

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
+ **CRL.REV.P. 967/2018 & CRL.M.A. 35635/2018 (Stay)**

Date of decision: 31<sup>st</sup> August, 2021

**IN THE MATTER OF:**

**VANDANA DUA**

..... Petitioner

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

versus

**STATE**

..... Respondent

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 petitioner has approached this Court challenging the orders dated 04.09.2018 and 14.09.2018, passed by the learned Additional Session Judge (SFTC)-2, Karkardooma Courts, dismissing application for discharge filed by the petitioner and directed framing of charges against the petitioner for offences under Section 109 IPC read with Section 376-D IPC.

2. Shorn of details, the facts leading to the present petition are as under:

a) On a 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 accused Krishan Kumar in partnership with accused Deepak Dua (husband of the petitioner). It is

stated that the prosecutrix does not have good relations with her husband and she lives separately. It is stated that one day when the prosecutrix was in the gym, her husband went 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 as her weight was not reducing, it would be better for her to go to 148 Prayatan Vihar where a special machine had been installed to reduce the 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 Deepak Dua was already present there. It is stated that when she asked Krishan Kumar as to what Deepak Dua was doing there, Krishan Kumar told the prosecutrix that Deepak Dua was his partner and he operated 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 Deepak Dua 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 Deepak Dua was present and was consuming alcohol. It is stated that in the flat the prosecutrix was

blackmailed by Krishan Kumar and Deepak Dua by showing her obscene photographs and videos. It is stated that after blackmailing the prosecutrix both Deepak Dua and Krishan Kumar raped her. It is stated that when the prosecutrix asked Krishan Kumar as to why he was doing this to her, she was told that Deepak Dua and his wife (the petitioner herein) were his partners and if she kept Deepak Dua 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 the 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 complaint, 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. In her statement under 164 Cr.P.C the prosecutrix introduced the role of the petitioner herein by stating that in March 2014, after Holi, when Krishan Kumar took the prosecutrix to 958, Jai Ambey Apartment, the petitioner herein and Deepak Dua were present there and that after her arrival, the petitioner herein left the room after some time and bolted the door from outside, and later Krishan Kumar asked the prosecutrix to establish physical relation with Deepak Dua, and both Deepak Dua and Krishan Kumar raped her.

- c) The petitioner approached the Sessions Court by moving an application under Section 438 Cr.P.C for grant of anticipatory bail. The petitioner was granted anticipatory bail by the learned Additional Sessions Judge vide order dated 16.11.2016.
- d) Charge-sheet has been filed against the petitioner for offences under Sections 376(D)/ 377/109/506/34 IPC. In the charge-sheet, the material against the petitioner is the statement by the prosecutrix under Section 164 Cr.P.C wherein she has stated that when she reached 958, Jai Ambey Apartment, the petitioner herein and Deepak Dua were present there and after sometime the petitioner herein went out and locked the door from outside.
- e) 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 Deepak Dua 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 Deepak Dua and Krishan Kumar in March 2014, was taken on rent by the prosecutrix.

f) The petitioner filed an application for discharge before the Sessions Court. The learned Additional Sessions Judge placed reliance on the statement of the prosecutrix made under Section 164 Cr.P.C wherein she has stated that after Holi, in March 2014 when she went to flat No.958, Jai Ambey Apartments, with Krishan Kumar, Deepak Dua and the petitioner herein were present there and after some time the petitioner left the room and bolted the door from outside. 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 the petitioner is being roped in by the prosecutrix only to extort money from the petitioner and her husband, Deepak Dua. 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 a 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 or her husband, Deepak Dua. 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 complaint with the Commissioner of Police, Delhi. He states that in the application which was filed on 21.09.2016 there was no allegation of rape against the petitioner or her husband, Deepak Dua. The learned counsel for the petitioner states that after failing in her attempt to get the property/money from Krishan Kumar, the prosecutrix has now set her sights on the petitioner and her husband, knowing that they are the owners of the gym and that the petitioner herein, her husband and Krishan Kumar were planning to open a separate gym. The learned counsel for the petitioner contends that the prosecutrix was hopeful that after implicating the petitioner herein and her husband, Deepak Dua, she would be able to sort out her differences with Krishan Kumar regarding the property at Noida Sector 76. The learned counsel for the petitioner contends that as the petitioner was the softest target, she has been roped in. He further states that the charge-sheet itself reveals that the property bearing Flat No.958, Jai Ambey Apartments, where the prosecutrix had allegedly been raped had been taken on rent by the prosecutrix herself. He further states that the charge-sheet reveals even the property at 148, Prayatan Vihar, was taken on rent by the prosecutrix. The said property was owned by one Uma Suresh who told that on 15.11.2013, the prosecutrix had taken the said flat on rent at Rs.8,000/- per month. The learned counsel for the petitioner further contends that the said Uma Suresh revealed that the prosecutrix had introduced herself as wife of Krishan Kumar, R/o C-145, Sector 55, Noida. He, therefore, states that the whole case of the prosecutrix is nothing but a pack of lies and, therefore, the petitioner, whose role is that she was present

at Jai Ambey Apartments along with her husband on that day and that she left the room after the prosecutrix arrived and bolted the door from outside, 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. He contends that for an offence under Section 376 IPC, the statement of the prosecutrix is sufficient to frame charges against the accused.

6. Ms. Kusum Dhalla, learned APP supports the order of the Trial Court and states that arguments raised by the petitioner should be considered only at the time of trial and cannot be considered at this stage. She contends that it is settled law that a mini trial could not be conducted at the time of framing charges.

7. The scope of the High Court while dealing with an application challenging an order passed by the lower Courts on discharging or refusing to discharge an accused has been laid down in several cases.

8. 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. 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.

11. 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])”*

12. 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. After analysing the materials before it, if two views are 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 in discharging the accused in exercising its jurisdiction under Section 227 Cr.P.C.

13. It is well settled that while framing charge the Court cannot hold a mini trial for discharging the accused. In the present case there are disputes between the co-accused and the prosecutrix regarding monetary and property transactions. The FIR has been filed after a considerable delay of around two-and-a-half years. The petitioner has not made any allegation regarding the alleged rape by Deepak Dua 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. Normally, when an FIR is registered after a long time it should contain a more graphic 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 part of the offence. The fact that the role assigned to the petitioner has been revealed by the prosecutrix in her statement under Section 164 Cr.P.C after two days of the registration of FIR, at this juncture, can safely be called as an afterthought in order to rope in a soft target, namely, the petitioner. The only allegation against the petitioner is that she was present at Flat No.958 Jai Ambey Apartment property which in the charge sheet it is mentioned has been taken on rent by her stating that

she is the wife of Krishan Kumar. On the day after Holi in March, 2014, she left before the incident took place and bolted the door from outside. It has also been mentioned in the charge sheet that 148 Prayatan Vihar has also been taken on record by the prosecutrix.

14. As stated by the Supreme Court in P. Vijayan (supra) if two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the 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 or not.

15. 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.

16. A reading of the charge-sheet shows that the material against the petitioner herein is the statement made by the prosecutrix under Section 164 Cr.P.C stating that the petitioner was present in the room where the prosecutrix was allegedly raped by Deepak Dua and Krishan Kumar but before the incident happened the petitioner had left the apartment and had bolted the door from outside. The petitioner, who is a lady, cannot commit rape. The only question is whether she abetted her husband in committing

the rape, if at all it happened. The fact that the petitioner was in the room and she went outside before the incident and bolted the door from outside, at this juncture, is not sufficient for trial to proceed against the petitioner herein. Further, from the material placed in the charge sheet, it can be said that the prosecutrix has not come with clean hands inasmuch as she did not make any complaint either in the complaint dated 31.12.2015 made to the Police Commissioner or in the application under Section 156(3) before the Surajpur Court.

17. The learned Trial Court has not appreciated the documents filed along with the charge-sheet and has accepted the version laid by the prosecution without sifting and weighing the evidence which points out that this FIR against the petitioner and her husband is only an afterthought. As stated above, the learned Trial Court fell in error in not appreciating that the prosecutrix would have levelled the allegation of rape at the very first instance i.e. before the Commissioner of Police. It is apparent that when the prosecutrix was unsuccessful in her attempt to get her money back from co-accused Krishan Kumar, she has tilted her lance towards the petitioner and her husband.

18. The prosecutrix did not state that the petitioner herein was at 958, Jai Ambey Apartments when the rape was committed on her and in her statement under Section 164CrPC which is inapplicable. There are disputes between the prosecutrix and co-accused Krishan Kumar. A reading of the charge sheet and the material on which reliance is placed by the prosecution, this Court is of the opinion that there is no sufficient material against the petitioner herein.

19. 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.

**SUBRAMONIUM PRASAD, J.**

**AUGUST 31, 2021**

*Rahul*

