

IN THE COURT OF MS. VRINDA KUMARI,
ADDITIONAL SESSIONS JUDGE-02, SOUTH DISTRICT,
SAKET COURTS, NEW DELHI

CNR NO. DLST01-008152-2018

SC NO. 681/2018

FIR NO. 317/2018

PS Malviya Nagar

IN THE MATTER OF

State

Versus

- 1. Kamlesh Dalmiya
S/o Sh. Nand Lal Dalmiya
R/o H. No. B-1st/49, 1st Floor,
Malviya Nagar, New Delhi**
 - 2. Jatin Mittal
S/o Sh. M.K. Mittal
R/o H. No. 1202, 1st Floor,
Gali Kashmiriyan, Imli Mohalla,
Kucha Pati Ram, Bazar Sita Ram, Delhi-6**
 - 3. Prabha Dalmiya
W/o Kamlesh Dalmiya
R/o H. No. B-1st/49, 1st Floor,
Malviya Nagar, New Delhi**
- Accused Persons**

ORDER ON CHARGE

1. Vide this Order, I shall decide the point of charge in the present case.

2. I have heard detailed arguments and have carefully perused the record including written submissions of the complainant.

3. Contention of Ld. Counsel for accused persons is that the allegation under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the SC & ST Act) against accused Prabha was levelled as an afterthought and this offence was pressed against her by way of filing a supplementary chargesheet. It is further submitted that the essential ingredient of 'public view' is not made out in the present case. There is also no neutral or impartial public witness.

4. Regarding accused Kamlesh Dalmiya, it is submitted that witness Dheeraj Kumar Rastogi is a tutor of victim 'M' and is also brother-in-law of father of the complainant. It is submitted that the incident involving Kamlesh Dalmiya took place at home of the complainant and witness Dheeraj Kumar Rastogi happened to come there. It is submitted that the relations between accused Kamlesh Dalmiya and Dheeraj Kumar Rastogi are not good. It is further submitted that the allegations of gang rape upon accused Kamlesh Dalmiya and Jatin Mittal are false and motivated allegations. It is submitted in respect of accused Jatin Mittal that this accused has been falsely implicated in the present case.

5. The contention of Ld. Counsel for the complainant is that the IO did not register FIR in the present case promptly and also did not invoke all the relevant provisions of law. Therefore, offence punishable u/s 4 of the SC & ST Act should be framed against IO and SHO concerned. It is further submitted that IO had intimidated the complainant and, therefore, charge for the offence u/s 3(1)(r) of the SC & ST Act should be framed against her. It is also alleged that IO conspired with the accused persons which calls for framing of charge for the offence punishable u/s 120B and 166A of the IPC. Since Section 120B IPC is a Scheduled offence, Section 3(2)(v) and Section 3(2)(va) should also be invoked against the IO. In the written submissions filed by Ld. Counsel for the complainant, it is submitted that several instances of offences committed against the complainant have been narrated by the complainant. It is submitted in the written submissions that offences punishable u/s 376D/323/506/34 IPC and section 3(e),(w)(i), (w)(ii), (x) as well as section 3(2)(v), 3(2)(va) are made out against the accused persons.

6. Ld. Addl. PP for State has stated that there is sufficient material on record to frame charge against the accused persons.

7. I have considered the rival contentions.

First Information Report

8. In the FIR dated 01.10.2018 registered on the written

complaint dated 01.10.2018 of prosecutrix 'M', four incidents of sexual assault have been cited. It is noted that as per the chargesheet the prosecutrix 'M' had appeared at the police station on 10.09.2018 and written complaint was given on 01.10.2018.

9. The first incident is alleged to have taken place in the last days of July 2018. It is submitted that when accused Kamlesh Dalmiya came to her house, her father was not present. Accused Kamlesh Dalmiya entered the house on the pretext of using washroom. He then asked 'M' if she had any boyfriend. He then grabbed her breast and pushed her on the bed. He touched her inappropriately everywhere including her private part and started to disrobe her. He tried to rape her. When she prayed for being left alone, he slapped her and threatened to kill her family members and herself if she disclosed about the incident to anyone. He also bit her on her breasts. Later, after a few days, he apologized and stated that he was just fooling around on the above said day and that he would not repeat this behavior.

10. The second incident pertains to 29.07.2018 when accused Kamlesh Dalmiya came to the house of 'M' between 7:30 PM to 8:00 PM along with his friend accused Jatin. Kamlesh Dalmiya assured 'M' that he had talked to her father and asked her to prepare tea. 'M' tried to avoid it by saying that there was no milk at home. Kamlesh Dalmiya sent Jatin to fetch milk. Finding her alone, he outraged her modesty. Upon his return, accused Jatin also

outraged her modesty. There is a specific allegation by the victim that she was brutalized for about 30 minutes to 45 minutes by the accused persons. They threatened her with acid attack if she disclosed about the incident to anyone and then left the house.

11. Third incident mentioned in the FIR is an undated incident. It took place after victim 'M' disclosed about her ordeal to her family members. It is alleged that Kamlesh Dalmiya stopped her on the way and threatened her with dire consequences. He further stated that there was still time and she should do as he says.

12. The fourth incident took place on the day of *Janmashtami*. On that day, victim 'M' went to see accused Prabha Dalmiya w/o Kamlesh Dalmiya to inform her about the conduct of Kamlesh Dalmiya. Accused Prabha Dalmiya, however, did not pay heed to the complaint of 'M'. The complainant/victim 'M' again went to her house the next day but again Prabha Dalmiya did not pay heed.

13. During investigation, it came to light that on complaint dated 01.10.2018, another FIR No. 318/2018 u/s 376/354 IPC and Section 4 POCSO Act had been registered against Kamlesh Dalmiya on the complaint of minor victim 'K' who is sister of prosecutrix 'M'.

Statement u/s 164 Cr.P.C.

14. On 03.10.2018, statement u/s 164 Cr.P.C. of the prosecutrix 'M' was recorded. In her statement, she narrated her ordeal during the first incident. She also narrated the second incident dated 29.07.2018. However, she also stated that oral penetrative sexual assault was also committed by Kamlesh Dalmiya and Jatin Mittal. On 29.08.2018, when she was crying inconsolably, her younger sister 'K' shared her own dilemma with her. They both did not inform their father till August end as he was going through depression since their mother had left him. They disclosed about their ordeal to their father after about a day or two of the *Raksha Bandhan* festival. After about two to three days, when 'M' was going to Chirag Delhi Metro Station on foot, accused Kamlesh Dalmiya threatened her with dire consequences and acid attack. 'M' disclosed about this third incident to his father after about a day or two. She further stated that on the day of *Janmashtami*, she went to meet accused Prabha Dalmiya w/o Kamlesh Dalmiya but she said that she would talk later.

15. In the statement u/s 164 Cr.P.C., 'M' further stated that accused Kamlesh Dalmiya did not hand over the audio recording of the conversation in which her father had talked to him about his daughters. She stated that he handed over only that audio recording to the police in which the complainant party was heard asking for their remaining amount from him. She also stated that in the said

audio recording, the plight of the victims was not referred to as it would have appeared that complainant party was demanding money on account of their allegations. She further stated that on 11.09.2018, when they went to the police station, they found accused Kamlesh Dalmiya and accused Prabha Dalmiya sitting there with the IO. It is also stated that IO Surekha called the complaint of the complainant false and that the FIR was registered only on 01.10.2018.

16. After investigation, chargesheet for the offences punishable u/s 376D/323/506 IPC was filed against accused Kamlesh Dalmiya and Jatin Mittal.

Supplementary Chargesheet

17. The supplementary chargesheet discloses that during the hearing in anticipatory bail application of accused Kamlesh Dalmiya bearing Bail Application No. 2467/2018 before Hon'ble High Court of Delhi, applicability of provisions of the SC & ST Act in present case was brought to the notice of Hon'ble High Court of Delhi. Thereafter, Sections 3(1)(w)(e)(r)(x) of the SC & ST Act were added in the present case against accused Kamlesh Dalmiya and Jatin Mittal. Investigation was handed over to ACP, Sub Division Hauz Khas. Voice samples of prosecutrix 'M', her father 'RL', one Ms. 'TL' and accused Kamlesh Dalmiya were taken. Statement of 'M' was again recorded by ACP, Hauz Khas. In her

statement recorded by ACP, 'M' reiterated her allegations. Additionally she stated that when she had gone to visit Prabha Dalmiya a second time, this accused told her that they did not keep any relations with lower caste people and that she would not let her enter her house.

18. Statement of Dheeraj Kumar Rastogi, tutor of 'M' and a relative of accused Kamlesh Dalmiya was also recorded by ACP, Hauz Khas. Statement u/s 161 Cr.P.C. of Dheeraj Kumar shows that on 28.08.2018, father of the complainant had called him at his house to discuss something about 'M'. Statement of this witness shows that he thought that he was being called as father of 'M' was always concerned about her progress in studies and her future. On 29.08.2018, father of 'M' made telephonic calls to him repeatedly but he could not respond properly because of his busy schedule. Father of 'M' thereafter came to his house and requested him (Dheeraj Kumar) to come to his (father of 'M') house in the afternoon. He told him that accused Kamlesh was also coming. Nearly at that time, accused Kamlesh also called Dheeraj and asked him to reach the house of father of the complainant. When Dheeraj Kumar reached the house of the complainant, he found Kamlesh and 'RL' (father of the complainant) fighting like cats and dogs using abusive language. Accused Kamlesh said, "*tum neechi jaat ke ho, tumhara koi dharam imaan nahi hota, tumhari soch chhoti hai. Tum bhangi hi rahoge*". After sometime, they both cooled down and accused Kamlesh apologized for his behavior.

19. I shall now consider the roles of the accused persons one by one.

Accused Kamlesh Dalmiya and Jatin

20. Regarding first incident that took place in July 2018, there are specific allegations of outraging of modesty of the prosecutrix by the accused Kamlesh Dalmiya. The second incident is dated 29.07.2018. In the statement u/s 164 Cr.P.C. of the prosecutrix, there are specific allegation of gang rape by accused Kamlesh Dalmiya and Jatin.

21. It is also alleged that a few days after the festival of *Rakshabandhan*, accused Kamlesh Dalmiya criminally intimidated the prosecutrix while she was on her way to Chirag Delhi Metro Station on foot. There also allegations of criminal intimidation at the time of above mentioned two incidents. There are also specific allegations that at time of first incident, accused Kamlesh Dalmiya slapped the prosecutrix and at the time of second incident, accused Kamlesh Dalmiya and accused Jatin bit her private parts.

22. This calls for framing of charge for offence punishable u/s 323/354/506/376D IPC against accused Kamlesh Dalmiya and offence punishable u/s 323/506/376D IPC against accused Jatin.

23. Since the complainant belongs to the Scheduled Caste Community, charge for the offence punishable u/s 3(1)(w)(i) of the SC & ST Act is made out against these accused persons. Further, section 323/354 IPC are scheduled offences attracting section 3(2)(va) of the SC & ST Act against them. The offence punishable u/s 376D IPC is punishable with rigorous imprisonment for a term which shall not be less than 20 years but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine. It calls for framing of charge for the offence punishable u/s 3(2)(v) of the SC & ST Act against the accused Kamlesh Dalmiya and Jatin. The issue whether or not the alleged offences were committed only on the ground that the victim was a member of Scheduled Caste community is a matter of trial. At this stage, only a prima facie case giving rise to grave suspicion against the accused persons is to be seen.

24. Now I shall consider whether offences punishable u/s 3(1)(r)(s) of the SC & ST Act are made out against the accused Kamlesh Dalmiya. It is alleged that on 29.08.2018, accused Kamlesh Dalmiya hurled casteist slurs upon the father of the complainant inside the house of the complainant in presence of one Dheeraj Kumar Rastogi. This Dheeraj Kumar was well known to the accused as well as father of the complainant. In fact, Dheeraj Kumar was present at the complainant's house at request of the accused as well as father of the complainant. It has been held in ***Judgment dated 05.11.2020 of Hon'ble Supreme Court of India in Crl.***

Appeal No. 707 of 2020 (Arising out of SLP (Crl.) No. 3585 of 2020) titled as Hitesh Verma Vs. The State of Uttarakhand & Anr.
as follows:

“15. As per the FIR, the allegations of abusing the informant were within the four walls of her building. It is not the case of the informant that there was any member of the public (not merely relatives or friends) at the time of the incident in the house. Therefore, the basic ingredient that the words were uttered “in any place within public view” is not made out. In the list of witnesses appended to the charge-sheet, certain witnesses are named but it could not be said that those were the persons present within the four walls of the building. The offence is alleged to have taken place within the four walls of the building. Therefore, in view of the judgment of this Court in Swaran Singh, it cannot be said to be a place within public view as none was said to be present within the four walls of the building as per the FIR and/or charge-sheet.”

In the present case, in absence of any person of public (other than relatives or friends), the above said incident cannot be said to have taken place at a place within public view.

Accused Prabha Dalmiya

25. In her statement u/s 161 Cr.P.C. on the basis of which

present FIR was registered, it was submitted by the prosecutrix that after the third incident of criminal intimidation which took place around *Rakshabandhan*, the prosecutrix went to Prabha Dalmiya W/o Kamlesh Dalmiya at her house to complain about the conduct of accused Kamlesh Dalmiya but she did not listen to her. The next day again the prosecutrix visited her but she again did not pay any heed to complainant.

26. In her statement u/s 164 Cr.P.C., the prosecutrix deposed that on the day of *Janmashtami*, she went to see Prabha Dalmiya to inform her about the conduct of her husband Kamlesh Dalmiya but she did not listen to her. She asked the prosecutrix to come the next day. On the next day again prosecutrix went to her house but Prabha Dalmiya did not open the door. It was only when the prosecutrix rang the bell repeatedly that accused Prabha Dalmiya opened the door and said that she did not want to talk to her and that she would talk later on. But she did not talk to the prosecutrix later.

27. Supplementary chargesheet discloses that during the hearing of anticipatory bail application of accused Kamlesh Dalmiya bearing Application No. 2467/2018, it was brought to the notice of Hon'ble High Court of Delhi on 28.01.2019 that the prosecutrix had special protection under the SC & ST Rules 1995 and the investigation in the matter was required to be investigated by an ACP. The investigation was, accordingly, marked to ACP, Hauz Khas. It was only when the statement of the prosecutrix was again

recorded by ACP, Hauz Khas in the present case on 23.03.2019 that the prosecutrix alleged for the first time that at the time of second visit the day after *Janmashtami*, accused Prabha Dalmiya did not open the door but when she open the door after a long time, she said, “*hum chhoti jaat walo se koi talluqaat nahi rakhte hain*”.

28. The absence of allegation against accused Prabha Dalmiya regarding hurling of casteist slurs in the initial statement u/s 161 Cr.P.C. of the prosecutrix and even in her statement u/s 164 Cr.P.C. and its introduction for the first time at a much belated stage after the provisions of the SC & ST Act had been invoked against the other two accused creates a doubt in the mind of the Court regarding its veracity.

29. It has been held in **Judgment dated 01.11.2001 of Hon’ble High Court of Delhi in Smt. Deepa Bajwa vs State And Ors. 115 (2004) DLT 202, 2004 (77) DRJ 725** as follows:

“6. After considering the submissions made by learned counsel for the parties, this Court is of the considered view that a complaint, on the basis of which the complainant seeks registration of an F.I.R., must disclose essential ingredients of the offence and in case a complaint lacks or is wanting in any of the essential ingredients, the lacuna or deficiency cannot be filled up by obtaining additional complaint or supplementary statement and thereafter proceed to register

the F.I.R. If such a course is permitted, it would give undue latitude as well as opportunity to unscrupulous complainants to nail others by hook or by crook in spite of the fact that their initial complaint does not make out the offence complained of. Such a course would be utter abuse of the process of law. First version as disclosed in a complaint is always important for adjudicating as to whether an accused has committed or not an offence. In the complaint dated 19th April, 2001, the Complainant himself alleged that the Councillor Chhannu Mal was introducing him to the petitioner. If that was the case, how could he say later that on that day the petitioner knew that he was a Scheduled Caste. This statement, therefore, was a crude falsity introduced at the behest of the police to implicate the petitioner under Section 3 of the Act. This effort on the part of the police to supply the deficiency and cover up a lacuna in the complaint in view of legal opinion was totally unwarranted and an abuse of the process of law.”

30. A bald allegation levelled at accused Prabha Dalmiya at a much belated stage by the prosecutrix is not sufficient to frame charge for the offence punishable u/s 3(1)(r)(s) of the SC & ST Act against her.

31. It has been held by Hon’ble Supreme Court of India in

Sajjan Kumar's case, as follows:

“17) Exercise of jurisdiction under Sections 227 & 228 of Cr.P.C.

On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:-

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. 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. The test to determine prima facie case would depend upon the facts of each case.

(ii) 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.

(iii) The 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 etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the

material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) 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.”

32. As already discussed above, in the initial statement u/s 161 Cr.P.C. of the prosecutrix ‘M’ and even in her statement u/s 164 Cr.P.C., there is not even a whisper of the allegation that casteist slurs were hurled by accused Prabha Dalmiya. This allegation added subsequently amounts to a major improvement and on the face of it is an afterthought. Such a circumstance does not give rise to a grave suspicion against accused Prabha Dalmiya and is not sufficient to frame charge under the SC & ST Act against her.

33. **In view of above discussion, accused Prabha Dalmiya stands discharged in the present case.**

34. During the course of arguments, Ld. Counsel for the complainant has argued that Section 4 of the SC & ST Act should be invoked against the initial IO for not registering the FIR promptly and for disbelieving the victim. Section 4 of the SC & ST Act mandates that *the charges in this regard against the public servant shall be booked on the recommendation of an administrative enquiry*. There is also no such cogent material on record on the basis of which offences punishable u/s 166A IPC and 120B IPC can be pressed against the IO.

35. In view of above discussion, **prima facie there is sufficient material on record to frame charge against the accused persons as follows:**

- (i) *Accused Kamlesh Dalmiya: offence punishable u/s 323/354/506/376D IPC, Section 3(1)(w)(i), Section 3(2)(v) and Section 3(2)(va) of the SC/ST Act.*
- (ii) *Accused Jatin Mittal: offence punishable u/s 323/506/376D IPC, Section 3(1)(w)(i), Section 3(2)(v) and Section 3(2)(va) of the SC/ST Act.*

**PRONOUNCED IN OPEN COURT ON THIS 27th DAY OF
JANUARY 2023**

**(Vrinda Kumari)
ASJ-02, South District
Saket Courts, New Delhi.**