

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **BAIL APPLN. 1168/2021 & CRL.M.(BAIL) 369/2021**

Date of decision: 05th July, 2021

IN THE MATTER OF:

SAURABH BALI

..... Petitioner

Through Mr. N. Hariharan, Senior Advocate
with Mr. Sidhart Yadav, Mr. Akshay
Bhandari, Mr. Varun Deswal, Mr.
Samarth Luthra and Ms. Aakriti
Mittal, Advocates with the petitioner-
in-person

versus

STATE

..... Respondent

Through Ms. Kusum Dhalla, APP for the State.
Mr. Pramod Kumar, Advocate with
Ms. Kanika, Advocate for the
complainant.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This is a petition under Section 439 Cr.P.C for seeking regular bail in FIR No. 225/2020, dated 12.09.2020, registered at Police Station Deshbandhu Gupta Road, for offences under Sections 376/377/328/ 323/506 IPC.
2. Facts, in brief, leading to the instant petition are as under:
 - a) On the complaint of the prosecutrix FIR No. 225/2020, dated 12.09.2020 was registered at Police Station Deshbandhu Gupta Road, for offences under Sections 376/377/328/ 323/506 IPC. The prosecutrix stated that she is a student and is doing graduation. She

also stated that she is a professional dancer. It is stated by the prosecutrix that the petitioner, whom the prosecutrix knows, gave her a call and told her to meet him at 6:00 AM and said that he will reconcile the fight between the prosecutrix and one Chandan Chugh. It is stated that the prosecutrix left her home on the pretext of a morning walk and met the petitioner who was waiting outside the house of the prosecutrix in his car. It is stated that the petitioner asked the prosecutrix to sit in the car. The FIR records that the petitioner told the prosecutrix that it will take some time to meet the said Chandan and that they should drive around. It is stated that during this time the petitioner offered alcohol to the prosecutrix which she consumed. It is stated that they stopped at a 24x7 shop in Naraina and bought some chips from there and thereafter had 1-2 drinks more. It is stated that the prosecutrix do not remember anything after that. It is stated that about 8:00 AM when the prosecutrix faintly gained consciousness she found herself in the house of the petitioner. She stated that the petitioner was committing rape on her, abusing her and making a video of the act. It is stated by the prosecutrix that she was not wearing anything. It is stated that the prosecutrix was in a lot of pain. It is stated that when the prosecutrix regained consciousness she pleaded the petitioner to leave her and asked him as to why he did this to her. It is stated that the prosecutrix told the petitioner that she wanted to go home. It is stated that the mother of the prosecutrix called her and the prosecutrix informed her mother that some wrong has been done to her and asked her mother to send her father at the earliest. It is stated that at that point of time the petitioner snatched the

phone from the prosecutrix and started talking to her mother. It is stated that the petitioner told the mother of the prosecutrix that the prosecutrix is tensed about something and he does not know as to what is the reason for her tension. It is stated that the mother of the prosecutrix kept on calling her again and again but the petitioner prevented the prosecutrix from answering the call. It is stated that at around 10 AM the petitioner asked the father of the prosecutrix to come near Liberty cinema. It is stated that the petitioner took some intoxicant. It is stated that the prosecutrix met her father near Liberty Cinema. It is stated that the prosecutrix went home and told everything to her family and her father gave a call to the police. The prosecutrix was then taken for a medical examination at LHMC hospital. The prosecutrix was examined vide MLC No.3234 dated 12.09.2020. In the MLC report the doctor has mentioned "*Pt was apparently well till 6 AM today morning of 12.09.20 when she went out with her friend Saurabh, whom she consider her elder brother to meet another friend Chandan. While in car, Saurabh gave her some drink (whisky) which she took. However, she felt dizzy and out of her senses after a few drinks (3) which less than her normal capacity. The patient fell unconscious after having those drinks. When, she woke up, she was at Saurabh's house in his bed room. He was continuously slapping and hitting the patient. The accused had vaginal intercourse with the patient. The patient is not aware as to how many times he had intercourse with her. Also, she is not aware of whether he ejaculated inside or not. The patient faintly remember that the accused was filming the entire act on his phone. When she gained her*

senses to some extent, she called her father and asked him to rescue her. Her father arrived in 10-15 minutes and brought her back. Then they went to Karol Bagh to file a case". FIR No. 225/2020, dated 12.09.2020, was registered against the petitioner at Police Station Deshbandhu Gupta Road, for offences punishable under Sections 376/377/328/ 323/506 IPC. The petitioner was arrested.

b) On 15.09.2020, statement of the prosecutrix was recorded under Section 164 Cr.P.C wherein she reiterated her complaint and added that offence under Section 377 IPC (oral sex) was also committed on her. It is stated by her that she does not remember as to how many times the petitioner had sexual intercourse with her. The prosecutrix also stated that when her mother gave a call, the petitioner received the call and told her mother that she is extremely troubled and that his mother is an astrologer and he would show the horoscope of the prosecutrix to his mother. The prosecutrix has stated that when her mother heard that the prosecutrix was crying he disconnected the call. It is further stated that he told her mother to take the prosecutrix home. It is stated by the prosecutrix that the petitioner held her hand and threatened her that if she revealed anything to any person he would get her father killed. It is stated by the prosecutrix that she called her father and asked him to come to Hyundai Showroom near Liberty Cinema and take her back. It is also stated that the prosecutrix messaged Chandan also stating that the petitioner has raped her. It is stated that the prosecutrix came back home with her father and got the FIR registered. The prosecutrix took the Police to the place where the alleged incident happened. CCTV footages were collected, mobile

phones of the petitioner, the prosecutrix and the said Chandan Chug were collected, material was collected from the room where the alleged incident took place and sent to FSL, blood samples of the petitioner and the prosecutrix were also collected and sent to FSL, other exhibits of the case i.e. sexual assault kit was also sent to FSL. Charge-sheet was filed on 09.11.2020.

c) The petitioner filed an application for bail being Bail Application No.1662/2020 which was dismissed by the learned Additional Sessions Judge *vide* order dated 05.11.2020.

d) The petitioner moved this Court by filing an application for bail being BAIL APPLN. 3462/2020. This Court *vide* order dated 10.11.2020 directed the State to file a Status Report along with the CCTV footage in a pendrive and the matter was adjourned to 04.12.2020. On 04.12.2020, the bail application was dismissed as withdrawn with liberty to the petitioner to seek redressal before the learned trial Court in accordance with law.

e) The petitioner thereafter filed an application for bail before the learned Additional Sessions Judge which was dismissed *vide* order dated 11.01.2021.

f) The petitioner filed an application for bail being BAIL APPLN. 403/2021 before this Court. On 05.02.2021, it was informed by the learned APP that the case is coming up for hearing on charge on 17.02.2021. This Court directed the petitioner that if charges are framed against the petitioner, the learned Trial Court is directed to examine the prosecutrix by 10.03.2021. Liberty was granted to the petitioner to approach this Court after 10.03.2021. However, the

petitioner mentioned his matter on 26.02.2021 stating that the Call Detail Record (CDR) of prosecutrix has not been made available. It was stated that the chemical analysis report from the chemistry division of the FSL has also not been made available and in the absence of these materials it will not be possible for the Trial Court to proceed ahead with the address on charge and this will have an adverse impact on trial. Accepting the said argument of the learned counsel for the petitioner, this Court modified the order dated 05.02.2021 and deleted the earlier direction to the learned Additional Sessions Judge to complete the examination of the prosecutrix by 10.03.2021.

g) First supplementary chargesheet related to FSL Report (Bio/DNA) was filed on 20.02.2021.

h) The petitioner approached this Court for grant of interim bail on the ground that he has to appear for 5th Semester BA LLB examination. This Court *vide* order dated 01.03.2021 granted interim bail to the petitioner for a period of one week. By another order dated 18.03.2021 the interim bail was extended till 10.04.2021.

i) Second supplementary charge-sheet related to Cyber Forensic Division Report (Mobile phone) was filed on 26.03.2021.

j) Third supplementary charge-sheet related to chemical analysis report of blood was filed on 15.04.2021.

k) The instant bail application was filed on 07.04.2021. It was contended by the learned counsel for the complainant that for entertaining a bail application under Section 439 Cr.P.C it is necessary that the petitioner should be in the judicial custody and

unless the petitioner surrenders the bail application cannot be heard. Mr. N. Hariharan, learned Senior Counsel appearing for the petitioner places reliance on the judgment of the Supreme Court in Sandeep Kumar Bafna v. State of Maharashtra, 2014 (16) SCC 623, to contend that the petitioner is in judicial custody and therefore there is no impediment in hearing the bail application. The case was heard on 07.04.2021, 08.04.2021, 19.04.2021, 07.05.2021, 17.05.2021, 28.05.2021, 01.06.2021 and 03.06.2021. The petitioner has joined the proceedings virtually. The matter has been listed for orders on 05.07.2021. The petitioner has been directed to join the proceedings from the concerned Police Station on 05.07.2021.

3. Heard Mr. N. Hariharan, learned Senior Counsel appearing for the petitioner, Ms. Kusum Dhalla, learned APP for the State and Mr. Pramod Kumar, learned counsel for the complainant and perused the material on record.

4. Mr. N. Hariharan, learned Senior Counsel appearing for the petitioner states that the charge-sheet filed on 09.11.2020 was an incomplete charge-sheet. He places reliance on the last paragraph of the charge-sheet to contend that the investigation is still going on and the investigation has not been concluded. The last paragraph of the Charge-sheet reads as under:

जो मुकदमा हज़ा में तफ़्तीश जारी है तथा FSL result, mobile phone CDR/CAF with §5 B certificate हासिल होने पर व अन्य तथ्य सामने आने पर माननीय अदालत में supplementary challan पेश किया जाएगा, जो मुकदमा हज़ा में अब तक की तफ़्तीश व ब्यानात गवाहन से Accused Saurabh Bali S/o Sushil Bali उपरोक्त के खिलाफ काफी सबूत काबिले चालान सफा मिसल पर गुज़र चुके हैं लिहाज़ा चालान U/S 376,377,328,323,506 IPC का तैयार किया जाकर

The learned Senior Counsel contends that since the investigation has not

been completed, the petitioner is entitled to default bail under Section 167(2) of the Cr.P.C. He places reliance on the judgement of the Madras High Court in P.M.C. Mereantile Private Ltd v. State, **2014 SCC OnLine Mad 10242**. He places reliance on paragraph No.11 and 16 of the said judgment. The said paragraph reads as under:

"11. Apart from the said mistake, as rightly pointed out by the learned Senior Counsel, the Report based on which the learned Special Judge took cognizance of the offences by passing the impugned Order, cannot be construed to be a Final Report as envisaged under Section 173(2), Cr.P.C. In this regard, the other Judgments cited supra and relied on by the learned Senior Counsel for the Petitioners will make it clear that when the Report of the Police itself contains a statement that the investigation has not been completed and evidence are yet to be collected, such a Report cannot be termed a Final Report and taking cognizance of the offences based on such Report shall not be in accordance with law....."

16. The Hon'ble Supreme Court also in T.V. Sarma v. Turgakamala Devi, 1976 Cri.LJ 1247, made a similar observation, which has been extracted by the learned Judge of the Allahabad High Court sitting in Lucknow Bench in the above cited case. The said observations made by the Hon'ble Supreme Court are reproduced here under:

"15. In the case on hand only a Preliminary Charge-sheet has been filed and it is specifically stated therein that the investigation is not yet completed. Therefore it cannot be treated as a police report within the meaning of sub-section (2) of Section 173, Code of Criminal Procedure

and so the Magistrate could not take cognizance of the offence in the present case and remand the Accused under Section 309, Code of Criminal Procedure.

16. The learned Public Prosecutor has argued that in this case there is a charge-sheet though styled preliminary and so the Proviso to Section 167, sub-section (2) does not apply. The Code of Criminal Procedure does not contemplate a Preliminary Charge-sheet and a Final Charge-sheet. What is contemplated is only a Police Report within the meaning of sub-section (2) of Section 173, Code of Criminal Procedure. Admittedly in this case, there is no such Report. The so-called Preliminary Charge-sheet filed in this case is not a Police Report because the investigation is not yet completed, and so the Proviso to Section 167, sub-section (2) is attracted. In this connection, the learned Public Prosecutor has relied upon sub-section (8) of Section 173, Code of Criminal Procedure. In order to contend that even a Preliminary Charge-sheet is a Police Report within the meaning of sub-section (2) of that Section. But a reading of sub-section (8) of Section 173, Code of Criminal Procedure shows that after a Police Report under sub-section (2) is sent to the Magistrate, further investigation is not precluded and if upon such investigation further evidence is obtained a further report should be sent to a Magistrate. Therefore sub-section (8) of Section 173, Code of Criminal Procedure comes into play only after a report under sub-section (2) is sent and not before. In this case since no Report under sub-section (2) is sent, sub-section (8) does not come into operation at all. Since the Preliminary Report is not the one sent to the Court after a Report

under sub-section (2) was sent, the learned Public Prosecutor cannot invoke the provisions of sub-section (8) of Section 173, Criminal Procedure Code..... ”” (emphasis supplied)

It is to be noted that in para 16 of P.M.C. Mereantile(supra) the learned Court noted that T.V. Sarma v. Turgakamala Devi, 1976 Cri.LJ 1247, is a judgment of the Supreme Court while it is a judgment of the Andhra Pradesh High Court. The learned Senior Counsel also places reliance on a judgment dated 19.03.2017, passed by this Court in **Bail Application No.215/2017** titled Tunde Gbaja v. Central Bureau of Investigation. The learned Senior Counsel also places reliance on the judgment of the Supreme Court dated 15.03.2021, in **Criminal Appeal No.319/2021**, titled Fakhrey Alam v. State of U.P.

5. The learned Senior Counsel has taken this Court through various CCTV footages to show that prosecutrix had alighted from the car at a shop in Narayana, at about 6:10 AM for buying chips. It is stated that she was not under the influence of liquor at that time. He states that at about 7:00 AM the petitioner and the prosecutrix can be seen going in the car to Greenpark. He points out that the prosecutrix was perfectly normal and there is no sign that she was intoxicated and the footage also shows that the prosecutrix and the petitioner were in close proximity while going into a house at about 7:00 AM and while coming out of the house also the prosecutrix does not look like she was intoxicated. The learned Senior Counsel has also shown the CCTV footage taken at about 10:00 AM somewhere near Liberty Cinema where the petitioner and the prosecutrix can be seen taking selfies and the prosecutrix is walking behind the petitioner fully conscious showing no

signs of any intoxication. The learned Senior Counsel states that these CCTV footages completely belies the story of the prosecution that the prosecutrix was intoxicated and raped. The learned Senior Counsel also places reliance on the second charge-sheet and the report of the Cyber Forensic Division showing that the mobile of the petitioner does not have any kind of video of the incident as alleged by the prosecutrix. The learned Senior Counsel has also taken this Court through the first supplementary charge-sheet related to FSL Report (Bio/DNA) to contend that that report does not indicate the presence of semen or blood of the petitioner on the exhibits sent to the FSL. He states that the FSL report also belies the case of the prosecution. The learned Senior Counsel has also taken this Court through the third supplementary charge-sheet which shows that the prosecutrix had “*Ethyl Alcohol 14 mg/100ml of blood*” to contend that even for an offence under MACT the percentage of alcohol should be above 20mg/100ml of blood. He states that the alcohol content was so low that it cannot be said that the prosecutrix could have lost her senses and therefore the entire case of the prosecution cannot be believed. He contends that the petitioner is in custody since 12.09.2020, he is a youngster and is a student of law. He states that due to the present pandemic there is no possibility of the trial commencing in the near future. He states that the investigation is complete, all the charge-sheets have been filed and therefore the petitioner is entitled to be released on bail.

6. *Per contra*, Ms. Kusum Dhalla, learned APP for the State contends that the charge-sheet filed on 09.11.2020 is a complete charge-sheet and it cannot be said that the investigation is not complete. She would rely on the judgment of a Division Bench of this Court in Taj Singh vs State (Delhi

Admn.), **1988 CriLJ 1634**, wherein this Court has observed that even if the Investigating Officer had not received the report of the FSL, so far as his job of collecting the evidence is concerned, that is the moment he collects the material exhibits and dispatches the same for the opinion of the FSL. In this view of the matter it will not be correct to say that the police report which does not include the FSL report, would not be a complete police report as envisaged in Section 173(2) Cr.P.C. The learned APP also relies on a judgment of this Court in Kishan Lal vs State, **39 (1989) DLT 392**, which states that there is no mandate that a police report must enclose the document purporting to be a report under the hand of a Government scientific expert. Ms. Kusum Dhalla, learned APP also places reliance on the judgment of this Court dated 25.09.2020 in **Bail Application No.2075/2020**, titled Babu v. The State, which follows Kishan Lal (supra). She contends that the charge-sheet was complete in itself. She states that it had the FIR, the statement of the prosecutrix under Section 164 Cr.P.C. and details of the investigation conducted by the police. She states that the report only mentions that certain reports are awaited from the FSL and if need be supplementary charge-sheet will be filed. She states that the offences alleged against the petitioner is a heinous one and bail should not be granted to him.

7. Mr. Pramod Kumar, learned counsel for the complainant reiterates the contentions of the State contending that the charge-sheet is complete and it cannot be stated that the investigation was still going on when the charge-sheet was filed and therefore the charge-sheet filed on 09.11.2020 is not a complete charge-sheet. He also state that the contention of the learned counsel for the petitioner that the FIR is an afterthought is also not true because the moment the prosecutrix met her father they gave a call to the

police and the FIR was registered. He also states that the accused and his family members are threatening and defaming the prosecutrix.

8. The first issue which has to be answered is as to whether the police had filed an incomplete charge-sheet and whether the Magistrate take cognizance on the basis of the report filed on 09.11.2020?

9. Section 173 Cr.P.C mandates that the police must file a report on the completion of the investigation. Section 173(1), 173(1)(A), 173(2) and 173(5) reads as under:

" Section 173 – Report of police officer on completion of investigation

1. Every investigation under this Chapter shall be completed without unnecessary delay.

1A. The investigation in relation to an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the Indian Penal Code shall be completed within two months¹ from the date on which the information was recorded by the officer in charge of the police station.

2. As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

- a) the names of the parties;*
- b) the nature of the information;*
- c) the names of the persons who appear to be acquainted with the circumstances of the case;*
- d) whether any offence appears to have been committed and, if so, by whom;*
- e) whether the accused has been arrested;*

f) whether he has been released on his bond and, if so, whether with or without sureties;

g) whether he has been forwarded in custody under section 170.

h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB, or 376E of the Indian Penal Code.

5. When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report-

a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses."

10. A perusal of the charge-sheet would show that all the requirements of Section 173(2) have been met. The FIR, the statement of the prosecutrix under Section 164 Cr.P.C, the medical report and the statement of the witnesses under Section 161 Cr.P.C have all been filed along with the charge-sheet dated 09.11.2020. Only on the basis of the statement of the prosecutrix and her medical report the Magistrate can take cognizance of the offence. The last paragraph of the translated version of the charge-sheet, as provided by the petitioner, reads as under:

"That investigation of the case is continuing and upon receiving the FSL result, Mobile Phone CDR/CAF with certificate u/s 65 B and other facts coming forth would be presented before the' Hon'ble Court through filing

of supplementary charge sheet. That in ;this case from the investigation conducted till now, statement of the witnesses against; accused Saurabh Bali S/o Sushil Bali above named enough evidence has been collected for charge-sheeting him therefore, charge-sheet u/s 376/377/328/323/506 IPC is being issued and presented before the court. The witnesses be summoned thought issue of summon and accused be summoned through issue conducted.”

The original version has been relied upon by the learned counsel for the petitioner and has been reproduced in para No. 4 of this judgement. A reading of the Charge-sheet in toto only shows that what was being awaited was only the FSL result and the Mobile Phone CDR/CAF with certificate under Section 65 B.

11. A Division Bench of this Court in Taj Singh vs State (Delhi Admn.), **1988 CriLJ 1634**, after reproducing Section 173 Cr.P.C has observed as under:

"6. Reading together sub-sections (1) and (2) of S. 173 of the Code the stage and the point of time at which the police report or the challan is to be filed before a Magistrate by the police officer is clearly made out in the sense that the police report or the challan is to be filed before a Magistrate as soon as the investigation of the offence is concluded. Sub-section (2)(i)(a) to (g) of S. 173 further details the requirements by way of particulars to be mentioned in police report. It would, thus, mean that when a police officer is able to complete his report by filling up therein the above mentioned particulars as required under sub-section (2)(i)(a) to (g), the investigation of the offence can be said to be complete because if the investigation is not complete he would not be able to make his report with the of aforesaid requisite particulars, and so that

supplies to us the acid test for determining whether the investigation of the offence is complete or not. The relevant requirements would be the ones contemplated in Clauses (c) and (d) of Sub-section (2)(i) of Section 173 which pertain to the names of the persons who appear to be acquainted with the circumstances of the case and whether any offence appears to have been committed and, if so, by whom. When the Investigating Officer is ready with these requirements, the other requirements being not very difficult to know, the police report is complete as per its definition given in S. 2(r) as per sub-section (2) of S. 173 of the Code. The persons contemplated in Clause (c) of sub-section (2)(i) of S. 173 appear to be the witnesses of the occurrence or who are otherwise in the know of the facts of the case but do not appear to include an expert of CFSL or any other Government Scientific Expert mentioned in sub-section (4) of Section 293 of the Code whose reports have been made admissible under S. 293 by tendering the same in evidence without any formal proof thereof.....

7. Even if the Investigating Officer had not received the report of the CFSL, so far as his job of collecting the evidence is concerned, that is over the moment he collects the material exhibits and dispatches the same for the opinion of the CFSL and this position remains unaltered even though he relies upon the CFSL report in his own report. In this view of the matter it will not be correct to say that the police report which did not include the CFSL report, would not be a complete police report as envisaged in sub-section (2) of S. 173 of the Code which is prepared and forwarded to the Magistrate only after the conclusion of the investigation.

8. For this view we find complete support from the

Full Bench decision of the Punjab & Haryana High Court reported as State of Haryana v. Mehal Singh. AIR 1978 Punj & Har 341 at p. 347 : (1978 Cri LJ 1810 at p. 1816). No authority to the contrary was available nor cited by the learned counsel for the petitioner and whatever authorities were relied upon by the learned counsel for the petitioner had not decided this question. The authorities relied upon by him are Noor Mohd. v. State ILR, (1978) 2 Delhi 442 : (1980 Cri LJ NOC 27), Raghubir Singh v. State of Bihar , Natabar Parida v. State of Orissa, , and Hari Chand v. State 2nd (1977) 2 Delhi 367 : (1977 Cri LJ NOC 262). Much stress was, however, laid by the learned counsel for the petitioner on the last mentioned authority but the perusal thereof shows that even though there was mention of 'incomplete Challan' filed in the court, it was not pointed out in terms as to what was actually lacking therein and so even this authority is of no help in determining the question before us." (emphasis supplied)

12. Similarly, this Court in Kishan Lal vs State, **39 (1989) DLT 392**, has observed as under:

7. It has been held by the Supreme Court that although the police are not permitted to send an incomplete report under Section 173(2) of the Code, yet the investigation except for the report of an expert like the Serologist or Scientific Officer and Chemical Examiner is complete and, therefore, the Magistrate is empowered to take cognizance of the offence on a police report which does not include the expert's opinion. In Tara Singh v. State. , the Police had infact filed a report dated the 2nd October, 1949 terming it an "incomplete challan" and on the 5th October they filed a report which they called a "complete challan". Thereafter on the 19th October they filed yet another report which was termed as "Supplementary challan".

The objection taken at the trial was that the Magistrate had no power to take cognizance of the case on 3rd October when the incomplete challan dated 2nd October, 1949 was placed before him. It was contended that the Police are not permitted to file an incomplete report under Section 173(2) of the Code.

8. It appears from paragraph 14 of the reported judgment that the witnesses named by the police in the second report, i.e. the report of 5th October, 1949 were not the witnesses who were "Acquainted with the circumstances of the case" but merely formal witnesses who had either examined the injured or recorded the dying declaration. It further appears that vide the report dated 19th October, 1949 which was termed as "supplementary challan", the report of the Imperial Serologist and the drawing of a sketch map of the occurrence were sought to be placed on the record-Negating the contention that the Magistrate had not taken prop?" cognizance, it was held that the police report dated 2nd October, 1949 was a complete report within the meaning of Section 190(1)(b) of the Code as the investigation was complete. Thus the challan dated the 5th October, 1949 and the supplementary challan dated the 19th October, 1949 did not vitiate the first report which had been termed as an "incomplete challan". It is useful to quote paragraph 14 of the reported judgment :

"WHEN the police drew up their challan of 2-10-1949 and submitted to the court on the 3rd, they had in fact completed their investigation except for the report of the Imperial Serologist and the drawing of a sketch map of the occurrence. It is always permissible for the Magistrate to take additional evidence not set out in the challan.

Therefore, the mere fact that a second challan was put in on 5th October would not necessarily

vitiating the first. All that Section 173(1)(a) requires is that as soon as the police investigation under Chapter 14 of the Code is complete, there should be forwarded to the Magistrate a report in the prescribed form : "Setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case"

All that appears to have been done in the report of 2nd October which the police called their incomplete challan. The witnesses named in the second challan of 5th October were not witnesses who were 'acquainted with the circumstances of the case. They were merely formal witnesses on other matters. So also in the supplementary challan of the 19th. The witnesses named are the 1st Class Magistrate, Amritsar, who recorded the dying declaration, and the Assistant Civil Surgeon. They are not witnesses who were "acquainted with the circumstances of the case." Accordingly, the challan which the police called an incomplete challan was in fact a completed report of the kind which Section 173(1)(a) of the Code contemplates. There is no force in this argument and we hold that the Magistrate took proper cognizance of the matter."

13. These two judgments have been followed in the judgment of this Court dated 25.09.2020 in **Bail Application No.2075/2020**, titled Babu v. The State. This Court after quoting the judgment in Taj Singh (supra) has observed as under:

"17. As noted above, the Division Bench of this Court relied upon the decision of the Supreme Court in (1951) 2 SCR 729 Tara Singh Vs. State which did not relate to an offence punishable under NDPS Act. A

distinction can clearly be drawn between the cases relating to offences under the Indian Penal Code and offences under NDPS Act, for the reason, in a charge sheet filed without a FSL report, say for example, for an offence punishable under Section 302 IPC, the prosecution cites witnesses who may be the eye witnesses or of circumstantial evidence besides the post-mortem report, MLC etc. which material in itself is sufficient to constitute the ingredients of the offence(s) alleged by the prosecution. The FSL report in the said charge sheet only supplements the material already filed by the prosecution. This is in contradistinction to an offence punishable under NDPS Act where the possession of the contraband itself is an offence and if the prosecution in the charge sheet is not able to show that the alleged recovery from the accused was prohibited under the provisions of the NDPS Act, the basic ingredient of the offence would be missing, therefore, the cognizance on such a charge sheet would suffer from total non-application of mind and would be non-est. It is trite law that Court takes cognizance of the offence and not the offender. Thus unless the ingredients which constitute the offence are established in the charge sheet, the cognizance of the offence alleged in the charge sheet by the Magistrate/Special Court would be illegal."

(emphasis supplied)

14. The judgments relied on by the learned counsel for the petitioner in P.M.C. Mereantile Private Ltd v. State, **2014 SCC OnLine Mad 10242**; **Bail Application No.215/2017** titled Tunde Gbaja v. Central Bureau of Investigation and Hari Chand and Ran Pal v. State, **ILR 1997 Delhi 367**, are not applicable to the facts of this case. In none of these cases did the Courts have to consider whether the absence of FSL report in the charge-sheet would make the charge-sheet an incomplete charge-sheet or not. As rightly

pointed out by this Court in **Bail Application No.2075/2020**, titled Babu v. The State, an offence under IPC and offence under NDPS are two distinct categories. The present case is one of an offence under Section 376 IPC. A charge-sheet for an offence of rape would be complete on the statement made by the prosecutrix under Sections 161 and 164 Cr.P.C. In this case, apart from the FSL report, every document has been filed with the charge-sheet dated 09.11.2020 including statement of the prosecutrix, the MLC report, the statement of other persons. The charge-sheet filed on 09.11.2020 was within the stipulated time and is a complete charge-sheet and the fact that the FSL report is not part of the charge-sheet does not make the charge-sheet an incomplete one. Though one line in the charge-sheet states that the investigation is going on but that one statement does not make the charge-sheet an incomplete one. A complete reading of the charge-sheet would show that only the report from the FSL are awaited and the same were to be filed once they are available. The FSL report would be used only to corroborate the version of the prosecution and the prosecutrix. Even if the FSL had not been filed, the Magistrate, on the basis of the Charge-sheet filed on 11.09.2020 could take the cognizance of the offence. The petitioner is therefore not entitled to default bail under Section 167(2) Cr.P.C and the order dated 15.03.2021 of the Supreme Court in Fakhrey Alam v. State of U.P.(**Criminal Appeal No.319/2021**) would not be applicable to this case.

15. Coming to the second question as to whether the petitioner is entitled to bail on the facts of the present case, the learned Senior Counsel for the petitioner has relied on CCTV footages to show that at about 7:00 AM the petitioner and the prosecutrix can be seen going to Greenpark. He points out that the prosecutrix was perfectly normal and there is no sign that she was

intoxicated. He states that the footage also shows that the prosecutrix and the petitioner were in close proximity while going into the House at about 7:00 AM. The learned Senior Counsel has also shown the CCTV footage taken at about 10:00 AM, somewhere near Liberty Cinema, where the petitioner and the prosecutrix can be seen taking selfies and the prosecutrix is walking behind the petitioner fully conscious showing no signs of any intoxication. He states that the conduct of the prosecutrix does not indicate that she has been raped by the petitioner.

16. The prosecutrix has alleged that she has been raped by the accused. This is not a case of promise of marriage or one where the petitioner and the prosecutrix were in any form of relationship with each other and the relationship going sour. There is nothing to suggest that there is any reason for the prosecutrix to make false allegation against the petitioner or to falsely implicate him and that too for an offence of rape. The statement of the prosecutrix alone is sufficient for the trial to go on. The learned Senior Counsel has taken this Court through the FSL report to contend that the conclusion of the report demonstrates that rape has not been committed on the prosecutrix and the prosecutrix is levelling false allegations against the petitioner. It is well settled law that at the stage of granting bail the Court is not expected to conduct a mini trial to ascertain as to whether the petitioner is guilty or not. The Court should not even comment on the conduct of the prosecutrix. It is well settled that a person can be convicted only on the statement of the prosecutrix and normally it does not require corroboration.

17. The Supreme Court in Om Prakash v. State of U.P., (2006) 9 SCC 787, has observed as under:

13. It is settled law that the victim of sexual assault is

not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian woman has a tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members have courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after scathing (sic scathing) her own prestige and honour.

14. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault—it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution

case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation. This position was highlighted in State of Punjab v. Gurmit Singh [(1996) 2 SCC 384 : 1996 SCC (Cri) 316]."

Similarly in State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550, the Supreme Court has observed as under:

"16..... If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

"It is only in the rarest of rare cases if the court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

*With respect, the law is not correctly stated. If we may say so, it is just the reverse. **Ordinarily the evidence of***

a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation.

17. We think it proper, having regard to the increase in the number of sex violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise

that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity." (emphasis supplied)

18. In view of the judgments of the Supreme Court, this Court, at the moment, is not going on the conclusions in the FSL report at this juncture as they are all matters of trial.

19. The parameters of granting bail have been laid down by the Supreme Court in a number of cases. In Ram Govind Upadhyay v. Sudarshan Singh, (2002) 3 SCC 598, the Supreme Court laid down the factors that must guide the exercise of the power to grant bail in the following terms :

"3. Grant of bail though being a discretionary order — but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the court and facts, however, do always vary from case to case. While placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always to be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic considerations for the grant of bail — more heinous is the crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.

4. Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture, though however, the same are only illustrative and not exhaustive, neither there can be any. The considerations being:

(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”

In Prasanta Kumar Sarkar v. Ashis Chatterjee, (2010) 14 SCC 496, the Supreme Court observed as under:

“9. We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the

point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

- i. whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;*
- ii. nature and gravity of the accusation;*
- iii. severity of the punishment in the event of conviction;*
- iv. danger of the accused absconding or fleeing, if released on bail;*
- v. character, behaviour, means, position and standing of the accused;*
- vi. likelihood of the offence being repeated;*
- vii. reasonable apprehension of the witnesses being influenced; and*
- viii. danger, of course, of justice being thwarted by grant of bail.*

10. It is manifest that if the High Court does not advert to these relevant considerations and mechanically grants bail, the said order would suffer from the vice of non-application of mind, rendering it to be illegal.”

20. Rape is an extremely heinous offence which stipulates minimum punishment of 7 years and can go up to life. The prosecutrix has alleged that she has been raped by the petitioner. As stated earlier, it is not a case of promise to marry or that the petitioner and the prosecutrix were in any kind of relationship and the relationship has gone sour. At this juncture, there is no reason to disbelieve the prosecutrix. As stated above, it has been stated by the learned counsel for the prosecutrix that the prosecutrix is being threatened. The prosecutrix is a young student. The accused is aged 28 years and is a man of means. He states that he is studying law. Considering the

facts of the case, this Court feels that the petitioner is not entitled to be released on bail till the prosecutrix is examined. The investigation is complete, supplementary charge-sheets have been filed. In the facts and circumstances of this case, the Trial Court is directed to hear the arguments on charge within two months from today and if charges are framed the prosecutrix be examined within two months thereafter.

21. Be it noted that the observations made in the order are only for the purposes of the present bail application and are not on the merits of the case.

22. Accordingly, the application is dismissed with the abovementioned observations along with the pending application. The petitioner who is on interim bail is directed to surrender on 06.07.2021 before the concerned Jail.

SUBRAMONIUM PRASAD, J.

JULY 05, 2021

Rahul

न्यायमेव जयते