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

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Reserved on: 27.07.2022

Pronounced on: 23.11.2022

+ **CRL.REV.P. 268/2018**

STATE

..... Petitioner

Through: Mr. Manoj Pant, APP for the
State with SI Pushpa IO P.S.
Jama Masjid and SI
Dharambir, P.S. Hauz Qazi

versus

MOHD. JAVED NASIR & ORS.

..... Respondents

Through: Mr. R.K. Singh and Mr.
Gagan Gautam, Advocates

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present revision petition has been filed by the State assailing the order dated 18.10.2016 passed by learned ASJ/SFTC-2 (Central), Tis Hazari Courts, Delhi in Case No. 28745/2016 arising out of FIR bearing no. 79/2016, registered at Police Station Hauz Qazi, whereby the accused persons have been discharged under Section 376 of Indian Penal Code, 1860 ("IPC") and charges have been framed against them under Sections 323/354/354B/458/509 read with Section 34 of the IPC.

2. Briefly stated, the facts of the case are that on 05.03.2016, accused Nasiruddin, while he was getting some work done in the building near the house of the victim, made some gestures towards the victim, to which she had objected. Thereafter, Nasiruddin along with his son and some of his friends went to quarrel with the victim, however, they fled the spot soon after the victim dialed the Police Control Room. Three days after the said incident i.e., on 08.03.2016, the accused persons unlawfully entered the house of the victim, who was five months pregnant, and thereafter assaulted her with an intention to outrage her modesty. On the day of occurrence, an intimation to the police was given by the complainant, pursuant to which the police officials took the complainant to the police station for registering an FIR. On the next day of the incident, the complainant went to the Lok Nayak Hospital on 09.03.2016 due to stomach ache and bleeding from her genitals, and was medically examined. During the course of investigation, on 31.03.2016, a torn piece of *kurta pyjama* was handed over to the Investigating officer by the victim. Subsequently, the statement of the prosecutrix was recorded by the learned Magistrate under Section 164 of the Code of Criminal Procedure, 1974 on 02.04.2016, wherein the victim had stated that one of the accused persons had inserted a finger inside her genitals. The charge under Section 376 IPC was added pursuant to the statement of the victim. Charge-sheet in the present case was filed under Sections 376/323/354/354-B/458/509/34 IPC and order on charge dated 18.10.2016 was passed by the learned Trial Court, whereby the accused

persons were discharged under Section 376 IPC. The operative part of impugned order dated 18.10.2016 reads as under:

“...As per case of prosecution, prosecutrix has never stated in her complaint that she was raped by accused nor in her MLC she has stated to doctor. Only her statement u/s 164 Cr.P.C. she' came about with the fact of rape.

In these circumstances, prima facie in my opinion, no case is made out to proceed with accused persons for offence punishable under section 376 IPC. However, prima facie case is made out against the accused persons for offences punishable under sections i.e. 323/354/354B/458/509/34 IPC are exclusively triable by magisterial court. Hence, file be sent to Ld. CMM concerned for necessary directions. Parties are directed to appear before Ld. CMM concerned on 19.10.2016 at 2:00 p.m...”

3. Learned APP for the State/petitioner submits that learned Trial Court, while passing the order on charge, has exceeded its jurisdiction and has appreciated the evidence in detail at the stage of framing of charge. It is argued that the learned Trial Court has ignored the settled law that even if two views are possible at the stage of framing of charge, the view in the favour of prosecution should be accepted. It is stated that the prosecutrix had revealed that she did not mention the occurrence of the incident earlier as she was afraid that her honour and dignity will be compromised. Reliance has been placed on the following decision in support of the aforesaid contentions by the learned counsel for the petitioner: (i) ***State of M.P v. S.B Johri (2002) 2 SCC 57***; (ii) ***Mathura Dass & Ors. v. State, (2003) 2 AD Criminal 437***; (iii) ***Neha Monga v. State 2012(10) AD (Delhi) 338***

4. The learned counsel appearing for the respondents, however, states that the petitioner has not raised a single ground which could be considered as the relief claimed in the petition is to be considered on the basis of statement made by the complainant at the first instance for determination of charge. The medical examination of the victim reveals that there is an alleged history of physical assault by a neighbour, however, no history of any sexual assault, no complaint of pain in the abdomen/LPV/BPV and no fresh external injury on the body at the time of examination has been observed. It has been stated by the learned counsel for respondents that the allegation of rape is a concoction of stories, in view of which the present petition be dismissed.

5. I have heard the contentions and arguments of learned counsels for both parties, and material available on record has also been perused. Before considering the facts of the case, it would be appropriate to briefly discuss the settled law applicable to the case at hand.

6. The provisions dealing with the discharge and framing of charge are given under Section 227 and 228 of Cr.P.C. respectively, and the same are 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."

"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."

7. The Hon'ble Supreme Court in the case of ***Sajjan Kumar v. CBI (2010) 9 SCC 368***, has considered the power of court in respect of the framing of charges and held the fact that a *prima facie* case would depend on the facts and circumstances of each case. The observations of Apex Court are as under:

"21. On consideration of the authorities about the 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 CrPC 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 cases 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 disclose 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.”

8. In the case of *Asim Shariff v. National Investigation Agency (2019 7 SCC 148)*, it was reiterated that the trial court is not supposed to divulge the evidence on the record to determine whether the accused would get acquitted or convicted if a particular charge is framed against an accused. The relevant portion of the observation of the court in the case is as under:

“18. Taking note of the exposition of the law on the subject laid down by this Court, it is settled that the Judge while considering the question of framing charge under Section 227 CrPC in sessions cases 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 material placed before the Court discloses grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, 3 2018(13) SCC 455 4 2019(6) SCALE 794 the trial Judge will be justified in discharging him. It is thus clear that while examining the discharge application filed under Section 227 CrPC, it is expected from the trial Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. It is true that in such proceedings, the Court is not supposed to hold a mini trial by marshalling the evidence on record.”

9. Further, in the case of *Vikram Johar v. State of Uttar Pradesh & Anr., 2019 SCC OnLine 609* the Supreme Court has reiterated that during the stage of charge, the court must not conduct a mini-trial and the decision should be based on the *prima facie* appreciation of the

materials placed on record. The relevant portion of the said judgment is as under:

“19. It is, thus, clear that while considering the discharge application, the Court is to exercise its judicial mind to determine whether a case for trial has been made out or not. It is true that in such proceedings, the Court is not to hold the mini trial by marshalling the evidence.”

10. Learned APP for the state/petitioner had placed reliance upon the judgment titled as ***Neha Monga v. State, (Delhi High Court), 2012 (10) AD (Delhi) 338*** and relevant portion of the said decision is reproduced herein:

“In the opinion of this Court the learned trial Court, even after noticing the judgment of the Supreme Court wherein it has been held as the at the stage of charge detailed and minute appreciation of the evidence which the prosecution proposes to adduce during the trial is not permissible, has gone much beyond its jurisdiction which it possessed at the stage of charge by considering the effect of nothing having been said against the discharged accused in the FIR and their being named as the rapists only in her subsequent statements under section 161 and 164 Cr.P.C. The question as to why names of the accused persons discharged by the trial court were not mentioned in the body of FIR, though their names were stated there as the accused persons, could to be gone into at the time of trial only and should not have been answered by the trial Court at the stage of charge. The subsequent statements under Sections 161 and 164 Cr.P.C. of the prosecutrix claiming the discharged accused also to be the rapists were sufficient to accept the allegations against them at the stage of charge. And as far as the submission made on behalf of the charged accused that the allegations of rape are highly improbable is concerned the

same has also no merit as there is nothing improbable about those allegations.”

11. A perusal of the impugned order reveals that that three things were considered by the learned Trial Court at the stage of framing of charge i.e., the FIR, the MLC and statement of the prosecutrix under Section 164 Cr.P.C. It was noted by the learned Trial Court that the prosecutrix has neither made any mention about the commission of rape while lodging the FIR, nor the same has been revealed in the MLC. It is further noted that the prosecutrix has only mentioned about the offence for the first time during the statement given to the learned Magistrate under section 164 Cr.P.C. wherein it was stated that one of the accused persons inserted a finger in her genitals and had hit her stomach despite the prosecutrix stating to the accused persons that she was pregnant. It was observed by the learned Trial Court that the MLC does not mention any sexual assault rather only the physical assault. However, it appears that the learned Trial Court, at the stage of framing of charge, went on to marshal the evidence and find contradictions in the same.

12. A reference in the present set of facts and circumstances can be made to the recent judgment of Hon’ble Apex Court in ***Hazrat Deen v. The State of Uttar Pradesh, Special Leave to Appeal (Crl.) No(s). 9552/2021*** wherein it was opined that:

“In her statement given by the prosecutrix under Section 164 of the Code of Criminal Procedure (CrPC) after the prosecutrix attained majority, she categorically made statements which tantamount to offence under Section 376 of the IPC. 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.”

13. Thus, when the impugned order is tested in light of ***Hazrat Deen (supra)*** as well as settled position of law with regard to framing of charge, it appears that the learned Trial Court has committed an error in discharging the accused by giving undue weightage to the discrepancies in the statements of prosecutrix. In the given facts, a charge under Section 376 IPC could have been framed solely on the basis of the statement made under Section 164 Cr.P.C. even if such an allegation was not made in the FIR or in statement under Section 161 Cr.P.C. This is so because in offences like rape where only the victim is the witness in majority of the cases, the statement made by victim should be looked at from a considerate and liberal perspective at the time of framing charges. A statement made under Section 164 Cr.P.C. disclosing the offence of rape shall be sufficient to frame charges under Section 376 of IPC.

14. The courts must give a careful consideration to the aftermath of an incident of sexual violence against any person. There is no doubt about the trauma which a victim goes has to face, both physically and emotionally, after incidents of such a nature. Many a times, a person may not be in an emotional or physical state to take an immediate stand against the assailant or to go through further trauma of investigation by the police or through an intrusive medical examination, and an accused should not merely be discharged under Section 376 because the prosecutrix has not stated about the same in her FIR or during MLC.

15. An overzealous approach to appreciate evidence in detail and conclude the entire case even before it begins is fatal not only to the case at hand, but, at times, to the justice and faith of the victim in the criminal justice system. There might be instances where the MLC will not be able to disclose the actual incident. One such example is when it has been alleged that an act of rape has been committed by a finger or by any other object or in any manner where restraint marks or other medical evidence could not be adduced. Thus, trial courts during the stage of framing charges, must not venture into the appreciation of evidence and start assessing the same, rather the courts are bound to frame charges where there is a *prima facie* case to show that an offence has been committed.

16. Therefore, in the light of the foregoing discussion, the impugned order dated 18.10.2016 passed by learned Trial Court in Case No. 28745/2016 arising out of FIR bearing no. 79/2016, to the extent of discharging the respondents for offence under Section 376 IPC is set aside and accordingly, charge under Section 376 IPC is framed against the accused persons, in addition to the other charges already framed against them.

17. Accordingly, the present petition stands allowed.

18. It is, however, clarified that the observations made by this Court are only for the purpose of deciding the present petition and the same shall not have any bearing on the merits of the case during the trial

SWARANA KANTA SHARMA, J

NOVEMBER 23, 2022/zp