

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

Criminal Revision No.343 of 2023 (O & M)

Date of Decision: 22.02.2023

Dr. Ashok Kumar Yadav

..... PETITIONER(S)

VERSUS

State of Haryana & another

..... RESPONDENT(S)

. . .
CORAM: **HON'BLE MR. JUSTICE TRIBHUVAN DAHIYA**

. . .

PRESENT: - Dr. Pankaj Nanhera, Advocate, with Mr. Rahul Gautam, Advocate, for the petitioner.

Ms. Mahima Yashpal, Deputy Advocate General, Haryana, for respondent No.1-State.

Mr. Vinod Ghai, Senior Advocate, with Ms. Kashish Sahni, and Ms. Chahat Aggarwal, Advocates, for respondent No.2-complainant.

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Tribhuvan Dahiya, J (Oral)

Leave granted.

This is a revision petition against order dated 06.01.2023 passed by the Additional Sessions Judge, Fast Track Special Court, Hisar (hereinafter referred to as, 'Special Court'), vide which the petitioner has been summoned for commission of offences punishable under Sections 328, 376, 377 IPC.

2. The facts in brief are, respondent No.2-complainant submitted a complaint dated 13.09.2022 to the Superintendent of Police, Hisar, alleging that she was subjected to rape and unnatural offence by the petitioner, in conspiracy with one Dr. Suresh Jaiswal, at night on 31.08.2022 in Room No.108, on the premises of Flamingo Restaurant, Hisar. The complainant, aged about 44 years, stated that she was employed as Medical Representative (Sales) with Hega Pharma Medical Company, Ludhiana,

Punjab, and also worked as freelancer with Renaults Medical Company for sale of medical health products in February/March 2022. The complainant met the petitioner, who is a doctor by profession, in his hospital-Ashok Hospital, Friends Colony, near street No.3, Jawahar Nagar, Hisar. The petitioner assured the complainant that he was President and under his influence she would get orders for the medical health products she was selling. On 30.08.2022, the petitioner made a phone call to the complainant asking her to come to Hisar on 31.08.2022 before 02:00 PM. On reaching Hisar, the complainant called the petitioner, who asked her to come at Camp Chowk, Hisar. The complainant reached there, and the petitioner took her in his Innova car to Government Flamingo Restaurant Complex. He again assured the complainant that her products would definitely be purchased by him, but first they should have some refreshments. The complainant started giving details of her products to the petitioner, who received a phone call and informed her that it was a friend of his, who was a senior Government officer. He also assured the complainant to get a government job arranged for her. Then he called his friend Dr. Jaiswal to Flamingo Complex, who also sat along with them. The petitioner thereafter left the restaurant stating that he was going to Narwana, and also stated that Dr. Jaiswal was also interested in buying the products, so the complainant should talk to him in the meanwhile. Dr. Jaiswal continued talking to the complainant from 02:30 PM to 05:40 PM in the restaurant. He then received a call from the petitioner, and told the complainant that a room had been booked for her there only. The complainant said that she had already made arrangement for stay at Hisar, but Dr. Jaiswal told her to take rest there, as in the evening her meeting with other doctors was scheduled. He then left the place at 06:00

PM. She checked into Room No.108 on 31.08.2022 after 06:00 PM. Around 08:00 PM, the petitioner came in the room. The complainant felt scared and thought of escaping. The petitioner called the waiter, who brought beer for him. There the petitioner, by intoxicating the complainant, subjected her to rape and unnatural sexual offences forcibly. On gaining consciousness, she immediately left the room and went to her friend's (Somy) house at Hisar. When she was getting ready to leave from Hisar on 01.09.2022, the petitioner gave her a phone call reminding that she had promised to meet him, but she left. She finally gathered courage and submitted a complaint, dated 13.09.2022, to the police with a request to collect CCTV footage of the restaurant and take action against the petitioner and co-accused, and also to provide protection to her.

3. On the basis of this complaint, FIR No.66 dated 13.09.2022 under Sections 120-B, 376, 377 IPC, Women Police Station, Hisar, was lodged. The complainant's medical examination was conducted on 14.09.2022 and her statement under Section 164 Cr.P.C. was also recorded, wherein she reiterated the allegations as contained in the FIR. The police did not arrest the accused; instead, questioned both the parties and reached a conclusion that sufficient evidence was not there against them. Finally, a cancellation report was filed by the police on 03.12.2022 in the Special Court.

4. Notice of the cancellation report was issued to the complainant for 03.12.2022, upon which she appeared and filed a Protest Petition on 16.12.2022 against cancellation of the FIR, and for adding offences under Section 328 IPC, and Section 7 of the Prevention of Corruption Act, 1988, against the petitioner, Dr. Suresh Jaiswal and four

investigating officers, who deliberately conducted a wrong investigation for illegal gratification to help the petitioner escape criminal prosecution. She was directed to produce preliminary evidence before the Special Court.

5. In preliminary evidence, the complainant examined herself as CW-1 and a friend, Somy, as CW-2. Besides, documentary evidence in the form of original complaint dated 13.09.2022 (Ex.C1), MLR dated 14.09.2022 (Ex.C2), copy of her statement under Section 164 Cr.P.C. (Ex.C3), a compact disc (Ex.C4), copy of representation dated 02.01.2023 to the Home Minister and Home Secretary (Exs.C5 and C6) against the petitioner, co-accused and police officers, who in connivance with him carried out wrong investigation, and postal receipts of the representations (Exs.C7 and C8).

6. Upon recording of preliminary evidence and considering the material on record, the Special Court vide order dated 06.01.2023 came to conclusion that only against the petitioner there were *prima facie* grounds to believe commission of offences punishable under Sections 328, 376 and 377 IPC and he was summoned. Hence, the instant revision petition by him.

7. Learned counsel for the petitioner has contended that the Special Court, which is a Court of Session, has no jurisdiction to take cognizance of the offences as a Court of original jurisdiction, since the case was never committed to it by a Magistrate. There is a specific bar under Section 193 Cr.P.C. that no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it under the Code. He has further referred to Section 209 Cr.P.C. to contend that upon presentation of cancellation report to the Magistrate, he has a role to play and has to come to a conclusion that the

offences were exclusively triable by the Court of Session, only then the case is to be committed to it for trial. In the instant case, the cancellation report was straight away filed by the police in the Special Court, and the Magistrate did not have any occasion to form his opinion as to whether the offences were exclusively triable by a Court of Session, nor did he ever pass the committal order sending the case to the Special Court. The Magistrate, as per him, is not merely a post office at the stage of commitment, but is required to apply his judicial mind prudently which was not done in this case. Therefore, the summoning order becomes unsustainable in law. In support of his submissions, learned counsel has placed reliance upon a judgment of Constitution Bench of the Supreme Court passed in *Dharam Pal and others vs. State of Haryana and another*, (2014) 3 SCC 306.

7.1 The second submission by learned counsel for the petitioner is on the merits of the case, that the investigating agency carried out the investigation in a proper scientific manner and came to the conclusion that no offence was made out against the petitioner. The Special Court, by ignoring the scientific evidence, has summoned the accused without there being sufficient material before it to do so. The prosecutrix was not even found to be working with the pharmaceutical company in Ludhiana. Therefore, the allegations were not believable, and had been levelled only to implicate the petitioner in a false case to extract money from him.

8. Learned senior counsel for the complainant/respondent no.2, on the contrary, argues that it is a clear-cut case of botched up investigation only to give clean chit to the petitioner. Otherwise, there is enough material on record, medical as well as electronic, apart from the complainant's statement under Section 164 Cr.P.C., to establish commission of the alleged

offences against the petitioner. He has been rightly summoned by the Special Court, and there is no illegality about it. He has further submitted that the offences alleged against the petitioner are triable exclusively by the Court of Session and the Special Court has been constituted specifically for that purpose. Therefore, the police has rightly approached the Special Court for filing cancellation report, whereupon notice was issued to the complainant, she filed the protest petition and preliminary evidence was recorded. The committal Magistrate had no role to play in the entire case since the offences were exclusively triable by the Court of Session. Even if cancellation report had been filed before him, he could not have done anything about it except committing the case to the Special Court, exclusively meant to try the alleged offences. He has relied upon a judgment of the Supreme Court in *Rattiram and others vs. State of Madhya Pradesh*, (2012) 4 SCC 516, to contend that the Special Court was within its powers to directly take cognizance of the alleged offences. The petitioner has not been prejudiced in any manner on that account also.

9. The respondent-State has filed a short affidavit dated 08.12.2022 of the Deputy Superintendent of Police, Head Quarter, Hisar, that the cancellation report was prepared on 07.11.2022 and was forwarded to the Court of Illaqa Magistrate/Judicial Magistrate 1st Class, Hisar, on 17.11.2022. However, after looking at the provisions of law under which the FIR was registered initially, oral directions were issued by the Illaqa Magistrate to submit cancellation report in the Special Court. Therefore, on the basis of these directions, cancellation report was submitted in the Special Court. A perusal of the cancellation report submitted by the investigating officer under Section 173 Cr.P.C., itself makes it evident that the report was

prepared in the name of Illaqa Magistrate/Judicial Magistrate 1st Class, Hisar, as it is clearly mentioned there.

9.1 Learned State counsel has further submitted that the Supreme Court in *suo motu* Writ Petition (criminal) No.1 of 2019, decided on 25.07.2019, upon considering the reports submitted to it issued certain directions to the Union of India and the State Governments to ensure timely completion of investigation and consequential trials in offences under The Protection of Children from Sexual Offences Act, 2012 (hereinafter, referred to as, 'POCSO'). One of the directions was, if there were more than one hundred cases under the POCSO Act, an exclusive/designated Special Court will be set up which will try no other offence except those under the POCSO Act which will be a Court of Session. The second direction was, that such Courts will be set up under a Central scheme and will be funded by the Central Government. Following the directions, the Ministry of Justice, Government of India, notified 'Scheme on Fast Track Special Courts (FTSCS) for Expeditious Disposal Of Cases Of Rape And Protection Of Children Against Sexual Offences (POCSO) Act, 2019'. That is how Special Courts were set up for disposal of rape and POCSO Act cases, and the instant case being a case of alleged rape upon the complainant, was exclusively triable by the Special Court. Therefore, the cancellation report has rightly been submitted to the Special Court, which is a Court of Session.

10. Learned counsel for the parties have been heard.

11. In the facts of the case, the cancellation report was filed before the Special Court on oral directions issued by the Judicial Magistrate on looking at the offences alleged against the petitioner. It is not in dispute that the offences are exclusively triable by a Special Court, which is a Court

of Session, and has been set up for trying such offences. Upon filing of the cancellation report before it, the Special Court issued notice to the complainant, whereupon she filed a protest petition and produced preliminary evidence by way of her and her friend's testimony, and also brought relevant documentary evidence on record. On consideration of the same and finding that *prima facie* for commission of the alleged offences is established against the petitioner, cognizance of the offences was taken by the Special Court in exercise of original jurisdiction under Section 193 Cr.PC, and the impugned summoning order was passed.

12. In this background the issue arises for consideration is, *whether the Special Court was within its jurisdiction to take cognizance of the offences and summon the petitioner by exercising original jurisdiction under Section 193 Cr.PC without there being any commitment order by the Magistrate ?*

13. To appreciate the issue arising here, it is apposite to reproduce the provisions of Sections 193 and 209 Cr.P.C. here-in-below:

193. Cognizance of offences by Courts of Session.-

Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

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209. Commitment of case to Court of Session when offence is triable exclusively by it.- When in a case instituted on a police report or otherwise, the accused

appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

[(a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;]

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

14. Section 193 Cr.P.C. undoubtedly prescribes that no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under the Code. The power to commit on the Magistrate has been conferred under Section 209 (a) Cr.P.C., which specifically provides, if it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit the case to the Court of Session, after complying with the provisions of section 207 or section 208 of the Code. Therefore, in case

offence alleged is exclusively triable by a Court of Sessions, the Magistrate has no option but to commit the case to the Court of Session. In that eventuality, he is not required to make any inquiry into the matter before committal. The limited jurisdiction conferred upon the Magistrate, therefore, is only to ascertain nature of the offence. In case, the offence is exclusively triable by the Court of Session, he has no jurisdiction except to commit the case to the Court of Session after furnishing of documents as per Section 207 or Section 208 Cr.P.C. as the case may be. It has been so held by the Supreme Court in *Rattiram's case (supra)* that the Magistrate has no discretion in such matters. Relevant paragraph 55 of the judgment reads as under:

55. To appreciate the said submission, it is apposite to refer to Section 207 of the 1973 Code which lays down for furnishing of certain documents to the accused free of cost. Section 209(a) clearly stipulates that providing of the documents as per Section 207 or Section 208 is the only condition precedent for commitment. It is noteworthy that after the words, namely, "it appears to the Magistrate", the words that follow are "that the offence is triable exclusively by the Court of Session". The limited jurisdiction conferred on the Magistrate is only to verify the nature of the offence. It is also worth noting that thereafter, a mandate is cast that he "shall commit".

14.1 Subsequently, in *Hardeep Singh v. State of Punjab and Others*, (2014)3 SCC 92, Constitution Bench of the Supreme Court has

opined about the power exercised by the committal Magistrate under Section 209 of the Code. It held that the pre-trial stage of committal or providing of the documents as per Section 207 or Section 208, is only intended to put the process in motion. It cannot be said to be judicial step in true sense, as it does not require any judicial application of mind; committing the case by the Magistrate is only an administrative action. Relevant paragraph 47 of the judgment reads as under:

47. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) Cr.P.C. can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Section 207/208 Cr.P.C., committal etc., which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. At this pre-trial stage, the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance of Sections 207 and 208 Cr.P.C., and committing the matter if it is exclusively triable by Sessions Court. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Sections 207 to 209 Cr.P.C. is forbidden, by express provision of Section 319 Cr.P.C., to apply his mind to the merits of the

case and determine as to whether any accused needs to be added or subtracted to face trial before the Court of Session.

14.2 The judgment in *Dharam Pal's case (supra)* relied upon by learned counsel for the petitioner, does not advance his cause in any manner. It is not on the proposition whether a Special Court can take cognizance of the offence in the absence of any committal order by the Magistrate. The issue before the Court was, whether the Court of Session can issue summons under Section 193 Cr.PC in case it disagreed with the police report, or will have to wait till the stage of Section 319 Cr.PC is reached during trial. It has laid down, even if Section 319 Cr.PC cannot be invoked at the stage of committal of the case, the Court of Session, acting as a Court of original jurisdiction, can take cognizance of the offence and issue summons under Section 193 Cr.PC, without waiting for the stage of Section 319 Cr.PC, on the basis of records transmitted to him pursuant to committal order passed by the Magistrate. In case the offence is exclusively triable by the Court of Session, only the Sessions Court can take cognizance and issue summons to the persons not named in the police report. At the same time, it also holds that cognizance of offence can be taken only once, either by the Magistrate or the Sessions Court. The Court further held, if the Magistrate finds that the offence is triable by the Court of Session, he has to commit the case to the Sessions Court; his role becomes formal and passive. This is apparent from paragraphs 35, 36, 38 and 39 of the judgment which are reproduced hereunder:

35. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him

under Section 173(2) Criminal Procedure Code. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter.

36. This brings us to the third question as to the procedure to be followed by the Magistrate if he was satisfied that a *prima facie* case had been made out to go to trial despite the final report submitted by the police. In such an event, if the Magistrate decided to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by the Sessions Court.

38. ... The key words in the Section are that "no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code." The above provision entails that a case must, first of all, be

committed to the Court of Session by the Magistrate. The second condition is that only after the case had been committed to it, could the Court of Session take cognizance of the offence exercising original jurisdiction...

39. This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part

cognizance being taken by the Magistrate and part
cognizance being taken by the learned Session Judge.

14.3 In the light of law laid down by the Supreme Court in the
aforementioned judgments, it is apparent that only an administrative role is
played by the Magistrate in committing the case to the Court of Session, and
is forbidden from applying mind to the merits of the allegations or hold any
inquiry in the matter. He is only to ascertain the nature of offences, and
commit the case on finding the same to be triable exclusively by the Court of
Session. Therefore, in case of offences triable exclusively by a Court of
Session, the Magistrate has no role to play, except that of committing it to
the Court of Session for taking cognizance, since cognizance can be taken
only once, either by the Magistrate or the Court of Session. The Magistrate's
role is confined only to the offences not triable exclusively by the Court of
Session; for such offences he may, either on the basis of a protest petition or
by disagreeing with the police report, take cognizance and summon the
persons not named in the report.

14.4 In this background, can it be said that the impugned
summoning order passed by the Special Court, without the case having been
committed to it, has prejudiced the accused/petitioner in any manner.
Prejudice, if any, can only be caused by judicial determination of rights of
the parties or even by taking a *prima facie* view of the allegations against the
affected party. At committal stage the Magistrate is forbidden from
exercising judicial mind to the case; it is only a procedure to set the process
of pre-trial inquiry in motion. The commitment, in itself, is neither an
enquiry nor a trial. Any violation of the commitment procedure, therefore,

can only be a procedural lapse, which, in itself, cannot cause any prejudice to the accused, who is not even required to be put to notice in this regard.

14.5 This takes us to the related issue, whether this procedural lapse can be termed ‘a failure of justice’, so as to entitle the accused/petitioner to challenge legality of the summoning order itself, on that account. The issue has been answered in the negative by the Supreme Court in *Rattiram case (supra)*, wherein the effect of not committing a case in terms of Section 193 Cr.P.C. was examined. In that case chargesheet was filed before a Special Court under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, and cognizance was directly taken by it. The reference about its effect on conviction was placed before the Larger Bench. One of the issues considered by the Court was, whether there could be a failure of justice if the Special Court directly took cognizance of an offence under the Act. The provisions of the old Cr.PC of 1898 (wherein a detailed inquiry by the Magistrate prior to commitment of the case to the Court of Session, including taking evidence as regards actual commission of the alleged offence, was vested with the Magistrate) as well as provisions of the present Code, were considered to come to a conclusion that non-compliance with the interdict of Section 193 Cr.P.C. is not a failure of justice. Miscarriage of justice has to be established as a fact, merely because there has been an irregularity in the committal proceedings, that in itself cannot lead to failure of justice. The relevant paragraph 58 of the judgment reads as under:

58. In our considered opinion, because of the restricted role assigned to the Magistrate at the stage of commitment under the new Code, the non-compliance

with the same and raising of any objection in that regard after conviction attracts the applicability of the principle of “failure of justice” and the convict appellant becomes obliged in law to satisfy the appellate court that he has been prejudiced and deprived of a fair trial or there has been miscarriage of justice. The conception of fair trial and the conception of miscarriage of justice are not in the realm of abstraction. They do not operate in a vacuum. They are to be concretely established on the bedrock of facts and not to be deduced from procedural lapse or an interdict like commitment as enshrined under Section 193 of the Code for taking cognizance under the Act. It should be a manifestation of reflectible and visible reality but not a routine matter which has roots in appearance sans any reality. Tested on the aforesaid premised reasons, it is well-nigh impossible to conceive of any failure of justice or causation of prejudice or miscarriage of justice on such non-compliance. It would be totally inapposite and inappropriate to hold that such non-compliance vitiates the trial.

14.6 In the instant case also, apart from alleging that the mandatory procedure of committing the case to the Special Court has not been followed, it could not be pointed out by learned counsel for the petitioner as to how such an irregularity can be termed ‘a failure of justice’. There is nothing on record which can even *prima facie* point out any failure or miscarriage of justice, or violation of the petitioner’s right to fair trial.

The only prejudice, as per the learned counsel, is that the petitioner has been prevented from filing a revision petition against the summoning order, if any, that would have been passed against him by the Magistrate after holding an inquiry and taking cognizance of the alleged offences. In the light of law laid down by the Supreme Court, as discussed herein above, it is apparent that the Magistrate has no jurisdiction to hold any inquiry in the matter as the offences are exclusively triable by the Court of Session. He is forbidden from applying judicial mind, and is mandated only to perform an administrative role of furnishing the documents as envisaged under Section 207 and 208 Cr.P.C., and commit the case to the Sessions Court. The argument advanced by learned counsel for the petitioner, therefore, has no legs to stand upon, and is hereby rejected.

14.7 Therefore, the Special Court taking cognizance of the offences without any order of committal, has neither caused any prejudice to the petitioner, nor has it resulted in any failure or miscarriage of justice. It is only an irregularity committed by the Magistrate on the administrative side, in not formally passing the order committing the case, though oral instructions were statedly issued to file cancellation report before the Special Court, which is a Court of Session having exclusive jurisdiction to try the alleged offences. Such an administrative lapse of procedure cannot divest the Special Court of its original jurisdiction to take cognizance of the offences and summon the petitioner. Accordingly, the impugned order cannot be held to be without jurisdiction.

15. There is another aspect of the matter which needs to be looked into; right to fair trial of the complainant. She, on her own, has not

committed any irregularity or illegality in filing the protest petition or adducing preliminary evidence before the Special Court as called upon to do so. But in the event of petition being allowed and the matter remitted to the police for filing the cancellation report before the Magistrate concerned for passing the appropriate order of committal of case to the Special Court, only she would be at a disadvantage. Such a course of action would undoubtedly only delay the trial in this case where heinous offences have been alleged against the petitioner. The complainant would again be required to adduce the preliminary evidence. In that eventuality, it is her right of fair/speedy trial that will be violated. It stands duly recognised that right to speedy trial is not vested exclusively in the accused; the victim's right to speedy trial needs equally to be protected.

16. The other argument advanced by learned counsel for the petitioner is that the petitioner has been summoned without there being any material before the Special Court to do so. However, pursual of the impugned order establishes that there was enough evidence *prima facie* disclosing commission of the alleged offences by the petitioner. It was found by the Special Court that investigation had been done in an unusual way. One of the reasons for filing cancellation report was, delay of thirteen days in lodging the FIR, whereas element of delay is a fact to be seen at the time of conclusion of trial. Despite the medical evidence that possibility of sexual assault could not be ruled out, and complainant's statement under Section 164 Cr.P.C., reiterating the allegations of rape and unnatural sex by the petitioner, it was surprising that the investigating officer considered the evidence insufficient to arrest the petitioner. It was also held that the investigating agency worked to falsify the allegations of the complainant, by

collecting evidence whether she was in employment of the company selling medical products or not. Even if area of operation of the complainant was not found to be at Hisar, that alone was not sufficient to throw away the allegations of rape and unnatural sex against the petitioner. Besides in the CCTV footage of Flamingo Tourist Restaurant, Hisar, obtained by the investigating agency, the petitioner's presence was established at the place of occurrence. There were photographs of the petitioner, attached with the cancellation report, which reflected that he was sitting wearing shorts and T-shirt, having bottle of beer, in the room where he had made arrangement for the complainant's stay.

16.1 It was further held by the Special Court, though as per Forensic Report (RFSL) dated 12.10.2022, semen was not detected on vaginal and pen-anal swabs and pubic hair, and as per report dated 10.11.2022, semen was not detected on the condom, but such reports could not be termed conclusive evidence to disbelieve the prosecutrix's allegations made on oath, because she was raped on 31.08.2022 at about 08:00 PM, whereas her medical examination was conducted on 14.09.2022 and swabs were taken on that day. The samples of vaginal, pen-anal swabs, pubic hair remained in the police *malkhana* till 02.10.2022 and were sent to the RFSL Hisar only on 03.10.2022. Similarly, sample of condom remained in police *malkhana* till 26.10.2022 and was sent to the laboratory on 27.10.2022. On account of the said delay in sending samples to the RFSL, the opinion in the FSL report was a matter to be taken into consideration during the course of trial, *vis-à-vis* evidence of the prosecutrix after her cross-examination. But at the investigation stage, said medical opinion cannot be the sole basis to outrightly disbelieve the complainant's allegations. It was, therefore,

concluded by the Special Court that there were sufficient *prima facie* grounds to believe commission of offences punishable under Sections 328, 376 and 377 IPC by the petitioner.

16.2 The preliminary evidence on record, duly establishes *prima facie* case to summon the petitioner for the offences alleged. There is no illegality or irregularity in the impugned order which has been passed by the Special Court on proper appreciation of material/evidence on record; it does not suffer from any jurisdictional error either.

17. In the light of this discussion, there is no merit in the petition, which is hereby dismissed.

(Tribhuvan Dahiya)
Judge

22.02.2023
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<u>Whether Speaking/ Reasoned:</u>	<u>Yes/ No</u>
<u>Whether Reportable:</u>	<u>Yes/ No</u>