

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.REV.P. 448/2018**

Date of decision: 26th FEBRUARY, 2021

IN THE MATTER OF:

STATE (NCT OF DELHI) Petitioner

Through Mr. Avi Singh, Advocate

versus

JIWAN KANT JAIN AND ANR Respondents

Through Mr. Aditya Jain, Advocate

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This revision petition filed under Section 397/401 Cr.P.C is directed against the order dated 03.01.2018, passed by the Additional Sessions Judge-Special Fast Track Court, South District, Saket Courts, New Delhi, in Case No.342/2017 where by the Additional Session Judge has discharged the accused from the charges under Sections 376, 328, 354A, 323, 506 and 509 IPC.

2. FIR No.23/2016, dated 05.01.2016 was registered at Police Station Safdarjung Enclave for offences under Sections 376, 328, 354A, 323, 506 and 509 IPC.

3. In the FIR the prosecutrix stated that she had been working in two companies *Faison World Hauz Khas* and *Perfect Organiser* belonging to the accused/respondent No.1 since six months prior to the lodging the

complaint. It is stated that the respondent No.1 told the prosecutrix that he had divorced his wife and was staying separately and needed a capable woman to handle his work. It is stated by the prosecutrix that the accused made her the CEO and later partner in one of the said companies. The prosecutrix states that since there was no separate place for work, work related meetings and talks regarding work were held at the home of the accused/respondent No.1. It is alleged in the complaint that one day, the accused called her home, he mixed some intoxicant in her cold drink because of which she went into a semi-conscious state and respondent No.1 raped her four times. It is stated that the prosecutrix got up in the morning and started crying. The respondent No.1 told her that he liked her and wanted to marry her. It is stated that after that incident the respondent No.1 made her his partner and told her that he would gradually pay her salary. It is stated that the respondent No.1 started harassing the prosecutrix for salary and stopped paying her salary and removed her from the job. It is stated that when the prosecutrix questioned the action of respondent No.1, he told her that due to financial constraints he was terminating their partnership and that she would be working with one Mr. Batra, who would pay her salary as well as profit. It is stated that when the prosecutrix asked for her dues, the respondent No.1 refused to pay the same. The prosecutrix gave him a call and asked the respondent No.1 for a meeting. It is alleged that the respondent No.1 called her to his office and gave her one month's salary and that too in two parts – half was paid in cash and the other half was by way of cheque which was issued in a wrong name. It is alleged that the prosecutrix protested. It is alleged that the respondent No.1 told her to come to Safdarjung Club where he would make another cheque with correct name. It

is alleged that the prosecutrix went to Safdarjung to collect her salary. It is stated that respondent No.1 came there with the other accused/respondent No.2, who was working in the office of the respondent No.1 and her husband. It is alleged that the respondent No.1 told the prosecutrix that if she persisted with her demand of money he would viral her video, which he had made. It is alleged that out of anger the prosecutrix went to the parking area. It is alleged that the respondent No.1 followed her and also threatened her. It is alleged that the respondent No.2 and her husband Prakash also came to the parking with the respondent No.1 and when they saw that the prosecutrix was alone, they started quarrelling with her. It is stated that one Heena (friend of the prosecutrix) had accompanied the prosecutrix and was sitting in the car and was waiting for her to return. It is stated that the respondent No.2 abused the prosecutrix and the respondent No.1 caught hold of her and tried to touch her inappropriately. It is also alleged that the respondent No.1 also gave a blow on her head with watch/kada, which he was wearing. It is stated that the prosecutrix sat in the car and locked herself and as she was trying to leave in her car, all three of them attempted to follow her. She managed to escape in her car.

4. On receiving the complaint the prosecutrix was sent to Safdarjung Hospital for medical examination. On the complaint of the prosecutrix FIR No.23/2016 dated 05.01.2016, for offences under Sections 376/328/354a/323/506/509 IPC was registered against the accused persons. On the very same day the statement of the prosecutrix under Section 164 Cr.P.C was recorded. The records indicate that during the investigation the IO obtained the CCTV footage from the Safdarjung Club. The Material on record indicates that on 24.02.2016 the prosecutrix visited the Police Station

and gave an affidavit stating that the prosecutrix and the accused/respondent No.1 have amicably settled the matter and the complaint was lodged due to some misunderstanding. However, the prosecutrix has gone back on her statement during the course of the hearing of the anticipatory bail. Charge-sheet was filed 20.03.2017. Supplementary Charge-sheet was filed on 11.07.2017. On 03.01.2018, the Additional Session Judge while passing the order on charge, discharged the accused persons. The learned Additional Session found that

a) prosecutrix has not mentioned any specific date or month of the incident in her complaint dated 04.01.2016. Although, In her statement under Section 164 Cr.P.C she has stated that the incident had taken place in September, 2015 two-three days after the birthday of accused/respondent No.1. The learned Additional Session Judge has come to a conclusion that the evidence which has been placed on record by the prosecution is to be connected with the tentative/approximate dates. The Passport of accused/respondent No.1 indicated that the date of birth of the accused is 25.09.1950. The Additional Session Judge found that the call details and the location of the mobile numbers of the accused and the mobile phone numbers of the prosecutrix showed different locations and they did not match with the alleged case of the incident.

b) The prosecutrix has not reported the matter immediately after the incident to the police. The learned Additional Session Judge held that though it is alleged that the accused had promised to marry the prosecutrix and had also threatened the prosecutrix that

he would make her video viral on internet but there was a age difference of nearly 40 years between the accused and the prosecutrix. The Additional Session Judge noted that the prosecutrix is a mature and well educated woman and not an uneducated woman who is disconnected from the ways of the world. The learned Additional Session Judge noted that at no point of time, after the alleged incident, did the prosecutrix call upon the accused to marry her or to ensure that he kept his promise of marriage. The learned Additional Session Judge held that a bald plea by prosecutrix, that accused had promised to marry her, does not inspire any confidence.

c) The Additional Session Judge took note of the fact that the prosecutrix has given contradictory versions in her complaint and her statement under Section 164 Cr.P.C regarding the alleged threat of making her video viral. The Additional Session noted that in her complaint to the police, the prosecutrix has stated that accused threatened her about making her video viral on 04.01.2016 when she went to meet him at Safdarjung Club for talks regarding full and final settlement of her dues. In her statement under Section 164 Cr.P.C the prosecutrix has stated that accused/respondent No.1 threatened her on the morning of the incident.

d) The Additional Session Judge also found that the allegation of the prosecutrix that accused/respondent No.1 had issued her a cheque of Rs. 35,000/- in wrong name is also false because it has been verified that the cheque had been duly encashed by the prosecutrix.

- e) The Additional Session Judge found that the story of the prosecutrix that when she went to Safdarjung Club on 04.01.2016 to talk to accused regarding full and final settlement of her dues, and later that the respondent No.1 along with co-accused Dimpal/respondent No.2 and Prakash assaulted her in the parking of Safdarjung Club is not correct because the CCTV footage of the area obtained by the IO does not substantiate the allegation of the prosecutrix.
- f) The learned Additional Session Judge found that the mobile phone of the accused/respondent No.1 was seized by the IO during the course of investigation but no obscene content or video of the prosecutrix was found in data retrieved from the mobile phone.
- g) The Additional Session Judge also took note of the fact that the prosecutrix had herself came to the Police Station and gave an application stating that she had resolved the dispute with the accused/respondent No.1. The Additional Session Judge observed that even though the prosecutrix claimed that the said affidavit was signed by her under threat from the accused/respondent No.1, no complaint has been filed by the prosecutrix regarding the threat.
- h) It has been found that the medical report of accused/respondent No.1 shows that after being subjected to scientific examination and diagnosis he was found to be suffering from Artereogenic Vascular Impotence. The Additional Session Judge has found that though the MLC conducted by doctor of Safdarjung Hospital contradicts the said report, the information given to the counsel for accused

pursuant to query made by accused under Right to Information Act reveals that no test for determining potency of the person accused of rape has been carried out in the department of forensic medicine. The learned Additional Session Judge, therefore held that the accused/respondent No.1 was not subjected to any scientific test by the doctors of Safdarjung Hospital.

i) The Additional Session Judge found that there is discrepancy even in the narration of facts by the prosecutrix regarding her visit to Safdarjung Club. In the complaint it is stated that the prosecutrix escaped in her car with her friend Heena and gave a call to her brother as well as other family friends and then came to wait outside Safdarjung Club from where her brother and some other family members came there and took her to police station. Whereas in her statement under Section 164 Cr.P.C the prosecutrix has stated that when she left in the car with her friend Heena, accused were waiting for her and they followed her and so she drove her car faraway so that they could not follow her and thereafter she parked her car and called all her relatives, uncle, mother and brother. The Additional Session Judge held that despite this contradiction the factum of quarrel and prosecutrix leaving the parking of Safdarjung Club on 04.01.2016 in haste to dodge off accused persons is disproved by the CCTV footage obtained by the IO.

j) The Additional Session Judge therefore came to a conclusion that no case is made out against the accused/respondent No.1 herein and accordingly the accused/respondent No.1 was discharged of offences punishable under Sections

376/328/354/354A/323/506/509 IPC. The accused/respondent No.2 herein was also discharged by the same order on the ground that she could not be convicted only on the basis of the allegations made by the prosecutrix. It is this order which is under challenge in this revision petition.

5. Mr. Avi Singh, learned counsel appearing for the State would contend that the learned Additional Session Judge has conducted a mini trial at the time of framing of charge which is not permissible. He submitted that the investigation had recorded a medical opinion of the accused's potency, and the same may only be dislodged by the accused at trial to the satisfaction of the trial court. Mr. Avi Singh, learned counsel for the State submits that the Trial Court has held the doctor's opinion and the Investigating Officer's collection of the same to be entirely false, without giving either of them an opportunity to be cross examined. He would state that the statement under Section 164 Cr.P.C, recorded on 05.01.2016, clearly records the offence that occurred in the house of the accused around September, 2015 two or three days after the birthday of the accused, which is admitted to be 25th September. He contend that the learned Trial Court has erred in examining the plea of alibi evidence, without any cross examination and has discharged the accused on the basis of different cell tower locations of the accused and the prosecutrix during the relevant time. He contends that even if proved, it will merely show that the accused and the prosecutrix did not make a call at that time. He would submit that the judgment is contrary to the settled law that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. It is

submitted that as per the evidences and materials placed on record before the Court including the FIR and statement of the Prosecutrix under Section 164 Cr.P.C, a *prima facie* case has been made out against the accused. Mr. Singh would rely on the judgment of the Supreme Court in the case of Sajjan Kumar v. CBI, (2010) 9 SCC 368, to contend that 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 the against the accused. He would state that the Supreme Court has held that the presumption of the guilt of the accused which is drawn at the initial stage is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. Mr. Singh would also rely on the following judgments:

- i. Bihar v. Ramesh Singh, 1978 SCR (1) 257
- ii. Sheoraj Singh Ahlawat v. State of U.P., (2003) 11 SCC 476
- iii. Ravindra v. State of MP, (2015) 4 SCC 491
- iv. Superintendent and Remembrance of Legal Affairs, West Bangal v. Anil Kumar Bhunja and others, (1979) 4 SCC 274
- v. Araj Sk. v. State of West Bengal, 2000 SCC Online Cal 400
- vi. Rajudan Gemardan v. State of Maharashtra, CRL Appeal 90/2016 (Aurangabad Bench)

to substantiate his contention that the Additional Session Judge has in fact done a “mini trial” while discharging the accused, which is impermissible.

6. On the other hand Mr. Aditya Jain, learned counsel appearing for the respondent supports the impugned judgement by bringing on record the various contradictions in the Statement of the prosecutrix between initial

complaint and her Statement under Section 164 Cr.P.C. Mr. Jain has relied on the judgment of the Supreme Court in Parshant Bharti Vs. State of NCT of Delhi, **2013(9) SCC 293** and Gajraj v. State of NCT of Delhi, **2011(10) SCC 675** wherein the Supreme Court had acquitted the accused in a case against Section 376 IPC by adverting to the tower locations of the mobile phones of the complainant and the accused and found that the parties were not present together at the place of occurrence. He would state that in the present case also the tower location of the accused and the complainant shows that they were far away on 27 and 28th September, 2015, which is approximate time of the incident. He would state that in view of this information the entire case of the prosecution is false. Mr. Aditya Jain, learned counsel for the respondent also states that the CCTV footage which has been relied upon by the Additional Session Judge while discharging the respondents is a material which is unimpeachable in nature and of sterling quality which points out to the innocence of the accused which the prosecution cannot get over and therefore, no useful purpose will be served in continuing the trial against the accused.

7. Heard Mr. Avi Singh, learned counsel Additional Standing Counsel for the State and Mr. Aditya Jain learned counsel appearing for the respondents and perused the documents.

8. The scope and ambit of Section 227 Cr.P.C has been discussed in a number of judgments. In Union of India v. Prafulla Kumar Samal, **(1979) 3 SCC 4**, the Supreme Court laid down the following principles:

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

- 1) *That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.*
- 2) *Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.*
- 3) *The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. **By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.***
- 4) *That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.” (emphasis supplied)*

9. In State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568, the Supreme Court after comparing Section 207 in the old Code of 1898 and Section 227 which was introduced in the new Cr.P.C observed as under:

“9. Further, the scheme of the Code when examined in

the light of the provisions of the old Code of 1898, makes the position more clear. In the old Code, there was no provision similar to Section 227. Section 227 was incorporated in the Code with a view to save the accused from prolonged harassment which is a necessary concomitant of a protracted criminal trial. It is calculated to eliminate harassment to accused persons when the evidential materials gathered after investigation fall short of minimum legal requirements. If the evidence even if fully accepted cannot show that the accused committed the offence, the accused deserves to be discharged. In the old Code, the procedure as contained in Sections 207 and 207-A was fairly lengthy. Section 207, inter alia, provided that the Magistrate, where the case is exclusively triable by a Court of Session in any proceedings instituted on a police report, shall follow the procedure specified in Section 207-A. Under Section 207-A in any proceeding instituted on a police report the Magistrate was required to hold inquiry in terms provided under sub-section (1), to take evidence as provided in sub-section (4), the accused could cross-examine and the prosecution could re-examine the witnesses as provided in sub-section (5), discharge the accused if in the opinion of the Magistrate the evidence and documents disclosed no grounds for committing him for trial, as provided in sub-section (6) and to commit the accused for trial after framing of charge as provided in sub-section (7), summon the witnesses of the accused to appear before the court to which he has been committed as provided in sub-section (11) and send the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session as provided in sub-section (14). The aforesaid Sections 207 and 207-A have been omitted from the Code and a new Section 209 enacted on the recommendation of the Law Commission contained in its 41st Report. It was realised that the commitment inquiry under the old

Code was resulting in inordinate delay and served no useful purpose. That inquiry has, therefore, been dispensed with in the Code with the object of expeditious disposal of cases. Instead of the committal Magistrate framing the charge, it is now to be framed by the Court of Session under Section 228 in case the accused is not discharged under Section 227. This change brought out in the Code is also required to be kept in view while determining the question. Under the Code, the evidence can be taken only after framing of charge.” (emphasis supplied)

10. In P. Vijayan v. State of Kerala, (2010) 2 SCC 398, the Supreme Court took note of the judgment in Union of India v. Prafulla Kumar Samal (*supra*) and after quoting Section 227 Cr.P.C observed as under:

“10. Before considering the merits of the claim of both the parties, it is useful to refer to Section 227 of the Code of Criminal Procedure, 1973, which reads as under:

“227. Discharge.—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.”

If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words “not sufficient ground for proceeding against the accused” clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether

a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.

11. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.” (emphasis supplied)

11. Similarly, State of M.P. v. S.B. Johari, (2000) 2 SCC 57, the Supreme Court has held that 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 and in such case, there would be no sufficient ground for proceeding with the trial.

12. In Dilawar Balu Kurane v. State of Maharashtra, (2002) 2 SCC 135, the Supreme Court after relying on Union of India v. Prafulla Kumar Samal (*supra*) observed as under:

“12. Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited

purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but 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 (see Union of India v. Prafulla Kumar Samal[(1979) 3 SCC 4:1979 SCC (Cri) 609])”

13. A reading of the above mentioned judgments would show that while framing a charge the Court has the power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out and after analysing the materials before it and if two views are possible and the judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified in discharging the accused in exercising its jurisdiction under Section 227 Cr.P.C.

14. It is well settled that while framing charge the Court cannot hold a mini trial for discharging the accused. In the facts of the present case the allegation of the prosecution is that the incident occurred two-three days after the birthday of the accused/respondent No.1. The Passport reveals that

the date of birth of the respondent No.1 is 25.09.1950, the offence therefore could have occurred on 27.09.2015 or 28.09.2015. Though in a rape case the time and place where the incident took place is extremely important for the accused to answer a charge which is framed against him however, even if we ignore that necessity and we take an approximate date when the incident would have taken place the tower locations of the accused and the prosecutrix show that they were always at different locations throughout the period. On 27.09.2015, the tower locations of the respondent were that of Himachal Pradesh, Haryana and Punjab and after entering Delhi on 28.09.2015, his tower location throughout the night until the next morning was in the area of Safdar Jung Enclave, Delhi. The locations of the prosecutrix on 27.09.2015 and on 28.09.2015 were in the area of Qutab Minar Metro Station. The accused and the prosecutrix were therefore never together at any time. The call detail record therefore completely destroys the case of the prosecution:

- a) It is not the case of the prosecution that the accused did not have his mobile phone during the period or that his phone was taken by somebody else nor it is the case of the prosecution that the prosecutrix was not having her mobile when she went to the Safdarjung Club.
- b) The mobile phone of the accused which has been seized does not show any obscene content. There is nothing on record to show that the mobile phone has been tampered with or the contents have been deleted.
- c) Even after the incident the prosecutrix has taken the salary/money from the accused and has encashed the cheques.
- d) In the light of the above mentioned facts the delay in lodging the FIR is fatal.

- e) The prosecutrix herself had come to the Police Station and had given an application and an affidavit stating that the dispute had been amicably settled. (Document No. IN-DL195404439477920). Even though at the time of hearing of the application for grant of anticipatory bail of the accused, the prosecutrix reciled from the statement there is no complaint as to why she went back on her words.
- f) There are several contradictions in the statement given by the prosecutrix in her complaint to the police about an incident which transpired about six months before the incident and the statement made under Section 164 Cr.P.C to the Magistrate which is recorded on the same day.

15. In the present case therefore other than the statement of the prosecutrix there is hardly any material which points towards the accused. Even though the statement of the prosecutrix alone is sufficient to bring out a case of rape but in the present case the material shows that at the time the offence was committed on the prosecutrix the respondent No.1 was not there with the prosecutrix.

16. The learned Additional Session Judge by the judgment impugned herein has considered all the material before him while discharging the accused. This Court while exercising its jurisdiction under Section 397/401 does not find any infirmity in the order impugned which calls for interference. It is well settled that while exercising its jurisdiction under Section 397/401 the revisional Court should not act like an appellate court. It cannot be said that the judgment of the Trial Court is so perverse or is completely contrary to law warranting any interference. Even if a different conclusion is possible it is well settled that a revisional court does not

substitute its conclusion to the one arrived at by the lower court unless it is perverse or contrary to law.

17. In view of the above, the petition is dismissed.

SUBRAMONIUM PRASAD, J.

FEBRUARY 26, 2021

Rahul

