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

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Reserved on: 09.11.2022
Pronounced on: 22.11.2022

+ **CRL.REV.P. 976/2018**

STATE

..... Petitioner

Through: Mr. Manoj Pant, APP for the
State with SI Murari Lal, P.S.
DBG Road, Delhi.

versus

PRAMOD KUMAR

..... Respondent

Through: Mr. Prince Arora and Mr.
Gagan Kumar, Advocates.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The petitioner i.e. the State through instant petition, filed under Sections 397/401 read with Section 482 of the Code of Criminal Procedure Code, 1973, seeking setting aside of order dated 23.07.2018 passed by learned ASJ/SFTC-2 (Central), Tis Hazari Courts, Delhi in case No. 283/2018 titled as “*State v. Pramod Kumar*” in FIR bearing no. 122/2017, Police Station DBG Road, and direct framing of charges against the respondent and consequent trial in accordance with law.

FACTUAL MATRIX

2. The brief facts of the case are that on 06.07.2017, a complaint was received at Police Station DBG Road by the Complainant ("X"), who is aged about 24 years. It was alleged in the complaint that the Complainant was unmarried and residing with her widowed mother. The complainant and her mother were stated to be doing the work of selling of boiled eggs and omelet on *rehri* in front of MCD office DBG Road.

3. The accused/Respondent was appointed as beat officer in that area. The complainant came into contact with the accused and later accused developed talking terms with her. It was alleged that the accused made a false promise of marriage to the complainant and on that basis, respondent outraged complainant's modesty a number of times and started playing with her emotions and body. Accused used to follow her to the gym and yoga classes. It was further alleged that on six occasions, the accused had taken the complainant to the *khandar* of Dev Nagar, behind Liberty Cinema and did oral sex with her. It was further alleged that on 10.04.2017, the accused entered into her house in drunken condition and performed sexual intercourse and raped her without her consent.

4. It was again alleged that after the abovesaid incident, the accused threatened the complainant stating that since he himself was a police constable, police could not do anything against him and in case she proceeded against him, she would have to face dire consequences and he would kill her. It was also alleged that the accused also threatened to upload the objectionable photographs of her on the net which was taken

by him. The complainant stated that the accused was in active contact with her through WhatsApp messages through his mobile number.

5. It was stated in the complaint that due to the abovesaid incidents the complainant went into depression and because of that initially she refused to join and participate in the investigation or get her medical examination conducted. Later, after efforts made by the I.O. SI Veena Sharma, the statement of the complainant u/S 164 Cr.P.C was recorded. In said statement, she reiterated the version given by her in the FIR bearing no. 122/2017 registered at Police Station DBG Road, Delhi for the offences punishable under Sections 354/354D/376/509 of the Indian Penal Code 1860. The Complainant further stated that she gave complaints to the police station for two months, but instead of taking action thereon, she was made fun of and threatened. She also alleged that the Investigating Officer of the case also threatened her to take back her case.

6. It was further stated by the complainant that on 15.07.2017, at 11:30-11:45, one person had come to her house, who did not tell his name, and asked her not to give her statement and to withdraw her complaint and they would ask the accused to apologize and even to pay money to the complainant. She further alleged that the Investigating Officer did not get her medical examination conducted and that at the relevant time she was under menstruation, but it was recorded that she did not want to get her medical examination done, though she wanted to get the same conducted. She further alleged that the Investigating officer had recorded incorrect date of birth of the complainant and certain other information in the above-mentioned FIR and despite

asking, refused to correct same on the ground that the FIR stood uploaded on the net.

7. The complainant alleging threat from the I.O., stated that she did not want to get medical done through her as earlier they had twice got a wrong medical report prepared. The I.O. had recorded in the case diary that despite repeated requests, the Complainant refused to get medical examination conducted. It was also recorded in the charge-sheet subsequently prepared, that the I.O. had informed this fact to learned CMM in writing.

8. During the course of investigation, the earlier complaints and enquiry/reports were also obtained and taken on record and made part of charge-sheet. The CDRs of the mobile numbers of complainant and accused were also obtained. It was further recorded in the charge-sheet that there was some conversation recorded on phone of the accused, which was seized and sent to FSL, Rohini for expert opinion.

9. The learned ASJ/SFTC-2, Central District, Tis Hazari, Courts, Delhi *vide* order dated 23.07.2018 discharged the respondent for the offences under Sections 354/354D/ 376/506 IPC.

SUBMISSIONS OF LEARNED COUNSELS

10. Mr. Manoj Pant, learned APP for the State states that the learned Trial Court has appreciated the evidence which was not permissible in law at the stage of framing of charge. He also states that the report of the NGO or any discrepancy in any representation, statement under Section 164Cr.P.C. or any other complaint could not have been gone

into in detail at this stage. Learned APP further states that the defence of the accused cannot be appreciated at the stage of charge.

11. It is further stated by learned APP that learned Trial Court did not even wait for the FSL report though the complainant has leveled allegations that a mobile phone conversation, including 10 voice calls which were saved, between the complainant and the accused and other material which supports the prosecution's case has been sent to FSL.

12. Mr. Manoj Pant, learned APP for the State further states that the learned Trial Court has also committed an error by not waiting for the FSL result of voice recording which was handed over by the complainant to the prosecuting agency. He states that it is clearly mentioned in the charge sheet that the FSL report is awaited and supplementary challan will be filed after receipt of result of FSL report.

13. SI Murari Lal who appears on behalf of the concerned SHO stated that FSL report has not been collected though the recordings were sent to FSL in the year 2017-18.

14. On the contrary, learned counsel for respondent states that the impugned order does not suffer from any infirmity or illegality since the learned Trial Court has passed a detailed order wherein the learned Trial Court has appreciated the material on record and has not gone into the material thoroughly. He further states that the learned Trial Court was justified in testing the veracity of statements of victim and take a prima facie view of the matter. He states that learned Trial Court could not have acted as post office of the prosecution.

15. Learned counsel for respondent argued that it is clear from record that the complainant had given different statements before

different authorities including her representations and she had not leveled allegations of rape against the respondent in her initial complaint. It is also argued that this is a case of one sided love affair in which respondent was not interested.

16. It is further stated by the learned counsel for respondent that he has no objection if the case is remanded back for the limited purpose of examining the FSL result in case supplementary charge sheet is filed before the learned Trial Court.

17. Rival contentions raised on behalf of the parties have been heard and material on record has been perused.

ANALYSIS AND FINDINGS

18. As per Section 228 Cr.P.C., the Court can proceed to frame charge against an accused if it is of opinion that there is ground for presuming that the accused has committed an offence. Section 228 of Cr.P.C. is reads as under:

“Section 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, 1[or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such 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 subsection (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."

19. An accused can also be discharged as per Section 227 Cr.P.C. Section 227 of Cr.P.C. is reads as under:

"Section 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."

20. In the case ***State of Bihar v. Ramesh Singh, (1977) 4 SCC 39***, this Court observed that at the initial stage of the framing of a charge if there is a strong suspicion-evidence 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 against the accused. 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 the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.

21. 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.”

22. Further, the Hon’ble Supreme Court recently in ***Sanjay Kumar Rai v. State of U.P., (2021) SCC OnLine SC 367***, held that the issue is well settled and the controversy qua revisional jurisdiction is set to rest with the actual position of the law being that the order of framing charge or that discharge is neither interlocutory nor final and hence

does not attract the bar of Section 397(2) of the Code. Surya Kant, J. in his judgement stated that:

“17. Further, it is well settled that the trial court while considering the discharge application is not to act as a mere post office. The Court has to sift through the evidence in order to find out whether there are sufficient grounds to try the suspect. The court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case and so on...”

23. Recently, the Hon’ble Supreme Court decision in ***State of Rajasthan v. Ashok Kumar Kashyap, 2021 SCC OnLine SC 314***, it was held that at the stage of framing of the charge and/or considering the discharge application, a mini trial is not permissible. The Court observed that the position of law that emerges is that at the stage of discharge/framing of charge, the Judge is merely required to take note of the material on record in order to find out whether or not there is sufficient ground for proceeding against the accused.

24. Before applying the test of the settled principles of law on charge and discharge to the present case, it will be useful to discuss the relevant provisions of law under question.

25. In ***Dileep Singh v. State of Bihar (2005) 1 SCC 88***, it was observed by the Hon’ble Supreme Court that *“the man was charged with rape under Section 376 of the Indian Penal Code. The consent of the girl for sexual intercourse was obtained by deceit, according to the Supreme Court, because he promised to marry her. Consent given by deception of the victim is not valid consent.”*

26. Recently the Hon'ble Supreme Court in *Shambhu Kharwar v. State of Uttar Pradesh and Anr. 2022 SCC OnLine SC 1032*, held that:

“11. In Pramod Suryabhan Pawar v. State of Maharashtra, a two Judge Bench of this Court of which one of us was a part (D.Y. Chandrachud J.), held in Sonu @ Subhash Kumar v. State of Uttar Pradesh, observed that:

“12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action...

[...]

14. [...] Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled...

[...]

*16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a “misconception of fact” that vitiates the woman's “consent”. On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. **The “consent” of a woman under Section 375 is vitiated on the ground of a “misconception of fact” where such misconception was the basis for her choosing to engage in the said act...***

[...]

18. To summarise the legal position that emerges from the above cases, the “consent” of a woman with respect to Section 375 must involve an active and reasoned deliberation towards

*the proposed act. To establish whether the “consent” was vitiated by a “misconception of fact” arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. **The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act.**”*

(emphasis supplied)

27. It is clear from the record of the present case that the complainant has been making complaints against petitioner since May, 2017 alleging that the accused had committed sexual intercourse with her on the pretext of marriage six times after taking her to a place behind Liberty Cinema, Dev Nagar. She has specifically stated that on 10.04.2017, she was raped at her home when petitioner had come there after consuming liquor. She has also stated in her statement to the police that the police officials were not helping her and were rather helping the petitioner since he was working as a police constable.

28. As per the call detail record, the location of the petitioner on 10.04.2017 has also been found near the area of house of the complainant. A perusal of her statement recorded under Section 164 Cr.P.C also shows that she has mentioned the place and the manner in which sexual assault was committed upon her. The relevant portion of Section 164 Cr.P.C reads as under:

“...I used to go to the gym near Liberty Cinema and he used to meet me while returning and used to take me to the khandar nearby where he made physical relations with me on six occasions without my consent by making promise with me for marriage. He also used to threaten me. On 10.04.2017, he came

to my house after consuming liquor when no one was present in the house and he forcibly made physical relations with me. Thereafter, he stopped talking to me and threatened me to make any number of complaints against him but he said do not write anything which may endanger him. He threatened me that he can do anything if I will make complaint against him because he is a police official and he also threatened to eliminate my family...”

29. She has also stated in her statement recorded under Section 164 Cr.P.C that she was willing to get herself medically examined. However, the Investigating Officer (IO) did not get the medically examination conducted and her complete statement was not recorded by the IO. Relevant portion of statement recorded under Section 164 Cr.P.C in this regard reads as under:

“...The I.O. did not get my medically examination done. She had asked me for medical examination, but at that time I was on menstruation cycle and having my periods. But she wrote that the girl has refused for medical examination whereas I wanted to get myself medically examined...”

30. It is thus clear that the allegations leveled by the victim/complainant are clear and specific that on pretext of marriage, she was forced to have sexual intercourse on several occasions and on some occasions against her will. Therefore, the consent obtained for sexual intercourse was on misconception of facts based on promise to marry.

31. An offence is punishable under Section 376 IPC if the offence of rape is established in terms of Section 375 IPC which sets out the ingredients of the offence. However, it has been mentioned under Section 375 IPC that sexual intercourse based on a promise to marry

will be considered as rape only. The Hon'ble Supreme in **Anurag Soni v. State of Chhattisgarh, (2019) 13 SCC 1**, held that:

“14. Considering the aforesaid facts and circumstances of the case and the evidence on record, the prosecution has been successful in proving the case that from the very beginning the accused never intended to marry the prosecutrix; he gave false promises/promise to the prosecutrix to marry her and on such false promise he had a physical relation with the prosecutrix; the prosecutrix initially resisted, however, gave the consent relying upon the false promise of the accused that he will marry her and, therefore, her consent can be said to be a consent on misconception of fact as per Section 90 of the IPC and such a consent shall not excuse the accused from the charge of rape and offence under Section 375 of the IPC.”

32. In case of **Pramod Suryabhan Panwar v. State of Maharashtra and Another(2019) 9 SCC 608** wherein it was laid down by the Hon'ble Supreme Court that:

“16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a “misconception of fact” that vitiates the woman’s “consent”. On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The “consent” of a woman under Section 375 is vitiated on the ground of a “misconception of fact” where such misconception was the basis for her choosing to engage in the said act....”

33. From the material placed on record, it is amply clear that the petitioner had no intention of getting married to the complainant and on false promise of marriage, on several occasions, he had outraged her modesty and on number of occasions he had sexual intercourse with

her with her consent on false promise of marriage and on two occasions without her consent.

34. A perusal of impugned order reveals that learned has discharged, the petitioner on the following grounds:

“On perusal of complaint dated 03.06.2017 and 06.06.2017 to DCP, It is revealed that prosecutrix has not stated in her complaints that they meet each other and they have only exchanged their views on phone. On perusal of complaint, it is also revealed that as per complaints there is no humiliation of the complainant, as the complainant has neither alleged regarding physical molestation nor mentally harassment.

In complaint dated 04.07.2017 wherein it is stated that the accused Pramod has taken the complainant into the Khandar of Dev Nagar which are behind the liberty Cinema and did oral sex with her and thus misuse the emotion of complainant but no time, date, month or year mentioned in the complaint.” whereas the statement recorded u/s 164 Cr.P.C., the prosecutrix stated that she was raped six time at the above mentioned place, same is contradictory with her own complaint.

Even, complaint mentioned to PMO, DCP or other various authorities does not disclosed the offence of rape against the accused on the same time whereas her statement u/s 164 Cr.P.C, she disclosed the offence of rape against the accused which is not sufficient to take cognizance.

Even, inquiry report and report of NGO also does not reflects the offence of rape against the accused. The question of life and liberty of accused is also of paramount consideration. An accused cannot be compelled to face trial in a case where the result of the case is apparent and as such that it would go in favour of accused. In these circumstances, the prosecutrix even if called by her deposition in court cannot depose anything beyond her statement given to police and before the Ld. MM which when consider with other relevant record part of judicial file like

report of Public Grievance Cell, counselling reports, earlier complaints of prosecutrix, it would not be proper to compell accused to face trial.”

35. In the given scenario, a reference 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 as under:

“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.”

Thus, in view of the decision in ***Hazrat Deen (supra)***, the learned Trial Court has committed an error in discharging the accused by giving undue weightage to the discrepancies in the statements of prosecutrix.

36. As per settled principles of law regarding framing of charge, the learned Judge was only to take a prima facie view of the matter and was not to test the veracity of statements of the witnesses or the probative value of statements of the witnesses on record. The learned Judge committed an error by discussing in detail the discrepancies in statement recorded under Section 161 Cr.P.C, statement under Section 164 Cr.P.C, her representations to various authorities.

37. The learned Judge has committed a grave error as he holds that the statement recorded under Section 164 Cr.P.C is not sufficient to frame charge under Section 376 IPC, though there are specific and

clear allegations of rape. The learned Judge has also relied on an inquiry conducted by Delhi Police in this complaint before Public Grievance Cell wherein it was mentioned that:

“In view of above facts and circumstances, the version of the complainant does not inspire the confidence and found to be motivated. The complainant have infatuation on Const. Pramod and she wants to marry him at any cost, which is one sided and there is no fault found on the part of Ct. Pramod. If approved complainant may please be directed to counseling herself.”

38. Learned judge has ignored the specific allegations leveled in statement under Section 164 Cr.P.C as well as the explanation given for non-medical examination and how she was made to run from pillar to post since the petitioner was also working in Delhi Police and an inquiry was also being conducted by Delhi Police. Learned Judge has chosen to ignore the statement under Section 164 Cr.P.C completely and has chosen to believe the inquiry report which states that the version of the complainant does not inspire confidence and is found to be motivated since she seems to have been infatuated and wanted to marry the petitioner at any cost. When the learned Judge had several complaints, statement under Section 161 Cr.P.C and statement recorded under Section 164 Cr.P.C before it coupled with the fact that the call detail record of the alleged date of incident indicated presence of the accused near the house of the prosecutrix, the same could not have been ignored as it was sufficient to give rise to grave suspicion regarding commission of an offence.

39. Learned Judge also committed an error in holding that in case of discrepancies in the statement under Section 161 and under Section 164

Cr.P.C and other representations etc even if the prosecutrix is called for deposition in Court, she cannot depose anything beyond her statement given to the police and the Metropolitan Magistrate which may not result into conviction of the petitioner. Learned Judge was not to decide at the stage of framing of charge as to whether the case will end into conviction or acquittal. The well settled principles of law as enumerated above had to be kept in mind that the material on record had to be looked into in light of only those settled principles of law and not beyond.

40. Moreover, the order seems to have been passed in a hurry as from the facts and the material on record, it is noted that FSL report had not been collected though the voice recordings were sent in the year 2017-18. It is case of complainant that a mobile phone conversation, including 10 voice calls which were saved by her between her and the accused and other incriminating material supporting her case were seized by police, however, the FSL report is awaited.

41. A bare perusal of the facts and material on record reveals that it was the case of the prosecution that there were recorded conversations and inappropriate material which was threatened to be used by the accused in the mobile phone which had been sent to FSL. It is not clear as to why the learned Trial Court was in a hurry to decide the matter even without waiting for the supplementary charge-sheet which was to be filed after obtaining FSL result. It is mentioned clearly in the charge-sheet that the recordings, etc. had been sent to Forensic Lab for analysis and supplementary charge-sheet will be filed after the result is

obtained. Learned Judge should have waited for the supplementary charge-sheet especially, when learned Trial Court was dealing with an offence under Section 376 IPC and should not have passed the order in a hurry.

42. Considering the allegations and the material available on record, the observation of the learned Trial Court to the extent of discharging the accused/respondent for the offences punishable under Sections 354/354D/376/509 IPC suffers from error of law and the learned Trial Court has wrongly discharged the accused for the said offences.

43. In view of the above, the present petition is allowed and the impugned order dated 23.07.2018 passed by learned ASJ/SFTC-2, Central District, Tis Hazari Courts, Delhi in Case No. 283/2018 arising out of FIR bearing no. 122/2017, Police Station DBG Road, under Sections 354/354D/376/506 of Indian Penal Code, 1860 is hereby set aside and the learned Trial Court is directed to pass order in the light of above observations and keeping in mind the settled position of law as well as waiting for the FSL report which this Court is informed will be filed along with the supplementary charge-sheet, before the learned Trial Court.

44. It is however, clarified that the observations made by this Court are only for the purposes of deciding the present petition against the order of discharge and shall have no bearing on the merits of the case during the trial.

SWARANA KANTA SHARMA, J

NOVEMBER 22, 2022/kss