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

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*Reserved on: 23.01.2024 &
01.02.2024**Pronounced on: 05.02.2024*+ **CRL.REV.P. 96/2024**

MANISH MAINI

..... Petitioner

Through: Mr. Gaurav Kakar & Mr. Amit
Jain, Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Naresh Kumar Chahar,
APP for the State.+ **CRL.REV.P. 152/2024**

LUVJOT UPPAL @ LUV

..... Petitioner

Through: Mr. Amit Jain, Advocate

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Manoj Pant, APP for the
State with SI Sudeep, P.S.
Prashant Vihar**CORAM:****HON'BLE MS. JUSTICE SWARANA KANTA SHARMA****JUDGMENT****SWARANA KANTA SHARMA, J.**

1. The present petitions under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') have been



preferred on behalf of the revisionists/petitioners, assailing order dated 03.11.2023, whereby learned Additional Sessions Judge-01 (POCSO), North, Rohini District Court, Delhi (*Trial Court*) has allowed the application filed by the respondent/State under Section 216 of the Cr.P.C., and has consequently directed to frame additional charges against the petitioners.

2. Brief facts of the present connected cases are that an FIR No. 978/2014 was registered under Sections 363/354A/506/34 of Indian Penal Code, 1860 (*IPC*) and Section 12 of Prevention of Children from Sexual Offences Act, 2012 (*POCSO Act*), at Police Station Prashant Vihar, Delhi on 25.08.2014, on the complaint filed by victim 'S', who had alleged that about three months prior to the date of incident, she had gone to attend a marriage in the neighbourhood, where the accused persons had given their mobile numbers to her and had asked her to speak to them. Next day, when she had called them, they had used filthy language with her, after which she did not call them. However, as alleged, they used to call her even at late hours in the night. On 16.08.2014, the victim had received a vulgar message, upon which she had disclosed everything to her cousin sister, who is also the second victim in this case i.e. victim 'P', and had also made her read the message which was "*Aap Mujhe apne saath sex karne doge mujhe aapke saath sex karna hai*". Thereafter, victim 'S' had called the accused persons, who had apologized to her and told that they would never message or call her again. The victim 'S' and 'P' had again called the accused persons at their mobile phone, when the accused persons had requested the victims to meet them in person to



apologize. The accused person had assured that they will come alone for meeting. On 24.08.2014, the victim 'S' and 'P' had gone to meet accused/petitioner Luvjot at Avantika, Sector-5, Rohini and at his request, the victims sat inside his car. Thereafter, he had picked up the co-accused/petitioner Manish Maini and other co-accused from Rithala Road and had driven to City Centre to speak to the victims. While sitting in the car, accused Luv and Vaibhav had misbehaved and had used vulgar language with the victims. They tried to convince the victims to consume beer. When they had refused to consume beer, accused persons asked the victims to stay with them for 3-4 hours and had offered to give them as much money as they wanted. Upon being frightened by the acts of the accused persons, victim 'S' had called her mother and had stepped out of the car to narrate the whole story and had requested her mother to reach the spot. Thereafter, the mother and aunt of victim 'S' had reached the spot, but the accused persons had fled away. On these allegations, the present FIR was registered on 25.08.2014.

3. The statements of victim 'S' and 'P' were recorded under Section 164 of Cr.P.C. Consequently, after investigation, the chargesheet was filed on 31.08.2016, against the accused persons under Sections 363/365/354A/506/34 of IPC and Section 12 of POCSO Act. Charges under Section 354A of IPC and Section 12 of POCSO Act were framed against all the accused persons *vide* order dated 07.11.2016 by the learned Trial Court, which reads as under:

“As per the statement of victims, they themselves went with accused persons to know their intent so that they can make a complaint against the accused persons for their



indecent behavior. In these facts, charge U/s 363/365 is not made out against the accused persons. There is prima facie ground to proceed against the accused U/s. 354A IPC & 12 POCSO Act. Charge is framed accordingly to which accused persons pleads not guilty and claims trial.”

4. The victim ‘S’ and victim ‘P’ were both examined on 27.03.2017, before the learned Trial Court. Witness M i.e. mother of victim ‘S’ and witness JK i.e. aunt of victim ‘S’ were also examined by the learned Trial Court. After examination of the all the prosecution witnesses, the prosecution evidence was closed, and the matter was posted on 01.07.2023 for recording of statement of accused persons.

5. On 01.07.2023, an application was preferred by the prosecution under Section 216 of Cr.P.C, whereby the prosecution had sought addition of Section 354 of IPC and Section 10 of POCSO Act against all the accused persons. The prosecution had submitted that charges under these Sections be also framed since the accused persons had touched the victims ‘S’ and ‘P’ inappropriately.

6. *Vide* impugned order dated 03.11.2023, the learned Trial Court had rejected the arguments of the accused persons, and had allowed the application filed by the prosecution and had directed to additionally frame charge against all the accused persons under Section 354 of IPC and Section 10 of POCSO Act read with Section 34 of IPC. The concluding portion of impugned order reads as under:

“20. From the above said observations, prima facie, it can be said that accused persons, in furtherance of their common intention with sexual intent, physically touched both the victims while acting in the form of a gang and



thus all the ingredients of Section 354 IPC & Section 10 POCSO Act r/w Section 34 IPC are made out.

21. Hence, the application moved by state U/s 216 Cr. P.C. is allowed and accused persons are to be additionally charged U/s 354 IPC and Section 10 of POCSO Act READ WITH Section 34 IPC.”

7. In these petitions, it is stated that the case was adjourned for framing additional charges on 06.12.2023. On 06.12.2023, the learned counsels appearing for all accused persons had prayed for recalling of victim for her further cross examination, in view of additional charges framed against the accused persons. However, the said prayer was rejected by the learned Trial Court *vide* order dated 06.12.2023. It is further stated that in order to assail the order dated 03.11.2023, learned counsel for the petitioner had inspected the judicial file on 13.12.2023 and had learnt that the Trial Court had inadvertently recorded, in order dated 06.12.2023, that the counsel for the petitioner did not want to recall the victim. It is now submitted that counsel appearing for the petitioner before the learned Trial Court on 06.12.2023 had rather prayed for recalling the victim, in light of additional charges framed against the petitioners. However, a perusal of the order sheet dated 06.12.2023, reveals that the same has been recorded otherwise. Therefore, an affidavit to the effect that counsel appearing for the petitioner before the learned Trial Court had prayed for recalling the victim for the purpose of examination/ cross-examination has been filed along with the present petition.

8. Learned counsels, appearing on behalf of the petitioners herein, pray that the order dated 03.11.2023 framing additional



charges against them, be set aside on the ground that the learned Trial Court had failed to appreciate that there was no material on record to even remotely suggest that petitioner had inappropriately touched victims 'S' or 'P' or had tried to force himself upon them. It is also stated that the learned Trial Court has failed to consider that the statement of victim 'S' in the FIR, the statement under Section 164 of Cr.P.C. and her testimony recorded in her examination-in-chief are contradictory, inconsistent and false. It is also argued that the victim 'S', on the basis of whose statement the FIR had been registered had not levelled any allegation, with respect to inappropriate touching by any of the accused persons. It is also argued that as per FIR, accused Luv and another co-accused Vaibhav were misbehaving with the victims, and not the accused Manish. It is also argued that even if the allegations contained in the FIR or subsequent statements are taken to be true on their face value, the same are insufficient to constitute any offence under Section 354 IPC or Section 10 POCSO Act, against the accused persons. It is also argued that a perusal of statement of Victim 'S' under Section 164 of Cr.P.C., recorded on the same day reveals that the allegations levelled therein are insufficient to constitute any offence against the accused persons. It is now argued that the victim 'S' for the first time had levelled allegations *qua* inappropriate touching by the accused persons or forcing themselves upon victims in her examination-in-chief, recorded on 27.03.2017. It is also argued that even if that testimony is taken to be true, it is not clear as to whom the witness is referring to, while imputing allegation with respect to inappropriate touching. In this regard,



learned counsel has drawn this Court's attention to the testimony of victim 'S' dated 27.03.2017. It is also argued that the allegation of inappropriate touching was never stated before the learned Magistrate while recording statement under Section 164 Cr.P.C., and therefore, how was it possible for the victim to recollect it after three years of the alleged incident when the examination-in-chief was recorded. It is stated that similarly, Victim 'P' in her statement recorded under Section 164 Cr.P.C. has accused Vaibhav and Manish for misbehaving with victims, who had also touched their bodies, at the same time when accused Luv was driving the car. However, in the Court, she had given an entirely different story and had attributed the role of Luv to Manish. It is therefore stated that the Trial Court has failed to take into account the above factors and had erroneously invoked Sections 354/34 of IPC as well as Section 10 of POCSO Act. Therefore, it is prayed that order dated 03.11.2023 be set aside.

9. Learned APP appearing on behalf of the State, on the other hand, argues that there is no illegality or infirmity in the order passed by the learned Trial Court and that as per statements of the victims, they had stated that the accused persons had touched their bodies inappropriately and had tried to force themselves upon them. It is also stated that the victims in their testimony before the Court had also deposed so. It is, therefore, stated that physically touching the body with sexual intentions is covered under Section 354 of IPC and Section 10 of POCSO Act. It is also argued that since all the three accused persons were sitting in the car, were consuming alcohol and were forcing the victims to consume alcohol, which is apparent from



the statements on record, it is clear that there was common intention on part of all the accused persons to commit offence under Section 354 of IPC and Section 10 of POCSO Act. It is therefore prayed that these petitions be dismissed, as the same are devoid of any merit.

10. This Court has heard arguments addressed by both the parties, and has considered the material placed on record as well as the trial court record.

11. The impugned order has been passed on an application filed under Section 216 of Cr.P.C. by the prosecution, seeking alteration of charge. Thus, at the outset, Section 216 is reproduced hereunder for reference:

“216. Court may alter charge.

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge has been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may, either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.



12. This Court has gone through the statements recorded under Section 164 Cr.P.C. of the victims, the FIR registered in this case and the testimonies recorded before the Court.

13. A perusal of the record would reveal that the victims in their testimonies before the learned Trial Court have categorically mentioned that the accused persons were touching them inappropriately. Victim 'S' in her testimony has deposed that *"Accused persons were touching us inappropriately and were trying to force them upon us."*, and similarly, victim 'P' has also deposed in her testimony that *"Accused Luv and Bhuvan @ Vaibhav started misbehaving with prosecutrix and they started touching us inappropriately."* In the statement recorded under Section 164 of Cr.P.C. also, the victim 'P' had stated about accused persons touching their bodies inappropriately. Furthermore, this Court notes that in the first message which was sent by the accused Luv to the victim X, as alleged, he had asked her to have physical relations with her. Thereafter, he had taken his friends along with the victims in his car, and they had forced them to have alcohol and were also touching them. One of the accused was driving the car. Thus, the record reveals that accused Luv had taken the victims along with his friends Manish and Bhuvan in the car, and had earlier asked the victims to have physical relations with him, and where accused persons were allegedly touching the victims inappropriately. In these circumstances, the conduct of the accused persons is prima facie reflective of their connivance with each other and acts committed in



furtherance of their common intention. The specific allegations regarding the inappropriate touching of their bodies by the accused persons and forcing them to have alcohol, sending them messages to have physical relations with them would, at this stage, for the purpose of amending the charge, are sufficient to drive to a conclusion that the same were with sexual intent.

14. Considering the same, this Court holds that the learned Trial Court did not commit any error while amending the charge under Section 216 of Cr.P.C. on the basis of the material on record. Therefore, the order dated 03.11.2023 is upheld.

15. However, during the course of arguments, another issue was addressed by the learned counsels for petitioners that vide order dated 06.12.2023, the learned Trial Court had declined to grant an opportunity to the accused persons to re-call the victims for cross-examination, and thus, had curtailed a crucial right of the accused. It has been submitted on behalf of petitioners that no submission was made before the learned Trial Court that the counsels for the accused did not wish to cross-examine the victims, but the same finds mention in the order dated 06.12.2023 and on its basis, the right to cross-examine the victim again was closed. Having gone through the contents of order dated 06.12.2023, this Court finds merit in the said argument, since Section 217 of Cr.P.C. mandates that whenever a charge is altered or added in a case, the prosecution and accused must be allowed to recall the relevant witnesses, except in cases where Court is of the opinion that such a request is made to delay the proceedings or to defeat ends of justice or is vexatious. No



such finding has been given by the learned Trial Court in order dated 06.12.2023. Therefore, at the oral prayer made by the petitioners, the order dated 06.12.2023 is set aside to this extent. It is directed that the counsel for petitioners shall be allowed to cross-examine the prosecutrix, in one single opportunity, only to the extent of putting questions to her in respect of which additional charge has been framed by the learned Trial Court.

16. In view of the foregoing discussion, the present petitions stand dismissed alongwith pending applications if any.

17. It is however clarified that the observations made hereinabove shall not be construed as opinion of this Court on the merits of the case.

18. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

FEBRUARY 5, 2024/at