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

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Reserved on: 30.08.2022

Pronounced on: 19.10.2022

+ **CRL.REV.P. 131/2018**

STATE (GOVT OF NCT DELHI)

..... Petitioner

Through: Mr. Naresh Kumar Chahar,
APP for State with SI Inder
Veer Singh, P.S. Laxmi Nagar

versus

SUSHIL KUMAR & ORS

..... Respondents

Through: Mr. Akhil Sharma, Ms. Ankita
Priay, Shree Nidhi and Ms.
Parul Singh, Advocates

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present revision petition has been filed against the impugned order dated 23.10.2017 passed by learned ASJ-I (East), Karkardooma Court, Delhi whereby the accused persons were discharged of the commission of offences punishable under Sections 323/342/363/506/367/34 of Indian Penal Code ("IPC") and Section 12 of The Protection of Children from Sexual Offences Act, 2012 ("POCSO Act") in case FIR No. 726/2016, registered at Police

Station Shakarpur.

2. The brief facts of the present case are that the victim, aged about 15 years, lodged a complaint with the police on 08.08.2016, alleging that on the way back to his home, the respondents caught him and started screaming “*Chor Chor*”. They took the victim to the second floor of House No. H-39, Sanjay Park, Delhi and assaulted him with sticks and belt. The victim raised alarm and his mother came to the spot and tried to rescue him. PCR reached the spot and took the victim to the hospital at about 12.30 am where his medical examination was conducted and he was found to be suffering from simple injuries caused by blunt objects. As per the MLC, the accused/respondent no. 1 also accompanied the victim to the hospital. The IO had reached the hospital and on the basis of the complaint of the victim, FIR under Sections 342/323/34 IPC was registered. At the identification of the victim, respondent no. 2 to 4 were arrested on 08.08.2016, at around 4:00 am.

3. On 08.08.2016 itself, the victim contacted the IO and claimed that he had given incomplete report to the police due to fear of respondent no. 1. Thereafter, a fresh statement under Section 161 Cr.P.C. was recorded by the IO wherein the victim stated that he was actually taken by respondent no. 2 to 4 in a room where respondent no. 1 was already present. Victim further stated that in that room, these four accused persons/respondents removed his clothes and attempted to do wrong acts with his private parts. Upon victim raising objection, all the respondents had beaten him with iron rod, and the respondent no. 1 even closed his mouth and threatened to kill

him. Due to this further statement of the victim, the offences under Section 363/506 IPC and Section 6 of the POCSO Act were added to the FIR.

4. The victim was again taken to hospital for fresh medical examination on 08.08.2016, but since the injuries were found simple in nature, the victim was referred to surgeon for detailed examination. The detailed report did not suggest any abnormality or any nature of sexual assault. Further, no bleeding or any abrasion was found in the private part and anal tone was in intact position.

5. Subsequently, the statement of the victim under Section 164 Cr.P.C. was recorded on 12.08.2016 in which he stated that he was assaulted by the respondents with bat, iron rods and was given something due to which he became unconscious. Victim has further stated that the respondents ill-treated and misbehaved with him.

6. After completion of investigation, charge-sheet was filed against the respondents under Sections 342/323/363/506/367/34 IPC and Section 12 of the POCSO Act. Section 12 of the POCSO Act reads as under:

“12. Punishment for sexual harassment - Whoever, commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.”

7. Learned APP for the State submits that the learned Trial Court has committed an error by not appreciating the entire evidence placed before the Court. It was not considered that the victim was only 15 years of age and minor contradictions/ omission in his statement/ complaint are not fatal to prosecution case, more so, when there are

no material contradictions in the statement of the victim which could shake his trustworthiness. It is argued that the learned Trial Court could not have appreciated the evidence as if the Court was conducting trial. Learned counsel also argued that the observations made in the MLC of the victim have been completely ignored. It is further averred that the FSL report of anal swabs is yet to be received, therefore, the order discharging the accused be set aside.

8. Controverting the aforesaid submissions, the learned defence counsel states that there is no illegality or infirmity in the order, since there are discrepancies in the statements made by the victim. It is also stated that in view of those inconsistencies in the statement of the victim, there is no probability that the offence in question was committed. It is also contended that the MLC also does not support the allegations leveled by the victim. It is, therefore, argued that there is no infirmity in the order dated 23.10.2017 of the learned Trial Court.

9. I have considered the submissions made by both the counsels and also perused the impugned order and the material on record.

10. The learned Trial Court, while passing the impugned order, has laid emphasis on discrepancies in the statements recorded under Section 164 Cr.P.C., under Section 161 Cr.P.C. and FIR, and has further observed that the allegations regarding the threats are inconsistent in the statement given to the police and to the Magistrate. The learned Judge has also taken note of the fact that police have not recovered any weapon by which the injuries were allegedly caused to the victim. Further, it held that on the basis of

contents of DD entry No. 64B which mentions that only a quarrel with the landlord had taken place, and that the MLC of the victim does not substantiate the allegations of sexual assault, and the statements given by the victim and his relatives with whom he had narrated the incident are also not co-related and therefore, discharged the respondent. The impugned order reads as under:

“The above circumstances show that the victim is changing his story again and again and the story regarding undressing the victim and touching his private part or alleged attempt to do "galat kaam" is highly doubtful. The MLC does not corroborate any such incident of sexual assault. Even otherwise also, the story of causing injuries with weapons is not convincing because the victim himself is not sure with which particular object he was given beatings and how many persons had caused him injuries. On the other hand, if the statements of the victim given from time to time are taken into consideration, then it shows that he is revealing unnatural conduct and behaviour. Even if for the sake of arguments, it is held that accused had caused simple injuries to the victim, then maximum the offence u/s 323 IPC is made out which is non cognizable and police cannot investigate the matter without permission of the court. Delhi High Court in case State vs Dr. Gajraj Singh CrI. Rev. Petition No. 9/2017 decided on 16.01.2017 held that where the statement given to the police u/s 161 Cr.P.C. and statement given to the Magistrate u/s 164 Cr.P.C. cannot be reconciled, then the accused deserves the order of discharge. The allegations of criminal intimidation levelled against the accused Sushil are vague and unspecific which cannot be relied upon. The victim allegedly had disclosed about the incident to his relatives and if the statement of those relatives is also considered, then it is not correlating with the version of the victim as described above. In view of the above discussions, I am of the opinion that no offence is made out

for framing charge so all the four accused persons are hereby discharged.”

11. It is settled law that at the stage of framing of charges, the evidence need not be looked at in detail, but needs to be merely scrutinized to form a prima facie view. The law relating to framing of charges can be found under Section 228 of Cr.P.C., which is reproduced below:

“228. Framing of charge.

(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub- section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

12. Further Section 227 read with Section 239 of Cr.P.C. lays down the law on discharge. Section 227 is reproduced 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.”

13. In the case of ***Union of India v. Prafulla Kumar Samal & Anr, (1979) 3 SCC 4***, the Hon’ble Supreme Court dealt with the scope of enquiry a judge is required to make with regard to the question of framing of charges. The following principles were laid down by the Court:

“10. ...(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 Judge cannot act merely as a Post office or a mouth-piece 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.”

14. The Apex Court, in the case of ***Sajjan Kumar v. C.B.I. (2010) 9 SCC 368***, held that at the time of framing of charge, the Court has to look at all the material placed before it and determine whether a *prima facie* case is made out or not and serious doubt has to be raised against the accused. The court need not consider the evidentiary value of the evidence as any question of admissibility or reliability of evidence is a matter of trial. The relevant portion of the judgment is reproduced below:

“21. On consideration of the authorities about scope of Sections 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. 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. The test to determine prima facie case would depend upon the facts of each case.

(ii) 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.

(iii) The 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 etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) 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.”

FINDINGS

15. Thus, a Trial Court at the time of deciding as to whether a charge is made out against the accused or not, is required to take note of the abovementioned legal propositions. When the impugned order is considered in the light of the settled law on charge, this Court notes that the learned Trial Court, in the present case, has clearly tried to appreciate the evidence in detail and has also gone into the statements

of all the witnesses to find inconsistencies. The learned Trial Court was permitted to '*sift or weigh*' the evidence for the limited purpose of finding a *prima facie* conclusion, since the evidence collected during investigation had to be discussed and appreciated after being tested on the touchstone of cross-examination of deposition of the witnesses. The approach of the learned Trial Court was erroneous as it appreciated evidence extensively as if trying to arrive at a conclusion whether the case will end in conviction or not.

16. It was observed in the impugned order that there were different versions of offence in statements under Section 161 Cr.P.C., Section 164 Cr.P.C. and the DD entry no. 64B. The learned Trial Court failed to note that this would have to be explained by the witness and the prosecution at the time of trial. At the time of lodging of DD entry, it is common knowledge that only an intimation is given to the police by anyone, including the affected parties, regarding the occurrence of an offence as may be apparent to the informer of the DD. It is not expected that the entire commission of an offence be narrated in detail. It has to be kept in mind that while dealing with cases under POCSO Act, victim must have undergone unexplainable trauma due to sexual assault. One cannot expect victim of sexual assault to always narrate the incident with same accuracy while giving statement under Section 164 Cr.P.C. and Section 161 Cr.P.C. To be arithmetically similar or correct is impossible for a victim who has been assaulted in mind as in the body. Discrepancies, if any, have to be explained by the prosecution at the time of trial and cannot become ground for discharge.

17. It has been held as under in the case of ***Hazrat Deen v. The State of Uttar Pradesh & Anr., SLP(Crl.) No(s). 9552/2021***, by the Hon'ble Supreme Court :-

“Discrepancies between the FIR and any subsequent statement under Section 164 of the CrPC may be a defence. However, the discrepancies cannot be a ground for discharge without initiation of trial.”

18. Further, the finding of the learned Trial Court that since the weapon of offence has not been recovered by the police, it was ground for discharge is also erroneous. It is not the fault of victim, and the prosecution is to answer this only during trial. The accused may take it as his defence during trial. In ***State of Rajasthan v. Ashok Kumar Kashyap (2021) 11 SCC 191***, the Apex Court observed as under:

“15. As observed hereinabove, the High Court was required to consider whether a prima facie case has been made out or not and whether the accused is required to be further tried or not. At the stage of framing of the charge and/or considering the discharge application, the mini trial is not permissible. At this stage, it is to be noted that even as per Section 7 of the PC Act, even an attempt constitutes an offence. Therefore, the High Court has erred and/or exceeded in virtually holding a mini trial at the stage of discharge application.

16. We are not further entering into the merits of the case and/or merits of the transcript as the same is required to be considered at the time of trial. Defence on merits is not to be considered at the stage of framing of the charge and/or at the stage of discharge application.”

19. Further in ***State v. Om Prakash Etc. 2017 SCC OnLine Del 11272***, the Coordinate Bench of this Court made the following

observations:

“9. It is settled legal proposition that FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy. The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has falsely been implicated. The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from this. Some people may miss even the most important details in narration. Therefore, in case the informant fails to name a particular accused in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused. (Vide: Rohtash v. State of Rajasthan (2006) 12 SCC 64; and Ranjit Singh and Ors. v. State of Madhya Pradesh JT 2010 12 SC 167).

10. In my considered view, the entire approach of the learned Trial Court is erroneous. The learned Trial Court was only required to consider whether a prima facie case for framing a charge under Section 12 of POCSO Act is made out and not to appreciate the evidence as if arriving at the conclusion as to whether the material placed was sufficient to base the conviction.”

20. As far as the MLC not supporting the prosecution or victim story is concerned, a perusal of the MLC prepared on 08.08.2016 at 12.30 am reveals that accused/respondent no. 1 himself was present in the hospital alongwith the victim. It has been mentioned that at 1:20 am, the patient was found unfit for statement. Thereafter, it is written that he is fit for statement but the time is not mentioned. MLC also points toward the injuries having been caused by blunt object,

and that the patient was conscious and oriented. It is also mentioned that the patient seems to be mentally retarded and has been referred to the department of surgery, medicine and ortho department. After he was examined, it was mentioned that he had bluish-reddish multiple bruises and abrasions on upper and lower back, both arms, both forearms, both hands, both hips, buttocks, thighs, both legs, neck and abrasions on the right thumb both axilla. Bruises and tenderness were found on thighs.

21. The victim has clearly mentioned that he was inappropriately touched on his private parts. The reddish and bluish marks, multiple bruises and abrasions on both the thighs, arms, hands, hips, legs, neck and tenderness raises a strong suspicion that he was forcibly held and inappropriately touched. The fact that since the rectal swabs were already sent to FSL and report was awaited, together with the fact that it is mentioned that the patient seemed to be mentally retarded, should have persuaded the learned Trial Court to look at the statements given with sensitivity keeping in mind the specific observations in the MLC. The entire incident would become clear only during trial including the exact mental condition and capability of the victim. Needless to say, a person, if mentally retarded to some extent, which is not clear from the MLC, too has a constitutional right to get justice for the wrong done to him as he was an easy pray for the sexual assault suffered by him. The specific opinion of injuries being caused by blunt object should not have escaped the notice of the learned Trial Court.

22. The victim was found to be conscious and oriented by the

doctor concerned at 12.30 am as per the MLC, however, it is mentioned that “*the victim was unfit for statement at present time i.e. at 01.20 AM*” which is also an indicator regarding the victim being in shock of the incident in question. The injuries were opined to have been caused by a blunt object which is clearly mentioned in the MLC. The rectal swabs have been sent for FSL report and the FSL report is awaited. The learned Trial Court clearly failed to take note of the facts which speak for themselves and arise nothing but grave suspicion regarding the commission of offences which necessitated trial to reach conclusion as to whether there was truth in the story of the prosecution and the victim or not.

23. Thus, in view of the aforesaid, the present revision petition is allowed and the impugned order dated 23.10.2017 passed by learned Trial Court is set aside. It is ordered that charges be framed against respondents under Sections 323/342/363/506/367/34 IPC and Section 12 POCSO Act.

24. Nothing expressed herein shall have any bearing on the merits of the case during trial.

SWARANA KANTA SHARMA, J

OCTOBER 19, 2022/ns