

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.REV.P. 968/2018 & CRL.M.A. 35640/2018 (Stay)**

Date of decision: 31st August, 2021

IN THE MATTER OF:

DEEPAK DUA

..... Petitioner

Through Mr. Tanveer Ahmed Mir, Advocate
with Mr. Gurpreet Singh, Mr. Bakul
Jain and Mr. Jatin S Sethi, Advocates

versus

STATE & ANR

..... Respondents

Through Ms. Kusum Dhalla, APP for the State
Mr. GP Thareja, with Mr. Satyam
Thareja, and Mr. Harshit Thareja,
Advocates for respondent No. 2

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This petition under Section 397 Cr.P.C read with Section 482 Cr.P.C is directed against the orders dated 04.09.2018 and 14.09.2018, passed by the learned Additional Session Judge (SFTC)-2, Karkardooma Courts, framing charges against the petitioner for offences under Sections 376-D/376(2)(n)/376(1) of the Indian Penal Code, 1860 (hereinafter, 'IPC').
2. Shorn of details, the facts leading to the present petition are as under:
 - a) On the complaint of the prosecutrix, FIR No. 571/2016 was registered on 05.11.2016 at Police Station Ashok Nagar for offences under Sections 376/506/34 IPC. It is stated by the complainant that on 08.02.2012 she joined a gym run by one Krishan Kumar in partnership with the petitioner herein. It is stated that the prosecutrix

did not have good relations with her husband and they lived separately. It is stated that one day when the prosecutrix was in the gym, her husband came there and started abusing her. It is stated that taking advantage of the fact that she does not have good relations with her husband, accused Krishan Kumar started getting close to the prosecutrix. It is stated that Krishan Kumar told the prosecutrix that since her weight is not reducing, it would be better for her to go to 148 Prayatan Vihar where a special machine had been installed to reduce her weight. It is stated that in November 2013, Krishan Kumar took the prosecutrix to 148 Prayatan Vihar. It is stated that when she reached 148 Prayatan Vihar, she saw that the petitioner herein was already present there. It is stated that when she asked Krishan Kumar as to what the petitioner herein is doing there, Krishan Kumar told the prosecutrix that the petitioner is his partner and he operates the said machine. It is stated that when the prosecutrix went into the room, Krishan Kumar put a knife on her and asked her to do what she was being told to do. It is stated that the petitioner herein and Krishan Kumar raped her and took obscene photographs and made videos of her. It is stated that after committing rape, Krishan Kumar showed the obscene photographs and videos to the prosecutrix and threatened her that if she told anyone about the incident her video and photographs would be uploaded on Youtube. It is stated that Krishan Kumar repeatedly blackmailed the prosecutrix. It is stated that in March 2014, Krishan Kumar took the prosecutrix to flat No.958 Jai Ambey Apartment where the petitioner herein was present and was consuming alcohol. It is stated that in the flat the prosecutrix was

blackmailed by Krishan Kumar and the petitioner herein by showing her obscene photographs and videos. It is stated that after blackmailing the prosecutrix both Krishan Kumar as well as the petitioner committed rape on her. It is stated that when the prosecutrix asked Krishan Kumar as to why he was doing this to her, she was told that the petitioner and his wife (Vandana Dua) were his partners, and if she kept the petitioner herein happy, he would promote him and give him money as well. It is stated that Krishan Kumar promised to marry the prosecutrix. It is stated that on the pretext of marriage, Krishan Kumar established physical relations with her on several occasions. It is stated that Krishan Kumar kept on threatening the prosecutrix by showing her photographs and videos. It is stated that on 08.04.2016, Krishan Kumar made physical relations with the prosecutrix and threatened her with dire consequences. It is stated that on the basis of this complainant FIR No. 571/2016 was registered on 05.11.2016 at Police Station Ashok Nagar for offences under Sections 376/506/34 IPC.

b) On 09.11.2016, the statement of the prosecutrix under Section 164 Cr.P.C was recorded wherein she alleged that the petitioner had also established unnatural sexual relations with her on the day she visited flat No.958 Jai Ambey Apartments.

c) The petitioner approached the Sessions Court by moving an application under Section 438 Cr.P.C for grant of anticipatory bail. The learned Additional Sessions Judge *vide* order dated 16.11.2016 dismissed the bail application filed by the petitioner.

d) The petitioner approached this Court by filling an application,

being BAIL APPLN 2369/2016, under Section 438 Cr.P.C for grant of anticipatory bail. This Court *vide* order dated 29.11.2016 granted anticipatory bail to the petitioner.

e) Charge-sheet has been filed against the petitioner for offences under Sections 376(D)/ 377/109/506/34 IPC.

f) The petitioner filed an application for discharge before the Sessions Court. The learned Additional Sessions Judge (SFTC) -2 *vide* order dated 04.09.2018 dismissed the said application. It is this order which is under challenge in the instant petition.

3. Heard Mr. Tanveer Ahmed Mir, learned Counsel appearing for the petitioner, Mr. G.P. Thareja, learned Counsel appearing for the prosecutrix, and Ms. Kusum Dhalla, learned APP for the State, and perused the material on record.

4. Mr. Tanveer Ahmed Mir, learned Counsel appearing for the petitioner, contends that a perusal of the charge-sheet shows that the prosecutrix and Krishan Kumar have a joint account in their name and a flat, bearing No.J007, Sec-76, Noida, was booked by them. He states that on 08.09.2016, the prosecutrix filed a complaint with the Commissioner of Police, Delhi, alleging that Krishan Kumar had defrauded her by forging papers to grab the property at Noida Sector 76 which had been jointly purchased by the prosecutrix and Krishan Kumar. He states that in this complaint there is no allegation of rape against the petitioner herein or his wife. He further contends that the prosecutrix filed an application under Section 156 (3) Cr.P.C before the Chief Judicial Magistrate, Gautam Buddha Nagar for registration of FIR against Krishan Kumar for alleged forgery regarding the same property at Sector 76 Noida for which the prosecutrix

had filed a complaint with the Commissioner of Police, Delhi. He states that this application was filed on 21.09.2016 and that there was no allegation of rape against the petitioner herein or his wife. He therefore states the petitioner and his wife are being roped in by the prosecutrix only to extort money from the petitioner herein. He further contends that the investigation also revealed that Flat No.148, Paryatan Vihar, Vansundhara Enclave, where the prosecutrix was allegedly raped by the petitioner herein and Krishan Kumar in November, 2013 had been rented by the prosecution for 11 months on 09.10.2013 by signing a lease deed, and that police verification had also been done by Delhi Police and the prosecutrix had signed as a tenant of the said property. He contends that as the prosecutrix was a tenant of the said property, her allegation that Krishan took her to the said flat and the petitioner herein and Krishan raped her is false as she was in possession of the said flat and, therefore, should have been aware that there was no such machine installed there. He further states that the charge-sheet reveals that flat No.958 Jai Ambey Apartments, where it is alleged by the prosecutrix that she was raped by the petitioner herein and Krishan Kumar in March 2014, was taken on rent by the prosecutrix on 15.11.2013 and the said flat was in possession of the prosecutrix till May, 2015. He, therefore, states that if the said property was in the possession of the prosecutrix till May 2015, then how could it be possible that the petitioner herein and his wife were already present at the flat No.958 Jai Ambey Apartment when she reached there along with Krishan Kumar on the day after Holi in March 2014. The learned counsel for the petitioner states that after failing in her attempt to get the property/money from Krishan Kumar, the prosecutrix is now falsely implicating the petitioner and his wife in order to settle her differences with

Krishan Kumar regarding the property at Noida Sector 76. He, therefore, states that the whole case of the prosecutrix is nothing but a blanket of lies and therefore the petitioner, be discharged from the present case.

5. *Per contra*, Mr. G.P. Thareja, learned Counsel appearing for the prosecutrix, contends that the fact that whether the prosecutrix has taken the flat, bearing No.958 Jai Ambey Apartments, on rent or not are all matters to be seen in trial and they cannot be examined now. He further contends that the rent agreement is a forged document.

6. A perusal of the charge-sheet shows that the prosecutrix and Krishan Kumar have a joint account in their name and a flat was booked by them. The investigation further revealed that the prosecutrix and Krishan Kumar had purchased a flat bearing No.J007, Sec-76, Noida and two properties have been purchased in Greater Noida Industrial Development Authority towards MA-5, in which the agreement was in the name of Krishan Kumar and the GPA was in the name of the prosecutrix and Flat No.C-1/45, Sector-55 Noida, UP is in the name of accused Krishan Kumar, which is in the possession of the prosecutrix. The investigation also revealed that Flat No.148, Paryatan Vihar, Vansundhara Enclave, where the prosecutrix was allegedly raped by the petitioner herein and Krishan Kumar in November, 2013 had been taken on rent by the prosecutrix on 09.10.2013 by signing a lease deed for 11 months. The investigation further revealed that flat No.958 Jai Ambey Apartments, where it is alleged by the prosecutrix that she was raped by The petitioner herein and Krishan Kumar in March 2014, was rented by the prosecutrix. The charge-sheet also reveals that the prosecutrix had introduces herself as the wife of accused Krishan Kumar while taking flat No.958, Jai Ambey Apartments on rent. These findings in the charge-

sheet has not been questioned by the prosecutrix by filing any petition in courts.

7. The scope of the High Court while dealing with an application challenging an order passed by the lower Courts while discharging or refusing to discharge an accused has been laid down in several cases. In Union of India v. Prafulla Kumar Samal, (1979) 3 SCC 4, the Supreme Court laid down the following principles:

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

- 1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.*
- 2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.*
- 3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. **By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.***

4) *That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.*” (emphasis supplied)

8. In State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568, the Supreme Court after comparing Section 207 in the old Code of 1898 and Section 227 which was introduced in the new Cr.P.C observed as under:

“9. Further, the scheme of the Code when examined in the light of the provisions of the old Code of 1898, makes the position more clear. In the old Code, there was no provision similar to Section 227. Section 227 was incorporated in the Code with a view to save the accused from prolonged harassment which is a necessary concomitant of a protracted criminal trial. It is calculated to eliminate harassment to accused persons when the evidential materials gathered after investigation fall short of minimum legal requirements. If the evidence even if fully accepted cannot show that the accused committed the offence, the accused deserves to be discharged. In the old Code, the procedure as contained in Sections 207 and 207-A was fairly lengthy. Section 207, inter alia, provided that the Magistrate, where the case is

*exclusively triable by a Court of Session in any proceedings instituted on a police report, shall follow the procedure specified in Section 207-A. Under Section 207-A in any proceeding instituted on a police report the Magistrate was required to hold inquiry in terms provided under sub-section (1), to take evidence as provided in sub-section (4), the accused could cross-examine and the prosecution could re-examine the witnesses as provided in sub-section (5), discharge the accused if in the opinion of the Magistrate the evidence and documents disclosed no grounds for committing him for trial, as provided in sub-section (6) and to commit the accused for trial after framing of charge as provided in sub-section (7), summon the witnesses of the accused to appear before the court to which he has been committed as provided in sub-section (11) and send the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session as provided in sub-section (14). The aforesaid Sections 207 and 207-A have been omitted from the Code and a new Section 209 enacted on the recommendation of the Law Commission contained in its 41st Report. **It was realised that the commitment inquiry under the old Code was resulting in inordinate delay and served no useful purpose. That inquiry has, therefore, been dispensed with in the Code with the object of expeditious disposal of cases. Instead of the committal Magistrate framing the charge, it is now to be framed by the Court of Session under Section 228 in case the accused is not discharged under Section 227. This change brought out in the Code is also required to be kept in view while determining the question. Under the Code, the evidence can be taken only after framing of charge.*** (emphasis supplied)

9. In P. Vijayan v. State of Kerala, (2010) 2 SCC 398, the Supreme Court took note of the judgment in Union of India v. Prafulla Kumar Samal (*supra*) and after quoting Section 227 Cr.P.C observed as under:

“10. Before considering the merits of the claim of both the parties, it is useful to refer to Section 227 of the Code of Criminal Procedure, 1973, which reads as under:

“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.”

If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words “not sufficient ground for proceeding against the accused” clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.

11. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.” (emphasis supplied)

10. In Dilawar Balu Kurane v. State of Maharashtra, (2002) 2 SCC 135, the Supreme Court after relying on Union of India v. Prafulla Kumar Samal (*supra*) observed as under:

“12. Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence

and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial (see Union of India v. Prafulla Kumar Samal[(1979) 3 SCC 4:1979 SCC (Cri) 609])”

11. Similarly, State of M.P. v. S.B. Johari, (2000) 2 SCC 57, the Supreme Court has held that charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by defence evidence, if any, cannot show that the accused committed the particular offence and in such case, there would be no sufficient ground for proceeding with the trial.

12. The Apex Court, in Dipakbhai Jagdishchandra Patel V. State of Gujarat (2019) 16 SCC 547 opined as follows :

"At the stage of framing the charge in accordance with the principles which have been laid down by the Court, what the court is expected to do is, it does not act as a mere post office. The Court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon the prosecution. The sifting is not to be meticulous in the sense the court dons the mantle of the trial judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion, must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of

the Judge that here is a case where it is possible that the accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence."

13. A reading of the above mentioned judgments would show that while framing a charge, the Court has the power to sift and weigh the evidence for the limited purpose of finding out whether or not a *prima facie* case against the accused has been made out and after analysing the materials before it, and if two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the Judge will be justified to discharge the accused, and at this stage he is not to see whether the trial will end in conviction or acquittal. The Supreme Court has held that, the words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution or not.

14. Absence of application of judicial mind can lead to grave injustice which may entail an individual being driven through the rigours of the legal system due to no fault of their own. It is the duty of the Court to, therefore, ensure that such injustice can be mitigated and that an accused does not have expend their resources in contesting a potentially *mala fide* prosecution. This can also resultantly reduce the burden on trial courts and High Courts.

15. In the present case the prosecutrix has filed the present FIR after two-and-half years after the incident. There are disputes between the co-accused

and the prosecutrix regarding several monetary transactions. The prosecutrix has not made any allegation regarding the alleged rape by the petitioner herein and Krishan Kumar either in her complaint given to the Commissioner of Police, Delhi or in her application filed under Section 156 (3) Cr.P.C before the Chief Judicial Magistrate, Gautam Buddha Nagar. When an FIR is registered after a long period of time, it should ideally record an extensive description of the incident that has transpired and it should contain all the details and names of all the accused who have committed the offence or were involved in the offence. Due to the fact that the prosecutrix did not reveal in the FIR that the petitioner herein had had unnatural sex with her and it was only revealed by the prosecutrix in her statement under Section 164 Cr.P.C after two days of the registration of FIR, this Court is of the opinion that the allegation is only an afterthought. The prosecutrix has also implicated the wife of the petitioner. The allegation of rape and the efforts to implicate the petitioner's wife drives this Court to the conclusion that they are merely an afterthought just to arm-twist the petitioner and his wife in order to sort out her differences with Krishan Kumar. The wife of the petitioner has also been included in her statement given under Section 164 Cr.P.C. The fact that the prosecutrix did not mention anything about rape in her complaint to the Police in her application under Section 156(3) Cr.P.C. filed before Chief Judicial Magistrate, Gautam Buddha Nagar coupled with the fact that there are significant improvements in her statement under Section 164 Cr.P.C. and further the fact that the interrogation has revealed that the prosecutrix had taken both the places where she was raped on rent does not raise a grave suspicion against the accused. The contention of Mr.Thareja that the lease deeds are forged and

fabricated at the instance of the petitioner cannot be accepted in the absence of any challenge to the same.

16. A perusal of the dated 14.9.2018 impugned order indicates that the Ld. Trial Court failed to apply its mind to the facts of case and mechanically dismissed the application of the Petitioner. The Ld. Trial Court ought to have analysed the chargesheet more closely to decide whether on the face of it an offence against the Petitioner was made out in light of the allegations and the investigation done thereafter.

17. Accordingly, orders dated 04.09.2018 and 14.09.2018 are set aside and the petitioner stands discharged. The petition is disposed of along with the pending application(s), if any.

AUGUST 31, 2021
Rahul

SUBRAMONIUM PRASAD, J.