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

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Reserved on: 10.01.2023
Pronounced on: 18.04.2023

+ **CRL.REV.P. 28/2023**
JITENDER KUMAR

..... Petitioner

Through: Mr. Rajeev Mohan, Ms. Nitika
Pancholi and Mr. Nishant
Madan, Advocates.

versus

STATE (NCT) OF DELHI & ORS. Respondents

Through: Mr. Manoj Pant, APP for the
State with SI Manju Yadav,
P.S. Tilak Nagar.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present revision petition filed under Section 397/401 of Code of Criminal Procedure, 1973 (*hereinafter 'Cr.P.C.'*) impugns the order on charge dated 07.09.2022 and the order framing charge dated 09.09.2022 passed by learned Additional Sessions Judge (POCSO)-06, West District, Tis Hazari Courts, New Delhi (*hereinafter 'Trial Court'*) in Sessions Case No. 246/2022, whereby charges were framed against the petitioner for the offences punishable under Sections 323/354/506/34/354B/509 of Indian Penal Code, 1860 (*hereinafter 'IPC'*) and under Section 12 of Protection of Children from Sexual

Offences Act, 2012 (*hereinafter* 'POCSO Act') in case FIR bearing no. 282/2022, registered at Police Station Tilak Nagar, New Delhi.

2. By way of present petition, the petitioner assails only the charges framed by the learned Trial Court under Section 509 IPC and Section 12 POCSO Act.

3. The case of prosecution is that on 16.02.2022, at about 10:45 AM, when the husband of the complainant/respondent no. 2 was leaving for work, the petitioner's wife had stopped him and had started hurling abuses at him. Upon him rejecting to such behaviour, the petitioner's wife had started creating a ruckus and had called the petitioner and their daughter downstairs and all of them had abused the complainant's husband. It was further alleged by the complainant 'RK' that upon hearing the commotion, she had gone downstairs where she had seen the petitioner and his family members giving beatings to her husband. She had also alleged that the petitioner had intentionally grabbed her and touched her chest inappropriately while she was trying to save her husband from their clutches, and had also threatened the complainant. Upon receipt of information, the concerned police officials had visited the place of incident where it was disclosed that the families used to reside in the same apartment complex and a quarrel had broken out between them on the issue of parking. Thereafter, all the parties were sent to DUU Hospital for medical examination, subsequent to which, a complaint was submitted by the complainant/respondent no. 2 to the police on the basis of which present FIR was registered under Sections 323/341/354/506/34 IPC.

4. During the course of investigation, statement of the complainant 'RK' was recorded under Section 164 Cr.P.C. along with the statements of witnesses 'KB' and 'SG' on 25.02.2022 whereby allegations of beating and making obscene gestures were levelled against the petitioner by all of them. Further, 'KB' in her statement also stated that the petitioner on a prior occasion had misbehaved with her elder daughter i.e. respondent no. 3/minor victim. Thereafter, the statement of minor victim 'B', aged around 8 years, was recorded under section 164 Cr.P.C. on 21.03.2022 whereby she had stated that on some prior occasion, while she had been cycling in the parking area of apartment complex in presence of her mother who was sitting near the staircase, the petitioner had come downstairs and had made obscene gestures towards her by pulling the zip of his pants and had winked his eye. Thus, in view of the statement of child victim, offences under Section 12 POCSO Act and Section 509 IPC were added by the police.

5. After hearing the arguments on point of charge, learned Trial Court, *vide* order dated 07.09.2022, framed charges against the petitioner under Sections 323/354/506/34/354B/509 IPC and Section 12 POCSO Act. The relevant portion of order dated 07.09.2022 reads as under:

“...Having considered the submissions and having gone through the statement u/s 164 Cr.P.C. of the complainant as well as other witnesses, more particularly statement u/s 164 Cr.P.C, of minor victim, I find that prima facie offence under section 323, 341, 354, 354B, 506/34 IPC as well as u/s 12 POCSO Act and alternatively u/ 509 IPC is made out as against accused Jitender Kumar. A case is also made for framing of charge for offence u/s 323, 341, 354, 354B,

506/34 IPC as against accused Sakshi Gupta and Manju. Let charges for the said offences be framed...”

6. Learned counsel for the petitioner states that the entire dispute between the petitioner and the complainant and other alleged affected parties is of civil nature and primarily pertains to the issue of parking in the apartment complex where they all reside. It is stated that the petitioner had filed a civil case pertaining to the said issue of parking, which is pending in Tis Hazari Courts, Delhi and the present FIR is only a counter blast to the said civil litigation. Learned counsel for petitioner further submits that the witness namely ‘KB’, in her statement under Section 161 Cr.P.C. which was recorded on the same day, had made no mention of any incident with regard to her minor daughter and it was only for the first time that she had levelled such allegations in her statement under Section 164 Cr.P.C. which was recorded on 25.02.2022. It is argued by learned counsel for petitioner that the alleged undated incident revealed by the child victim had occurred on a day, few months prior to the date of registration of present FIR and even as per the testimony of child victim, her mother was present at the spot i.e. the parking area of apartment complex, however, no complaint was lodged by her.

7. It is also argued that framing of charge against the petitioner under Section 509 IPC and Section 12 POCSO Act, in a case arising of present FIR, is impermissible in law since the said incident had allegedly occurred much prior to the present incident and although a separate FIR could have been registered by the investigating agency as and when the said fact had come on record, but adding Section 509 IPC

and Section 12 POCSO Act to the present case is illegal and perverse, since the alleged acts in relation to these provisions of law do not form part of same transaction i.e. incidents alleged in present FIR. Reliance in this regard has been placed on the following decisions: (i) **Anju Chaudhary v. State of Uttar Pradesh & Anr.** (2013) 6 SCC 384 and (ii) **Nasib Singh v. State of Punjab & Anr.** (2022) 2 SCC 89.

8. Learned APP for the State opposes the present petition and states that there is no illegality or infirmity with the impugned order since specific allegations have been levelled by the child victim in her statement under Section 164 of Cr.P.C. against the petitioner. It is stated that FIR cannot be an encyclopedia of everything and the conduct of the petitioner is also clear from the statements of other witnesses/ women recorded under Section 164 Cr.P.C. It is stated that there is no infirmity in framing charges under Section 509 IPC and Section 12 POCSO Act in the present case, considering the relations between the parties and pending disputes between them.

9. This Court has heard the arguments of learned counsels for both the sides and has perused the material on record.

10. During the course of arguments, learned counsel for the petitioner stated that the main grievance of the petitioner is that charges could not have been framed against him under Section 509 IPC and Section 12 POCSO Act in the present case, considering the settled law on joinder of charges.

11. In such circumstances, to appreciate the contentions of learned counsel for petitioner, it would be appropriate to take note of the

statutory law and judicial precedents dealing with the aforesaid issue.
The relevant provisions of Cr.P.C. are reproduced as under:

“ *B.—Joinder of charges*

218. Separate charges for distinct offences.—

(1) For every distinct offence of which any person is accused there shall be a separate charge, **and every such charge shall be tried separately:**

Provided that where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby, the Magistrate may try together all or any number of the charges framed against such person. (2) Nothing in sub-section (1) shall affect the operation of the provisions of sections 219, 220, 221 and 223.

(2) Nothing in sub-section (1) shall affect the operation of the provisions of sections 219, 220, 221 and 223.

Illustration

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

219. Three offences of same kind within year may be charged together.—

(1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code (45 of 1860) or of any special or local law:

Provided that, for the purposes of this section, an offence punishable under section 379 of the Indian Penal Code (45

of 1860) shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the said Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

220. Trial for more than one offence.

(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence....”

12. The scheme of Sections 218 to 223 Cr.P.C. was explained by the Hon’ble Apex Court in *Nasib Singh v. State of Punjab & Anr.* (2022) 2 SCC 89, whereby it was observed as under:

“38. From the decisions of this Court on joint trial and separate trials, the following principles can be formulated:

(i) Section 218 provides that separate trials shall be conducted for distinct offences alleged to be committed by a person. Sections 219-221 provide exceptions to this general rule. If a person falls under these exceptions, then a joint trial for the offences which a person is charged with may be conducted. Similarly, under Section 223, a joint trial may be held for persons charged with different offences if any of the clauses in the provision are separately or on a combination satisfied;

(ii) While applying the principles enunciated in Sections 218 - 223 on conducting joint and separate trials, the trial court should apply a two-pronged test, namely, (i) whether conducting a joint/separate trial will prejudice the defence of the accused; and/or (ii) whether conducting a joint/separate trial would cause judicial delay.

(iii) The possibility of conducting a joint trial will have to be determined at the beginning of the trial and not after the trial

based on the result of the trial. The Appellate Court may determine the validity of the argument that there ought to have been a separate/joint trial only based on whether the trial had prejudiced the right of accused or the prosecutrix;

(iv) Since the provisions which engraft an exception use the phrase ‘may’ with reference to conducting a joint trial, a separate trial is usually not contrary to law even if a joint trial could be conducted, unless proven to cause a miscarriage of justice; and

(v) A conviction or acquittal of the accused cannot be set aside on the mere ground that there was a possibility of a joint or a separate trial. To set aside the order of conviction or acquittal, it must be proved that the rights of the parties were prejudiced because of the joint or separate trial, as the case may be.”

13. The test to determine whether two or more acts constitute the same transaction was discussed in the case of *Anju Chaudhary v. State of Uttar Pradesh & Anr. (2013) 6 SCC 384* by Hon’ble Apex Court. The relevant observations are extracted herein-under:

“44. It is not possible to enunciate any formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. **Such things are to be gathered from the circumstances of a given case indicating proximity of time, unity or proximity of place, continuity of action, commonality of purpose or design.** Where two incidents are of different times with involvement of different persons, there is no commonality and the purpose thereof different and they emerge from different circumstances, it will not be possible for the court to take a view that they form part of the same transaction and therefore, there could be a common FIR or subsequent FIR could not be permitted to be registered or there could be common trial.

45. Similarly, **for several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action.** Thus, where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences “committed in the course of the same transaction”...”

(Emphasis supplied)

14. In the present case, the incident on the basis of which present FIR was registered had taken place on 16.02.2022 whereby a quarrel had broken out between the parties and the complainants had leveled allegations relating to physical and sexual assault against the petitioner and his family members. Thereafter, during the course of investigation, statements of original complainant ‘RK’, and other witnesses ‘KB’ and ‘SG’ were recorded before learned Magistrate under Section 164 Cr.P.C. whereby all of them had levelled allegations of sexual assault against the petitioner, and ‘KB’ had further stated that petitioner had also misbehaved with her minor daughter on a previous occasion. Pursuant to this, statement of minor victim ‘B’, aged around 8 years, was also recorded under Section 164 Cr.P.C. whereby she had alleged that a few months ago, the petitioner had opened the zip of his pants and made obscene gestures towards her while she was cycling in her apartment complex.

15. The relevant portion of the order framing charge dated 09.09.2022 passed by the learned Trial Court, insofar as it relates to child victim/respondent no. 3, is reproduced herein under:-

“...That few months before 21.03.2022 at the above said place you with sexual intent winked your eye and also opened zip of your pant in front of victim 'B' (identity withheld) aged about 8 years and thereby you committed offence punishable U/s 12 of POCSO Act and within my cognizance.

Or in alternative during the above, date, time and place mentioned above, you outraged the modesty of the above said victims by uttering the filthy words and gestures, thereby you committed offence punishable U/s 509 IPC and within my cognizance...”

16. In such facts and circumstances, this Court finds merit in the argument of learned counsel for petitioner that the statement of minor victim and the offence alleged to have been committed by the petitioner upon her cannot be held to be a part of present FIR dated 16.02.2022, so as to frame charges for the same in the present case for several reasons. *Firstly*, there is no proximity of time between the incident alleged by complainant/respondent no. 2 in the present case and the incident alleged by the minor victim/respondent no. 3. In fact, the minor victim in her statement under Section 164 Cr.P.C. had stated that petitioner had made obscene gestures towards her a few months ago. The mother of victim i.e. ‘KB’ also in her statement under Section 164 Cr.P.C. had not mentioned any particular month, date or time of the alleged incident when the petitioner had misbehaved with her daughter. Therefore, there is no proximity of time between the incident alleged by the minor victim and the incident dated 16.02.2022 which led to registration of present FIR. *Secondly*, the offences alleged to have been committed by the petitioner upon complainant/respondent no. 2 and minor victim/respondent no. 3 are also different. While the initial FIR was

registered under Sections 323/341/354/506/34 IPC, Section 509 IPC and Section 12 POCSO Act were added in the present case only pursuant to recording of statement of minor victim under Section 164 Cr.P.C. *Thirdly*, there is no continuity of action between the two incidents which can be inferred from the material on record, especially when there is no particular time, date or month of the incident alleged to have been committed by the petitioner in relation of offences punishable under Section 509 IPC and Section 12 POCSO Act. *Fourthly*, a perusal of all the statements of witnesses also does not reveal anything to show that the both the incidents are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action.

17. The incident alleged by the minor victim cannot be held as a part of same transaction merely for the reason that accused person is same or place of incident is common. It is trite law that every charge has to be tried separately as per Section 218 Cr.P.C., subject to the exceptions provided under Section 219-221 Cr.P.C. The present case, however, is not covered under any of such exceptions. The offences alleged to have been committed by the petitioner against the minor victim 'B' are not punishable under the same provisions of substantive law, thus, do not fall within ambit of Section 219. Since they also do not form part of same transaction for the reasons stated in preceding paragraph, Section 220 also cannot be applicable in present case. Further, there is no doubt as to under what offence would the alleged acts of petitioner fall, so as to invoke the exception of Section 221. As held by Hon'ble Apex Court

in catena of judgments, the issue of joinder of charges is to be decided at the initial stage.

18. Considering the overall facts and circumstances of the case and in view of the foregoing discussion, the impugned orders dated 07.09.2022 and 09.09.2022, insofar as they frame charges against petitioner under Section 509 IPC and Section 12 POCSO Act in Sessions Case No. 246/2022, arising out of FIR No. 282/2022, registered at Police Station Tilak Nagar, New Delhi are set aside.

19. *Needless to say*, if the minor victim 'B'/respondent no. 3 or anyone on her behalf lodges any complaint with the police/investigating agency for the offence as disclosed by the minor victim in her statement under Section 164 Cr.P.C. before the learned Magistrate, the same shall be dealt with as per law on its own merits.

20. Accordingly, petition stands disposed of in above terms.

21. It is, however, clarified that the observations made hereinabove are only for the purpose of deciding present petition on the issue of joinder of charges, and the same shall have no bearing on the merits of the case during trial or any further/subsequent legal proceedings.

22. A copy of the judgment be also forwarded to the learned Trial Court by the Registry.

23. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

APRIL 18, 2023/ns