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

% *Date of Judgment: 18th September, 2020*

+ **CRL. REV. P. 283/2020**

SUMIT @ TINKA

..... Petitioner

Through: Mr Ravinder Tyagi, Advocate.

versus

STATE (GOVT. OF NCT DELHI)

..... Respondent

Through: Mr Amit Gupta, APP for State
with SI Sunil, PS Keshav
Puram.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through video conferencing]

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition impugning an order dated 28.01.2020 passed by the learned Additional Sessions Judge, Rohini Courts in FIR no. 563/2018 under Sections 392/397/302/34 of the IPC and Sections 25/27 of the Arms Act, 1959 registered with PS Keshav Puram. By the impugned order, the learned Trial Court had held that there is a *prima facie* case to proceed against the petitioner for offences under Section 392/34, 302/34 of the IPC and under Section 25 of the Arms Act, 1959. The court had, accordingly, framed charges against the petitioner for committing the said offences.

2. Mr Tyagi, learned counsel appearing for the petitioner contends that the impugned order is palpably erroneous as there are no grounds

to charge the petitioner for committing offences punishable under Sections 392/34 of the IPC or Sections 302/34 of the IPC.

3. The FIR in question was registered on a statement made by one Mukesh Kumar (hereinafter the complainant). He had stated that he resides in Mangol Puri and is employed as a Field Executive in Apeksha International Footwear, Udyog Nagar, Delhi. He stated that on 26.12.2018 at about 02:15 pm, he had come on his motorcycle to ICICI Bank, Lawrence Road for remitting money through RTGS. He stated that after doing so, he left the bank to go to his office on his motorcycle. He stated that as he reached the underpass of Lawrence Road, two boys came on a motorcycle and hit his motorcycle by their motorcycle. The person, who was sitting pillion, took out a pistol in his left hand and showed it to him. He threatened the complainant that he would shoot him if he did not hand over his bag. The complainant stated that under the threat he handed over his bag, which contained a laptop, to the boy who was holding a pistol in his hand. He described the age of that boy to be about 25 to 30 years. He stated that his bag contained his duplicate driving license, original RC of his motorcycle, four ATM cards, passbook of SBI Bank, one mobile phone (Black coloured Nokia having no SIM), keys to his house, some blank cheques and cash of about ₹2,500/-. The complainant stated that when the boys were about to leave, he asked them to return the bag and told them there was nothing in it. The said boys told him not to follow them otherwise they would shoot him. He stated that he raised an alarm and started running behind the two boys. In the meantime, one

person riding a scooter came to his aid and the boy who had a pistol in his hand asked him to run away from the spot. However, the scooter rider did not comply. At that stage, the person who had a pistol in his hand, fired upon the said scooter rider and both the boys fled on their motorcycle along with the complainant's bag. The complainant stated that he called PCR and the PCR van took the injured (the scooter rider who had come to the aid of the complainant) to the hospital.

4. The said scooter rider was identified as Vinod Kumar Garg. He was declared brought dead by the hospital.

5. It is the case of the prosecution that the IO received secret information that one of the boys, who had given effect to the incident of murder and robbery at Lawrence Road Underpass, was present in a house at JJ Colony, Wazirpur.

6. The IO then proceeded to the given address and apprehended one boy named Mithun. On interrogation he stated that he had three other accomplices, namely, Sonu, Sagar @ Rahul and Tinka @ Sumit (the petitioner herein) who were also involved in the said incident.

7. The disclosure statement of Mithun was also recorded. He stated that he was married five years ago and he has a daughter aged about four years. He stated that he was on temporary duty with MCD and he is engaged in cleaning work. He stated that his salary is about ₹12,000/-. He had also subscribed to two chit funds and he was required to pay monthly installments of ₹10,000/- and ₹8,000/- respectively. He stated that he could not meet his ends on his salary

and was in perpetual need of money. He stated that he fulfils his needs by either borrowing or by committing petty offences. He further stated that he was friends with Sagar @ Rahul, Sonu and Tinka @ Sumit (petitioner) since the past ten years and they are also residents of JJ Colony, Wazirpur. He stated that Tinka (the petitioner) was also in need of money as his brother's wedding had been fixed in February 2019. He stated that all of them met in the morning on 26.11.2018 to make a plan for committing a robbery (*loot paat*). According to their plan, he and Tinka (the petitioner) would position themselves near Lawrence Road, Branch of ICICI Bank and they would look out for any person who would exit the bank with money. They would then indicate the same to Rahul and Sonu who would then rob that person of his money. He stated that Sonu also possessed a pistol (*katta*) which could be used to scare the victim. He stated that on the date of the incident, they were on two motorcycles. The petitioner was riding one motorcycle and he was riding pillion. The second motorcycle was being ridden by Rahul @ Sagar and Sonu was riding pillion with him. He stated that he and Tinka had positioned their motorcycle at the beginning of the underpass, while Rahul and Sonu positioned themselves at some distance behind. At about 02:15 pm, one person exited ICICI Bank with a bag and he gave an indication to Sonu and Rahul who were also positioned on a motorcycle at some distance away. He stated that Rahul and Sonu came on their motorcycle from behind and rammed into the motorcycle being driven by the complainant. Sonu who was riding pillion snatched the complainant's bag by threatening him with the *katta*. However, the victim had raised

an alarm. One person riding the scooter was passing by and he turned his scooter towards Sonu. He stated that Sonu became anxious (*ghabra gaya*) and in his anxiety pointed the *katta* towards that person and fired. The bullet struck the scooter rider and all of them (Mithun, Sonu, Tinka and Rahul) fled from the spot.

8. He stated that as per the plan they all met near Mukundpur Chowk. The petitioner was already present at the spot. He stated that all the boys were scared because of the incident of firing and, therefore, they did not go back home. They checked into a hotel (Blue Diamond Hotel, Shah Alam Bandh Road). He stated that the bag that was snatched by Sonu contained only ₹2500/- which were spent on paying the hotel bill and for their boarding (*khane peene me*). He stated that Sonu left home at night while the other three left for their respective houses in the morning of 27.12.2018.

9. Subsequently, Rahul and Sonu were also apprehended and their disclosure statements were also recorded. Sonu also narrated the manner in which the said robbery was effected. He stated that on examining the bag they had found ₹2,500/- which he removed from the bag and threw the bag near Punjabi Bagh. He also confirmed that in accordance with their plan, they all met at Mukundpur and he handed over the *katta* to Tinka (the petitioner herein). Sonu also disclosed that about twenty-twenty five days prior to the said incident that he along with Tinka, Rahul @ Sagar and one Neeraj had robbed ₹20,000/- from a shop on a gunpoint. Sonu stated that he knew the usual haunts of Tinka and he could assist in apprehending him. A final

report under Section 173 Cr.PC (Chargesheet) was filed against the accused Sonu, Mithun, Uma and Sagar @ Rahul. The petitioner was not apprehended at the material time and, therefore, a supplementary chargesheet was filed subsequently.

10. The learned ASJ heard arguments on Order on Charge and by an order dated 02.08.2019 directed that charges under Sections 392/397/34 IPC and Sections 302/34 IPC be framed against Sonu. Charges under Sections 392/34 IPC and 302/34 IPC be framed against Sagar @ Rahul. Charge under Section 212 IPC was framed against Uma. The accused Mithun was discharged as it was found that there was no evidence against him except CDR call records which established that he was at the vicinity of the incident at the material time. However, the call records indicated that he had not made any calls on the phones used by the other accused. The learned ASJ was of the view that sufficient material was not available on record to proceed against accused Mithun.

11. The petitioner was arrested in the present case on 09.06.2019. He had been arrested earlier on 25.05.2019 in another case (FIR No. 67/2019 under Sections 186/353/307/411 IPC) and had disclosed that he was also involved in robbery, which was committed on 26.12.2018. The petitioner also made a disclosure and his statement was recorded. In his disclosure statement, the petitioner stated that Sonu had handed over the *katta* to him at Mukundpur Chowk and he had buried the same in the bushes near his house. He disclosed that he had stolen the motorcycle from Jahangir Puri. The disclosure statement was recorded

on 09.06.2019. Subsequently, a supplementary disclosure statement was also recorded in relation to FIR No. 563/2018.

12. It is alleged that at the instance of the petitioner, the pistol (*katta*) used in commission of the offence was recovered. It is further stated that the report received from FSL has confirmed that the said shell which was recovered from the site of the incident was fired from the same pistol that was recovered at the instance of the petitioner. Thus, according to the prosecution, it is established that the pistol recovered at the instance of the petitioner was the weapon that was used in committing the offence and the petitioner was in possession of the same.

13. Mr Tyagi, learned counsel appearing for the petitioner contended that as per the case of the prosecution, the petitioner and his three accomplices had used two motorcycles. While the petitioner was riding one motorcycle with the accused Mithun sitting pillion, the other motorcycle was ridden by Rahul @ Sagar and, Sonu was riding pillion. He submitted that the offence of snatching the bag from the complainant and firing on the deceased was done by Sonu along with Rahul @ Sagar. He submitted that the petitioner and the accused Mithun were not involved in the incident and there was no material to proceed against them and, therefore, the learned ASJ had discharged the accused Mithun and even the prosecution did not appeal against the said decision. In view of the above, there were no grounds to proceed against the petitioner as well. He contended that the charge of committing an offence under Sections 392/34 and 302/34 IPC could

not be framed against the petitioner and at the most a charge under Section 25 of the Arms Act could be framed on the basis of the alleged recovery of the weapon. However, since the petitioner was not riding along with Rahul @ Sagar and Sonu, the charges for committing an offence under Section 392/34 and Section 302/34 IPC were not sustainable. Mr Tyagi also referred to certain photographs filed along with the present petition in support of his contention. He stated that the weapon could not have remained hidden as the place where the weapon was allegedly recovered is a public place and is also frequented by ragpickers.

14. This Court is of the view that at this stage, it is not necessary to evaluate the evidence in any detail as at this stage, this court has to merely ascertain whether there is strong suspicion founded on material that the accused has committed the offence. At the stage of framing of charges, the court has to presume that the material produced by the prosecution is true.

15. In *State of Tamil Nadu v. N. Suresh Rajan: (2014) 11 SCC 709*, the Supreme Court held as under:

“29. We have bestowed our consideration to the rival submissions and the submissions made by Mr. Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage

of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage.

30. Reference in this connection can be made to a recent decision of this Court in *Sheoraj Singh Ahlawat v. State of U.P.* [(2013) 11 SCC 476 : (2012) 4 SCC (Cri) 21 : AIR 2013 SC 52], in which, after analysing various decisions on the point, this Court endorsed the following view taken in *Onkar Nath Mishra v. State (NCT of Delhi)* [(2008) 2 SCC 561 : (2008) 1 SCC (Cri) 507] : (*Sheoraj Singh Ahlawat* case [(2013) 11 SCC 476 : (2012) 4 SCC (Cri) 21 : AIR 2013 SC 52], SCC p. 482, para 15)

“15. ‘11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out

if the facts emerging therefrom, *taken at their face value*, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What *needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even **strong suspicion** founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.*’ (Onkar Nath case [(2008) 2 SCC 561 : (2008) 1 SCC (Cri) 507], SCC p. 565, para 11)”

(emphasis in original)

31. Now reverting to the decisions of this Court in *Sajjan Kumar* [*Sajjan Kumar v. CBI*, (2010) 9 SCC 368 : (2010) 3 SCC (Cri) 1371] and *Dilawar Balu Kurane* [*Dilawar Balu Kurane v. State of Maharashtra*, (2002) 2 SCC 135 : 2002 SCC (Cri) 310], relied on by the respondents, we are of the opinion that they do not advance their case. The aforesaid decisions consider the provision of Section 227 of the Code and make it clear that at the stage of discharge the court cannot make a roving enquiry into the pros and cons of the matter and weigh the evidence as if it was conducting a trial. It is worth mentioning that the Code contemplates discharge of the accused by the Court of Session under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on a police report are dealt with in

Section 245. From a reading of the aforesaid sections it is evident that they contain somewhat different provisions with regard to discharge of an accused:

31.1. Under Section 227 of the Code, the trial court is required to discharge the accused if it “considers that there is not sufficient ground for proceeding against the accused”. However, discharge under Section 239 can be ordered when “the Magistrate considers the charge against the accused to be groundless”. The power to discharge is exercisable under Section 245(1) when, “the Magistrate considers, for reasons to be recorded that no case against the accused has been made out which, if unrebutted, would warrant his conviction”.

31.2. Section 227 and 239 provide for discharge before the recording of evidence on the basis of the police report, the documents sent along with it and examination of the accused after giving an opportunity to the parties to be heard. However, the stage of discharge under Section 245, on the other hand, is reached only after the evidence referred in Section 244 has been taken.

31.3. Thus, there is difference in the language employed in these provisions. But, in our opinion, notwithstanding these differences, and whichever provision may be applicable, the court is required at this stage to see that there is a prima facie case for proceeding against the accused. Reference in this connection can be made to a judgment of this Court in *R.S. Nayak v. A.R. Antulay* [(1986) 2 SCC 716 : 1986 SCC (Cri) 256]. The same reads as follows: (SCC pp. 755-56, para 43)

“43. ... Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of ‘prima facie’ case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial court is satisfied that a prima facie case is made out, charge has to be framed.”

16. According to the prosecution, there is sufficient material to establish that the weapon recovered at the instance of the petitioner is the weapon that was used in committing the offence and fatally injuring Vinod Kumar Garg. While it is correct that it is the prosecution’s case that the fatal bullet had been fired by accused Sonu; however, the prosecution also alleges that he had not acted alone but in conspiracy with the other accused including the petitioner. The recovery of the weapon used in the offence at the instance of the petitioner and his disclosure statement that the same was handed over by the accused Sonu to him at Mukundpur where they had met as earlier planned, does link the petitioner to the offences for which he is charged. The question whether the prosecution is able to lead sufficient evidence to meet the standards of proof required for convicting the petitioner is another matter and this Court is not required to examine the same at this stage.

17. Mr Tyagi had also referred to the decision of the Division Bench of this Court in *Saddak Hussain v. State (NCT of Delhi)*:

CRL.A. 717/2018, decided on 15.05.2019, whereby the appellant was acquitted. He contended that the prosecution's evidence against the appellant in that case was similar to the material that has been coalesced by the prosecution in this case. He submitted that if a person cannot be convicted on the basis of such evidence, framing of a charge on the basis of such material is also impermissible. The said contention is unpersuasive. The decision in the case of **Saddak Hussain** (*supra*) was rendered on the facts of that case. In that case, the Trial Court had accepted that there were contradictions in the testimony of the eye witnesses, which raised a doubt about their presence at the scene of the crime. In view of the doubts raised, the Trial Court had acquitted the accused who had allegedly fired the weapon. It is in that context that the Court held that having acquitted the accused who had allegedly fired the shot, the appellant therein could not be convicted of an under Section 302 IPC on the ground that the weapon had been recovered at his instance. In the present case, the prosecution is yet to lead the evidence.

18. In view of the above, this Court finds no reason to interfere with the order passed by the learned ASJ framing charges under Section 392/34 IPC; 302/34 IPC and Section 25 of the Arms Act. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

**SEPTEMBER 18, 2020
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