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

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Date of Decision: 05.02.2020

+ CRL. REVP. 114/2020

ANITA

..... Petitioner

Through Mr. Ajit Nair, Advocate

versus

STATE & ANR.

.... Respondents

Through Ms. Rajni Gupta, APP for the State
(R-1) alongwith ASI Raghubir
Prasad-P.S. Naraina

CORAM:

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

RAJNISH BHATNAGAR J. (ORAL)

CRL. M.A. 2647/2020 (Exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

CRL. M.A. 2646/2020 (Condonation of delay)

Heard on the application.

In the facts and circumstances as mentioned in the application, the application is allowed and delay is condoned. The application stands disposed of.

CRL.REVP. 114/2020 & CRL. M.A. 2645/2020 (Stay).

1. Issue notice. Ld. APP for the state who appears on advance notice accepts notice.

2. The present revision petition has been filed by the petitioner with the following prayers :

(a) Orders be passed to call for Records of the Case S.C. No. 141/19 titled "State V. Gulshan and Ors' in FIR No. 02/2019 P.S. Naraina pending before the Court of Smt. Ruby Alka Gupta, Special Court POCSO, Additional Sessions Judge-01, New Delhi District, Patiala House Courts, Delhi for the date 03/03/2020.

(b) Order be passed to allow the Crl. Rev. Pet. for setting aside the charges against the petitioner which has been framed by the impugned orders on charge dated 16.10.2019 & 15.11.2019 by Smt. Ruby Alka Gupta, Special Court POCSO, Additional Sessions Judge-01, New Delhi District, Patiala House Courts, Delhi in the matter S.C. No. 141/19 titled "Stae V. Gulshan and Ors' in FIR No. 02/2019 P.S. Naraina."

3. The victim "A" made a statement U/s 164 Cr.P.C wherein she stated as follows :

" I was present in my house alongwith my sister and was watching TV. My mother alongwith my brother had gone to bring medicines and my father was on duty. In the meanwhile Gulshan and his uncle entered the house as the gate was open. I asked them why they had come but they did not speak and pushed me on the bed. Uncle caught hold of my hands and Gulshan started opening the string of my

salwar. When he was not able to open the string of my salwar, he tore my salwar. When my sister tried to save me then Mausi of Gulshan caught hold of my sister. I gave leg blow to Gulshan who fell down. He again tried to come towards me but in the meanwhile my mother came and my mother tried to stop him. Gulshan kicked my mother in her stomach. His uncle collected the neighbours and asked them to beat us. My father called the police. On 19.08.2018 Gulshan had stopped my sister and asked her to kiss him. When I went there he threatened us that I should not disclose this to anybody otherwise I know that my father goes to office alone. On 20.08.2018 Gulshan had sought pardon."

4. The statement of the sister of the victim who as per the prosecution was also present at the spot was also recorded U/s 164 Cr.P.C. which reads as follows :

"Gulshan and his uncle tried to rape my sister. Uncle of Gulshan had caught the hands of my sister and Gulshan was trying to open the string of her Salwar and when he could not open the string of her Salwar he tore her salwar. When I tried to stop him his Mausi caught hold of me and gave beatings to me. In the meanwhile my mother also came and Gulshan gave a kick blow in the stomach of my mother.

Previously also on 19.08.2019 Gulshan had caught hold of my hand and asked for a kiss from me. He threatened me and my sister and said that your father goes to office and your mother remains at home so I will do something with them. He had asked for pardon but he did not mend his ways"

5. The only argument advanced by the counsel for the petitioner is that the petitioner has in no manner abetted the crime and she had arrived at the scene of incident after it has been committed by other co-accused. It is further argued that no charge U/s 452/34 IPC is made out against the petitioner because the petitioner was not present with the other accused

persons i.e. Gulshan and Kale when they entered the house, so there was no question of petitioner sharing common intention with the co-accused.

6. The Ld. counsel for the petitioner has relied upon ***Kulwant Singh @ Kulbansh Singh vs. State of Bihar***, (2007) 15 SCC 670 in which the Hon'ble Supreme Court held as follows:-

"11. Section 109 IPC reads as follows:

"109. Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment—Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Illustrations

(a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in Section 161.

(b) A instigates B to give false evidence. B, in consequence of the instigation, commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(c) A and B conspire to poison Z. A in pursuance of the conspiracy, procures the poison and delivers it to B in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby

causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.”

12. Where a person aids and abets the perpetrator of a crime at the very time the crime is committed, he is a principal of the second degree and Section 109 applies. But mere failure to prevent the commission of an offence is not by itself an abetment of that offence. Considering the definition in Section 109 strictly, the instigation must have reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation. Section 109 is attracted even if the abettor is not present when the offence abetted is committed provided that he had instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to the conspiracy some act or illegal omission takes place or has intentionally induced the commission of an offence by an act or illegal omission. In the absence of direct involvement, conviction for abetment is not sustainable. (See *Joseph Kurian v. State of Kerala* [(1994) 6 SCC 535 : 1995 SCC (Cri) 20] .)"

7. On the other hand, it is submitted by the Ld. APP for the state that there is no infirmity in the impugned orders dated 16.10.2019 and 15.11.2019. It is further submitted by the Ld. APP for the state that the contention of the counsel for the petitioner that the petitioner cannot be charged U/s 452 with the aid of Section 34 IPC has no force in it. Ld. APP has further argued that as per the statement of the victim and her sister, co-accused Gulshan and Kale entered the room and Anita has also entered the

room without any purpose and while inside the room, she prevented the younger sister of the victim from saving her sister from the hands of accused Gulshan and Kale who were bent upon raping her. So Ld. APP has argued that in these circumstances, there is no infirmity in the charge against the petitioner U/s 452/34 IPC.

8. It is further submitted by the Ld. APP that petitioner prevented sister of the victim when she came to rescue her from Gulshan and Kale and thereby she abetted the continuance of the sexual assault upon the victim by the two co-accused persons which is evident from the statements of the victim and her sister recorded U/s 164 Cr.P.C.

9. It is further argued by the Ld. APP for the state that the petitioner by her act of preventing the younger sister of the victim from saving her at the hands of co-accused Gulshan and Kale who were continuing with the assault, had abetted the commission of the crime U/s 354 IPC and U/s 8 read with section 17 POCSO Act.

10. It has been vehemently argued by the Ld. counsel for the petitioner that petitioner had entered after the assault but this contention has no force as from the reading of the statements of the victim and her sister recorded U/s 164 Cr.P.C., the assault was continuing, otherwise, there was no occasion for the petitioner to prevent the sister of the victim when she was trying to rescue her sister.

11. The petitioner has played an active role in the commission of the crime. She has entered the house of the victim without any reason and upon entering and on seeing the sexual assault being committed upon the victim,

rather than coming to the aid of the victim, she prevented the younger sister of the victim from rescuing her sister who was under the assault from her co-accused Gulshan and Kale.

12. It is well settled law that at the stage of framing of charge, the court has power to shift and weigh the evidence for the limited purpose of finding out whether or not a prima-facie case against accused has been made out. When the material placed before the court discloses great suspicion against the accused which has not been properly explained, the court will be justified in framing charge. No roving inquiry into the pros and cons of the matter and evidence is not to be weighed as if a trial was being conducted. 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 of framing of charge exists.

13. To put it differently, if the courts were to think that the accused might have committed the offence it can frame a charge, though for conviction the conclusion is required to be that accused has committed the offence. At the stage of framing of a charge, probative value of the materials on records cannot be gone into, the material brought on record by the prosecution has to be accepted as true at that stage. The truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged, nor any weight is 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.

14. 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 this stage of deciding the matter under Section 227 or under Section 228 of the Code. 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. While deciding the question of framing of charge in a criminal case, the court is not to apply exactly the standard and test which it finally applies for determining the guilt or otherwise.

15. What is required to be seen is whether there is strong suspicion which may lead to the court to think that there is ground for presuming that the accused has committed an offence. The above proposition is supported with law laid down by the Hon'ble Apex Court and Hon'ble High Court reported as "*Union of India vs Prafulla Kumar*", AIR 1979 Supreme Court 366, "*State of Maharashtra and others vs Som Nath Thapa and other*" JT 1996 (4) SC 615, "*State of Bihar vs Ramesh Singh*", AIR 1997 SC 2018: (1997 CRI LJ 1606), "*Umar Amdula Sakoor Sorathia vs. Intelligence Officer Narcotic Control Bureau*" JT 1999 (5) SC 394, "*Kalu Mal Gupta vs. State*" 2000 I AD Delhi 107.

16. The judgment "supra" relied upon by the counsel for the petitioner is of no help to the petitioner because in that case the petitioner had not taken

the prosecutrix alongwith him and left her alone in the company of the co-accused who raped her so it was held that lack of due care and caution or not taking the intelligent decision cannot fasten a criminal liability and mere failure to prevent the commission of the crime is in itself not an abetment of the offence which is not so in the instant case where the petitioner had played an active role and did not allow the sister of the victim to save her from the hands of co-accused Gulsha and Kale and in the process abetted the commission of the crime.

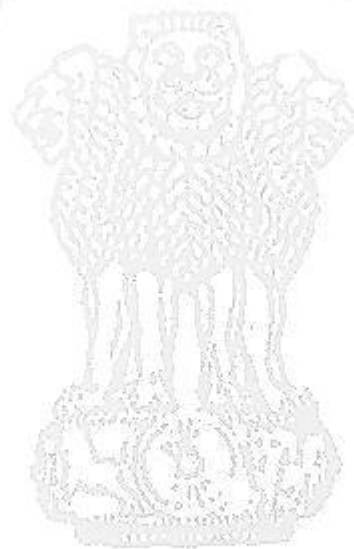
17. Therefore, in view of the above discussions, I am of the opinion that there is no infirmity in the impugned orders dated 16.10.2019 and 15.11.2019, the same are, therefore, upheld and consequently, the present revision petition is dismissed and CRL. M.A. 2645/2020 is also disposed of accordingly.

RAJNISH BHATNAGAR, J.

FEBRUARY 05, 2020

Sumant

HIGH COURT OF DELHI



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