharge is set aside. The matter is directed to be listed before the concerned court on 15.01.2020.

14. A copy of this order be sent to trial court for information and compliance.

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 09, 2019

SSC