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

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Reserved on: 02.05.2023
Pronounced on: 08.05.2023

+ CRL.REV.P. 492/2023 & CRL.M.A. 11681/2023
NAIMUDDIN Petitioner
Through: Mr. Kunal Khanna, Advocate

versus

THE STATE (NCT OF DELHI) Respondent
Through: Mr. Manoj Pant, APP for the
State with S.I. Suman P.S.
Civil Lines

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant revision petition under Sections 397/401 read with Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C') has been filed by the petitioner seeking setting aside of impugned order on charge dated 27.01.2023 *vide* which charges were ordered to be framed against the revisionist/petitioner for offences punishable under Sections 354/354B/376 of Indian Penal Code, 1860 ('IPC') passed by the learned Additional Sessions Judge, SFTC-02, Central District, Tis Hazari Courts, Delhi in SC No.826/2022.

2. Brief facts of the case are that on 20.03.2014, an FIR bearing no.122/2014 was registered under Section 354-B IPC at Police Station

Civil Lines, Delhi on the statement of prosecutrix Ms. 'P'. It was alleged that the petitioner had misbehaved and had insulted her and had torn clothes of the complainant. During the course of investigation, statement of Ms. 'P' was recorded under Section 164 Cr.P.C on 25.03.2014. On the basis of statement of the complainant under Section 161 and 164 Cr.P.C. and other material on record, learned Magistrate had framed charge under Sections 354/354B IPC against the petitioner on 24.01.2015. During examination-in-chief of prosecutrix Ms. 'P' recorded on 23.07.2015 and 12.07.2018, the learned Magistrate *vide* order dated 05.12.2022 and 08.12.2022 had ordered the file to be placed before learned Principal and Sessions Judge, Headquarter, Tis Hazari Courts, Delhi for committal of trial to the Court of Sessions for further trial of the case as a sessions triable case since an offence under Section 376 IPC was made out which was exclusively triable by the Court of sessions. Thereafter, the case was received by the learned Sessions Court and learned Sessions Judge *vide* impugned order dated 27.01.2023 had framed charge under Sections 354/354B/376 IPC against the petitioner which has been impugned before this Court.

3. Learned counsel for the petitioner argued that learned Trial Court had passed the order in a mechanical manner on the basis of assumptions and presumption. It is submitted that learned Trial Court had failed to appreciate that the complainant had changed her statement several times. It is also argued that Trial Court had failed to consider that the prosecutrix has improved her statement from time to time and had stated in her examination-in-chief before the learned Trial Court that the petitioner had inserted his hand in her private part, this fact was

neither disclosed by the complainant in her first statement on the basis of which present FIR was registered nor in her statement under Section 161 Cr.P.C. She had also not disclosed this fact in her statement recorded under Section 164 Cr.P.C. before the learned Magistrate. It is vehemently argued that only in the Court in her examination-in-chief this fact was disclosed on 23.07.2015 and 12.07.2018. It is further stated that the prosecutrix had refused to undergo medical examination and this fact has been completely ignored that she has refused to undergo medical examination as she had not suffered any injury. It is also argued that the learned Trial Court had overlooked the material fact that in case the accused would have inserted his hand in the private part of the prosecutrix, she would have definitely suffered some physical injury. However, since she did not undergo any medical examination, it can be presumed that she is levelling false allegations and even *prima facie* no case under section 376 IPC is made out against the applicant/petitioner. Learned counsel for the petitioner also argued that the petitioner herein had lodged an FIR under Section 323/341 IPC against the complainant and thereafter the complainant had improved her statement only after the cross FIR was lodged against her, Therefore, it is a motivated FIR.

4. Learned APP for the State, on the other hand, has argued that prosecutrix has levelled specific allegations in her statement under Section 164 Cr.P.C and in the Court against the petitioner which *prima facie* make out a case under Section 376 IPC. It is also stated that a detailed order was passed by the learned Magistrate as well as the Court of Learned ASJ and that there is no infirmity in the said order. It is also

stated that the contentions raised before this Court can be raised only during trial as these are triable contentions and issues and they cannot be looked into at the stage of framing of charge where only a prima facie view of the matter is to be taken.

5. I have heard arguments advanced on behalf of both the parties and have gone through the material available on record.

6. Before getting into the merits of the case it is important to look at the statutory law with respect to framing of charge and discharge which is provided under Sections 227 and 228 of Cr.P.C., and the same have been reproduced as under for reference:

“228. Framing of charge.

(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub- section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

"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."

7. Thus, in order to establish charge against an accused, it is necessary to look into the facts and circumstances of each case to determine whether a prima facie case is made out or not. At the time of framing of charge, due consideration needs to be given to the material placed on record along with the investigation and the facts determined therefrom, and only the information gathered from the aforementioned sources should be used to ascertain if the essential ingredients of an offence can be prima facie made out or not. The Court, however, is not permitted to examine the probative value of evidence while deciding as to whether a charge be framed or not, as the court is not allowed to conduct a mini trial at this stage.

8. This Court has applied the above principles to assess the entire material placed on record meticulously.

9. This Court is of the opinion that vide order dated 24.01.2015 learned Magistrate on the basis of evidence on record had framed charge under Section 354/354B of IPC against the accused. However, during examination-in-chief of the complainant, she had stated the following in her testimony dated 23.07.2015:

".... I objected but he started misbehaving with me and he touched my breast and due to that my kurti was torn from the middle of the neck. Thereafter, he put his hand on to my private part. When I tried to run away, he again dragged me from the shoulder and my wearing kurti was torn from the left shoulder. Anyhow, I managed to run away from there and came outside. I was running while

crying and on the way my mother-in-law met me. I told her the whole incident. Thereafter, she took to the police chowki for lodging the complaint against the accused (who is present in the court today and correctly identified by the witness)”.

10. On the basis of the aforesaid statement made by the prosecutrix, the case was placed before learned Principal and Sessions Judge, Headquarter, Tis Hazari Courts, Delhi for committal of trial to the Court of Sessions for trial of the case as a sessions triable case since an offence under Section 376 IPC was made out. The same was done in accordance with Section 323 Cr.P.C, which provides as under:

323. Procedure when, after Commencement of inquiry or trial, Magistrate finds case should be committed. If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provisions of Chapter XVIII shall apply to the commitment so made.

11. Thereafter, learned ASJ passed the impugned order which has been challenged before this court, the same is reproduced as under:

“Arguments on charge heard.

As per the police complaint, the prosecutrix has alleged that the accused/applicant had misbehaved with her, caught hold of her hand and also hit her on her chest with his hand. Charge sheet was filed for the offence u/s 354B IPC and was pending trial before the concerned court of Ld. MM, Mahila Court. During her evidence, the prosecutrix deposed on 23.07.2015 that the accused had touched her breasts and also put his hand on her private part. On 12.07.2018, on court question, the prosecutrix

stated that the accused had inserted his hand inside her private part (peshab karne wali jagah). Thereafter, the Ld. MM opining that offence u/s 376 IPC is also made out in the present case, she committed the present case for committal by the court of Sessions. The said matter was subsequently, assigned to this court.

In view of the committal of matter, arguments on charge have been heard afresh.

I have also perused the record.

Counsel for accused pleaded that the accused is innocent and has been falsely implicated in the present case. He further argued that the prosecutrix has kept on changing her version and she is untrustworthy: She has falsely implicated the accused due to property dispute. Hence, he prays that the accused may be discharged for the offence charged with.

Per contra, Id. Substitute Addl. PP for the State submitted that the complainant has made the specific and serious allegations against the accused. Hence, he prays that the accused may be charged accordingly.

After going through the case file including the statements and documents available on record, this court is of the view that prima facie, there is sufficient material on record to proceed against the accused Naimuddin for the offence punishable u/s 354/354B/376 IPC. The contention that the accused has been falsely implicated or that there is a property dispute between the parties is a matter of trial to be proved by the accused. Moreover, the alleged contradictions in the statements of the prosecutrix cannot be evaluated at the stage of charge where only prima facie view is to be taken.

Accordingly, the accused Naimuddin is charged for the offences punishable u/s 354/354B/376 IPC to which the accused pleaded not guilty and claimed trial.

Witnesses mentioned at serial No.1, 3 and 6 of list of witnesses be summoned for NDOH.

Put up for PE on 23.03.2023.”

12. The main contention of the learned counsel for petitioner is that since the complainant has improved her statement while deposing in the Court, learned Magistrate as well as learned ASJ have gone beyond the mandate of law by holding that offence under Section 376 IPC is made out as they failed to weigh the evidence of the petitioner from the point of view of improvisation in her statement.

13. However, this Court is unable to agree with this contention of the learned counsel for the petitioner since the prosecutrix had specifically stated in her examination-in-chief that “the accused Naimuddin had inserted his hand inside my private part (peshab karne wali jagah)”.

14. The learned Magistrate has committed no wrong and had jurisdiction to have taken cognizance of the fact that commission of offence under Section 376 IPC was revealed and to have decided that since this case was exclusively triable by the court of sessions had committed it. The judicial precedents, law and the criminal jurisprudence works on this principle that Courts are not post offices of the prosecuting agency and should not work mechanically while framing charge or discharging an accused of offences under which they have been charge-sheeted. Further in case, if the prosecuting agency has not charge-sheeted an accused for an offence for which material is available on record, the Court concerned has power to pass an order that an offence which is exclusively triable by court of sessions is *prima facie* made out and commit it to the court of session.

15. Similarly, during trial when the testimony of witnesses is being recorded, in case, the learned Judge is of the opinion that an offence under a particular section of law is made out on the basis of said

material or testimony on record and that case is exclusively triable by the Court of sessions, the Court is also empowered to commit the said case to the Court of Sessions. The Sessions Court thereafter on the basis of the material on record as well as the testimony of the said witness can make up its mind as to whether prima facie on the basis of the same, a case is made out for the purpose of framing of charge or not.

16. The effect and evidentiary value of improving such statement and other related evidence on record will be considered and taken into account by learned Sessions Court after evidence is recorded and the benefit if any, as per principles of criminal jurisprudence will be available to an accused at the time of final disposal of the case.

17. However, to throw out the case of the prosecutrix at the threshold without trial being held for that particular offence on the ground that she had not stated certain facts to the investigating officer would amount to material being available on record on oath by a witness and it not being taken into account by the concerned Court.

18. In cases as the present one, the material which has come on record during trial discloses an offence which is exclusively triable by the Court of Sessions and the Magisterial Court is not empowered to try the same. The allegations thus which have come on record can be tested on the touchstone of either cross-examination or a full-fledged trial to which an accused as well as the complainant is entitled too. Therefore, in such cases where such allegations emerge before the Magistrate where the Magistrate is not empowered to try the said offence, it will be within its power under Section 323 to send the case to the Court of

sessions wherein it can be tried as per law so that justice can be done to the complainant as well as to the accused.

19. Considering the same, this Court is of the opinion that the Magistrate committed no error in sending the case to the Court of Sessions and the learned Sessions Court has passed a detailed order wherein it has mentioned that it has gone through the statement of prosecutrix and has come to the conclusion that prima facie a case under Section 376 IPC is made out against the petitioner.

20. It is noted that the trial is yet to commence before the learned Sessions Judge. At the stage of framing charge, only a prima facie view of the matter is to be taken and the Court cannot weigh the evidence or minutely examine it as if deciding the case at the final stage, therefore, at the stage of charge being guided by the principles of law on framing of charge as laid down in several judgments of the Hon'ble Apex Court of this Court, the learned sessions Court could not have discharged the accused only on the basis that a cross-FIR is pending between the parties and improvements have been made by the complainant in her statements made before the police, in her statement under Section 164 Cr.P.C. and at the time of recording her deposition in the Court.

21. Considering overall facts and circumstances of the case this Court does not find any ground to interfere with impugned order on charge dated 27.01.2023 passed by learned Additional Sessions Judge, SFTC-02, Central District, Tis Hazari Courts, Delhi in SC No.826/2022. Henceforth, the impugned order is upheld.

22. Accordingly, the present petition stands disposed of along with pending application.
23. Nothing expressed herein will tantamount to any expression on merit of the case during trial.
24. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

MAY 8, 2023/ns

