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

CRL. REV. P. 104/2016 & CRL. M.A. 2433/2016

Reserved on : 28.01.2020

Decision on : 29.01.2020

IN THE MATTER OF:

VIKAS

..... Petitioner

Through: Mr. Sidharth Aggarwal, Advocate
with Mr. Aditya Singla, Ms. Supriya
Juneja, Ms. Cheshta Jetly, Mr.
Sidharth Satija & Mr. Ravi Pathak,
Advocates

versus

STATE (NCT) OF DELHI

..... Respondents

Through: Ms. Manjeet Arya, APP for State with
SI Rajender Singh, P.S. Malviya
Nagar
Ms. Mallika Parmar, Advocate
(DHCLSC) for respondent No. 2

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present petition is directed against the order on charge dated 06.01.2016 and order dated 21.01.2016 whereby the trial court has framed charge against the petitioner for the offence punishable under Sections 417/376 IPC in FIR No. 1561/2015 registered at P.S. Malviya Nagar.

2. The brief facts of the case, as noted in the impugned order, are as follows :-

“1. The case of the prosecution as per the chargesheet is that on 14.08.2015 the prosecutrix gave her statement in police station Malviya Nagar stating to the following effect: She was living with her 3 children in a rented accommodation. Since the past 2 years she was staying in different rented accommodations in Chirag Delhi. She was a permanent resident of village Kalani in district Gorakhpur Uttar Pradesh. Her one daughter was living with her in-laws. When she was living in her in-laws house in Bihar her husband used to beat her because of this she became fed up and came with someone to Chirag Delhi. Here she started doing the job of cooking in houses. After 10 years of coming to Delhi her husband also came to Chirag Delhi. He used to beat her. In September 2014 she along with her children and husband started staying in T-265 Chirag Delhi. One day when her husband was beating her the accused who was living in the opposite house got her freed from her husband and assured her that he was unmarried. He assured her that he would look after her and her children and would bear all the expenses and that she should stay with him. He told her to leave her husband. She believed the accused and the accused used to come to her room and established physical relations with her. The accused took full advantage of her helplessness. Because of these reasons her husband left her and went away. Since September 2014, the accused established physical relations with her in her rented accommodation and also in his house. It was on 18.07.2015 that he for the last time in her room had physical relations with her. About 15 days before her filing her complaint the accused went away somewhere. The accused had taken advantage of her helplessness and established physical relations with her. Now she learnt that the accused was married and his wife are living in Ghaziabad. The accused played with her honour and established physical relations with her and now had left. She wanted legal action against him.

2. On the basis of the above complaint of the prosecutrix

the FIR was lodged under Section 376 IPG. On 17.08.2015 the statement of the prosecutrix was recorded under Section 164 Cr.P.C. Wherein she stated to the following effect: She worked as a domestic help in houses. She came from her village in Gorakhpur 2 years back. Her husband used to beat her that is why she left her house and came to Delhi in search of work. Her husband also after 10 days came to Delhi. After coming here he used to fight with her as he did earlier. 3 to 4 times she had to change her house as because of the fights no one was ready to keep them for long. One day her husband beat her and she got badly hurt. Her husband ran away. Since then she did not allow her husband to enter the house, in Chirag Delhi in front of her house the accused was living. Everyday he used to see them fighting. About 5 months back when her husband ran away the accused gave the false promise of marriage. When earlier there used to be fights and her husband used to go away the accused used to come and stay with her. For the past 8 months he was living with her as husband and wife. The accused did not tell her that he was already married. For the past 8 months he was establishing physical relations with her saying that he would marry her. About 20 days back the accused ran away. He had also switched off his phone. Thereafter she filed a police complaint The prosecutrix was taken for her medical examination however, she refused to undergo a gynaecological examination. The accused was arrested. He was sent for his medical examination. The site plan was prepared at the instance of the prosecutrix. On 12.10.2015 the statement of the brother of the accused Mr. Chandrakant Gautam was recorded under Section 161 Cr.P.C wherein he informed that the accused got married in April 2003 to Ms. Manju in New Delhi and he had 2 children. The wife of the accused did not live with him and was living somewhere in Ghaziabad with her brother because of a fight which they had 2 to 3 years back. The accused was friendly with the prosecutrix and

used to go to her house. Despite his efforts to make the accused understand he did not understand. Because of these reasons he turned the accused out of house no. 100A Chirag Delhi. The accused used to go to the room of the prosecutrix.

3. On 15.10.2015 the supplementary statement of the prosecutrix under Section 161 Cr.P.C was recorded wherein she stated that the accused on 22.07.2015 had forcibly established physical relations with her. From the mobile phone records of the accused and the prosecutrix It was revealed that they both had been in touch with each other. The chargesheet was filed under Section 376 IPC.”

3. Learned counsel for the petitioner contended that as per the allegations made in the FIR registered on 14.08.2015, the prosecutrix herself was a married lady living separately from her husband along with her two children. He submits that the prosecutrix has not levelled any allegation of rape in her initial complaint and the statement is only with respect to consensual physical relations and from a bare reading of the FIR no cognizable offence is made out. He has placed reliance on State of West Bengal & Ors. v. Swapan Kumar Guha & Ors. reported as **(1982) 1 SCC 561** to contend that as no cognizable offence was reported, the FIR itself ought not to have been registered.

He further submits that the prosecutrix had tried to improve the case at the time of recording of her statement under Section 164 Cr.P.C. where, for the first time, she levelled allegations of false promise of marriage given by the petitioner. While placing reliance on the decision on Prashant Bharti v. State (NCT of Delhi) reported as **(2013) 9 SCC 293**, it was submitted that the basic ingredients of the offence punishable under Section 376 IPC are

not made out as the prosecutrix herself was married and not divorced at the time of the incident.

Further, it was submitted that although in her initial complaint the last incident of physical relations occurred on 18.07.2015, however, in her supplementary statement recorded under Section 161 Cr.P.C. on 15.10.2015, it was stated that the petitioner had made forcible sexual relations with her on 22.07.2015. In support of his submission that all the essential ingredients of the offense ought to be disclosed in the FIR and the lacuna and deficiency can not be filled up obtaining additional complaint or supplementary statement, he has placed reliance on the decision on Deepa Bajwa v. State & Ors. reported as **2004 (77) DRJ 725**.

Lastly, it was submitted that the prosecutrix had refused for her internal medical examination.

4. Per contra, ld. APP for the State, duly assisted by learned counsel for the complainant, submitted that in the first complaint itself, the prosecutrix had stated that “*Vikas ne meri majboori aur bebasi ka poora phayada uthaya*”. It was further pointed out that the petitioner had misrepresented about his marital status to the prosecutrix in the initial meeting. It was submitted that the petitioner had stated that he was a bachelor to the prosecutrix, however, the prosecutrix later came to know that the petitioner was already married, which fact is also apparent from the statement of brother of the petitioner, namely, *Chandrakant Gautam* recorded under Section 161 Cr.P.C. wherein it was stated that the petitioner was already married to one Manju in April, 2003 and out of the said wedlock, he had two children. It was further stated that the aforesaid wife of the petitioner was living separately from him on account of matrimonial dispute with the

petitioner.

5. I have heard learned counsels for the parties and gone through the case record.

6. The scope of revision under Section 397 Cr.P.C. has been discussed in the case of Amit Kapoor Vs Ramesh Chander and Anr. reported as **(2012) 9 SCC 460** as under:-

“17.Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code”.

7. In Sajjan Kumar Vs. Central Bureau of Investigation reported as **2010 (10) SCALE 22**, it has been held as under:-

“20. A Magistrate enquiring into a case under Section 209 CrPC is not to act as a mere post office and has to come to a conclusion whether the case before him is fit for commitment of the accused to the Court of Session. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is the duty of the Magistrate to discharge the accused, on the other hand, if there is some evidence on which the conviction may reasonably be based, he must commit the case. It is also clear that in exercising jurisdiction under Section 227 CrPC, the Magistrate should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial”.

8. In the present case, although the initial complaint was made 14.08.2015, but within three days i.e. on 17.08.2015 the statement of the prosecutrix under Section 164 Cr.P.C. was recorded where the factum of making physical relations on the false promise to marry was mentioned. Although, the complainant's MLC was not placed on record however, a perusal of the same from the case diary reveals that the complainant was examined on 17.08.2015 and in the history of assault, she stated about the incident dated 22.07.2015. It was stated that the petitioner came to her house and sexually assaulted her and rather continued to commit forceful acts for five hours. In her supplementary statement dated 15.10.2015 recorded under Section 161 Cr.P.C., the prosecutrix mentioned the incident of 22.07.2015. She has explained that she forgot to mention the last incident. Even in her initial complaint made on 14.08.2015, it was stated that the petitioner had suddenly disappeared about 15 days ago. Similarly,

in her statement under Section 164 Cr.P.C. recorded on 17.08.2015, it was stated that the petitioner left her about 20 days ago which means that the petitioner was in touch with the prosecutrix till about 27/28.07.2015. Accordingly, I do not find any merit in the contention of the learned counsel for the petitioner that the complainant has made improvement in her statement recorded under Section 164 Cr.P.C.

9. In Swapan Kumar Guha (Supra), the case related to an FIR lodged by a Commercial tax officer, Bureau of Investigation against the respondent firm and its partners u/s 3 of the Price Chit & Money Circulation Schemes (Banning) Act. It was held that the FIR lacked the basic ingredients of the offence as the necessary ingredients of Section 2(c) that the scheme for making quick or easy money must be dependent on any event or contingency relative or applicable to the enrolment of members into the scheme. The aforesaid allegation was wanting in the FIR. In these circumstances, the FIR was quashed. In the present case, as noted above, in the initial complaint itself it was stated that prosecutrix was beaten by her husband and the petitioner who was staying in the opposite house, took advantage and despite being married misrepresented himself to be a bachelor and made physical relations with her. The prosecutrix is a domestic servant who was a resident of a village in Gorakhpur and on account of physical torture given by her husband, left her home and came to Delhi. Her husband followed and ordeal of the prosecutrix continued even in Delhi. In Prashant Bharti (Supra), unlike in the present case, there was no allegation of forcible physical relations. In Deepa Bajwa (Supra), the case related to offence under the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 where initially a complaint was made

on 19.04.2001 which was kept pending as the ingredients of offence under Section 3 of the Act were not complete. Legal opinion from the prosecution branch was obtained by the SHO and after recording the supplementary statement, the FIR was registered on 14.06.2001. The decisions cited are distinguishable and not applicable to the facts of the present case.

10. At the stage of charge, the test is of a prima facie view and a case of strong suspicion against the accused. The Court is not required to sift and weigh the evidence with an objective of whether the trial would result in conviction or acquittal.

11. In Rohtash v. State of Rajasthan reported as (2006) 12 SCC 64, the Supreme Court held as under :-

“14. The first information report, as is well known, is not an encyclopaedia of the entire case. It need not contain all the details. We, however, although did not intend to ignore the importance of naming of an accused in the first information report, but herein we have seen that he had been named in the earliest possible opportunity. Even assuming that PW1 did not name him in the first information report, we do not find any reason to disbelieve the statement of Mooli Devi, PW6. The question is as to whether a person was implicated by way of an afterthought or not must be judged having regard to the entire factual scenario obtaining in the case.”

12. In State v. J. Doraiswamy and Ors., reported as (2019) 4 SCC 149 the Supreme Court held as under:

“14. In our view, consideration of the record for discharge purpose is one thing and the consideration of the record while deciding the appeal by the Appellate Court is another thing.

15. While considering the case of discharge sought immediately after the charge-sheet is filed, the Court cannot

become an Appellate Court and start appreciating the evidence by finding out inconsistency in the statements of the witnesses as was done by the High Court in the impugned order running in 19 pages. It is not legally permissible.”

(emphasis added)

13. The following observations made in State of M.P. v. S.B. Johari reported as **(2000) 2 SCC 57** were reaffirmed in State of Delhi v. Gyan Devi and Ors. reported as **(2000) 8 SCC 239**: -

“In our view, it is apparent that the entire approach of the High Court is illegal and erroneous. From the reasons recorded by the High Court, it appears that instead of considering the prima facie case, the High Court has appreciated and weighed the materials on record for coming to the conclusion that charge against the respondents could not have been framed. It is settled law that at the stage of framing the charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the court is satisfied that a prima facie case is made out for proceeding further then a charge has to be framed. The charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by defence evidence, if any, cannot show that the accused committed the particular offence. In such case, there would be no sufficient ground for proceeding with the trial...”

14. The prosecutrix has unequivocally stated at the time of her medical examination that the petitioner made forcible physical relations with her on 22.07.2015. In somewhat similar facts, this Court in Ajeet Singh v. State & Anr. reported as **2019 SCC OnLine Del 11264** while relying on the decision

rendered in Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra & Ors. reported as **2018 SCC OnLine SC 3100**, held that there is a clear distinction between rape and consensual sex.

15. In view of the above discussions, the revision petition is dismissed. The Miscellaneous application is disposed of as infructuous.

(MANOJ KUMAR OHRI)
JUDGE

JANUARY 29, 2020
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