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

+ **CRL.REV.P. 10/2018**

STATE (GNCT OF DELHI)

..... Petitioner

Through: Mr. Naresh Kumar Chahar,
APP for State with SI Amit,
P.S. Mahindra Park.

versus

SAMEER & ORS.

..... Respondents

Through: Mr. Gaurav Gupta and Mr.
Sharan Mehta, Advocates

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J (ORAL)

1. The present revision petition under Section 397 read with Section 401(5) of the Code of Criminal Procedure, 1973 ("Cr.P.C.") has been filed by the petitioner/State for setting aside/quashing the impugned order dated 09.08.2017 passed by learned Additional Sessions Judge ("ASJ"), Rohini Courts, Delhi in Case FIR No. 1001/2015 under Sections 365/354/328/323/34/174A of the Indian Penal Code, 1860 ("IPC") at Police Station ("PS") Mahendra Park, Delhi titled as "State v. Sameer & Ors." whereby learned Trial Court discharged the respondents from the offence punishable under Section 328 IPC.

2. The brief facts of the case are that on 07.11.2015, respondents/accused persons, in furtherance of their common intention, administered alcohol mixed in a cold drink to complainant with an intent to cause hurt to her. It is alleged that accused persons also caused simple injuries to the complainant and also outraged her modesty. On this basis, an FIR bearing no. 1001/2015 was registered at PS Mahindra Park, Delhi for the offences punishable under Sections 365/354/328/323/34 IPC against accused persons. After investigation, a charge sheet was filed against the accused persons and respondent no. 1 was charge-sheeted for having committed offence punishable under Section 174A of IPC along with above-mentioned offences.

3. Learned APP for the State submits that learned Trial Court, without going into the merits of the case, discharged the accused persons for the offence punishable under Section 328 of IPC. It is stated by learned APP that learned Trial Court failed to appreciate that there are specific allegations by the complainant against accused persons that she was beaten up after being administered with alcohol mixed in a cold drink. It is further stated that learned Trial Court failed to appreciate the fact that there is a prima facie case against the accused persons for the offence punishable under Section 328 of IPC as the MLC of the complainant clearly states that smell of alcohol is present and the MLC is sufficient to frame charge under Section 328 of IPC against the accused persons. Learned APP for the State argues that the impugned order was passed by learned Trial Court without waiting for the FSL report. It is further stated that grave error was

committed by learned Trial Court while passing the impugned order.

4. On the contrary, learned counsel for respondents 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. It is further stated by learned counsel for respondents that learned Trial Court has rightly tested the records of the case and taken a *prima facie* view.

5. I have heard the submission and arguments on behalf of learned counsel for petitioner as well as respondents and have gone through the material on record.

6. It is appropriate to first reproduce the relevant portion of the impugned order dated 09.08.2017, which are as under:

“The essential element of S.328 IPC is that the victim should be administered poison or any stupefying, intoxicating or unwholesome drug or other thing. The forensic examination of the stomach order to determine the substance that administered was alcohol is, therefore, imperative for ascertaining the commission of the offence u/s 328 IPC. The opinion of the victim who is rendered unconscious after taking the substance may not be stated to be final as to whether the drug administered was either poison or any stupefying, intoxicating or unwholesome drug. In the present case in the absence of the opinion of the doctor who examined 'X' after she was brought to the hospital and the stomach wash was not sent for examination, I am of the opinion that there is no prima facie sufficient material for framing charge u/s 328 IPC against the accused persons. Though not referred to or relied upon, for taking this view I am supported with the judgment -Sanjay Singh v. State. Crl. Appeal No.636/2005 decided on 23.4.2008 by the High Court of Delhi. Hence, the

accused are discharged for the commission of offence punishable u/s 328 IPC only. The other offences are triable by the Court of Ld.MM. All the accused are directed to appear before the Court of concerned Ld. ACMM, North, Rohini Courts, Delhi today i.e on 09.8.2017 at 12.30 p.m who shall proceed further in the matter in accordance with law.”

7. For appreciation of intent of Section 328 of Cr.P.C., the same is reads as under:

“328. Causing hurt by means of poison, etc., with intent to commit an offence.- -Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

8. It is stated by learned APP for the State that learned Trial Court had passed the impugned order without sending the blood samples of the complainant to forensic lab for verification of the ingredients of Section 328 of IPC. On the other hand, learned Counsel for the respondents state that at the time of medical examination of complainant, she denied for forensic examination of her stomach wash which was required to determine the substance administered upon her for ascertaining the commission of the offence under Section 328 of IPC.

9. Though, it is not disputed that stomach wash was neither taken nor sent to FSL as is correctly mentioned in the impugned order, however, the learned Trial Court failed to take note of the fact that blood samples in this case had been taken which is clearly mentioned

in the MLC of the victim. The blood samples were taken and had been sent to FSL to ascertain the presence and content of alcohol or any stupefying substance in the blood sample of the victim. However, on a perusal of record, it is not clear as to whether the fact that FSL report of the blood samples of victim was awaited, was brought to the knowledge of the learned Trial Court at the stage of arguments on charge since the impugned order contains no reference to the same. Learned APP for the State, however, submitted that the prosecution had brought this fact to the knowledge of the learned Trial Court. Be that as it may, the impugned order discharging the accused persons for offence punishable under Section 328 of IPC was passed without waiting for the FSL report which was received *vide* FSL Report No. 2015/B-7317/C-727/18 dated 19.04.2018. The said FSL report of victim clearly shows the presence of alcohol and the relevant portion of same reads as under:-

“On Gas Chromatography Head Space examination, (i) Exhibits ‘1e1’, ‘1e2’ & ‘1f2’ were found to contain ‘Ethyl Alcohol’ 41.2, 72.9 & 26.4 mg/100ml of blood respectively. (ii) ‘Methyl Alcohol’ & ‘Ethyl Alcohol’ could not be detected in exhibit ‘1f1’.”

10. Considering the overall facts and circumstances of the present case, this Court is of the opinion that since the order on charge was passed without waiting for FSL report which has been subsequently received, the impugned order dated 09.08.2017 is set aside and the present case is remanded back to the learned Trial Court for passing order on charge afresh after considering the FSL report.

11. Accordingly, the present petition stands disposed of in above terms.

12. 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
DECEMBER 19, 2022/zp

