

**IN THE COURT OF SH. VAIBHAV MEHTA, ADDITIONAL
CHIEF METROPOLITAN MAGISTRATE:03, ROUSE AVENUE
DISTRICT COURTS, NEW DELHI**

**CR No. 10/2023
FIR No. 85/2023
State Vs. Cancellation
PS: Mehrauli
U/s 376/328/506 IPC**

Dated: 10.10.2023

ORDER ON PROTEST PETITION

1. The subject matter of this order is a *Protest Petition* filed by the Complainant Ms. X (Name Withheld) in the present matter. This is a case where FIR has been registered upon an application of the Complainant u/s 156(3) Cr.P.C. wherein she alleged offence of rape and criminal intimidation by alleged Syed Shahnawaz Hussain amongst other offences. After completion of investigation, police has filed a *cancellation report* and prosecution has supported the same stating that no case at all is made out as no prima facie offence has been made out against the alleged after investigation. However, opposing the cancellation report, complainant has argued that this is a fit case for taking the cognizance and summoning the alleged and the IO is hand in glove with the alleged.

Accordingly, vide this order it shall be decided as to whether the Cancellation Report filed by the police is to be accepted or allowing the Protest Petition, cognizance is to be taken in the present matter.

CASE PUT FORWARD BY THE COMPLAINANT:

2. Before proceeding on the ground on which cancellation report has been filed by the police, it is relevant to make a note of the complaint filed by the Complainant which is as follows:

(i) The complainant has alleged that on 12.04.2018 during BJP dharna in Delhi, alleged Syed Shahnawaz Hussain called the complainant in Roshan Tent House to sort out the problems between the complainant and the brother of alleged i.e. Syed Shahbaz Hussain and alleged told her that his brother and his brother's wife will be coming in farm house in Chattarpur and so the complainant accompanied the alleged to the farm house and was waiting with him late in the evening when he told the complainant to switch off the phone after which one waiter had brought some cold drink and after consuming it, complainant became unconscious. The complainant has alleged that the alleged took the complainant in the said farm house and raped her and also threatened the complainant with dire consequences stating that he had prepared video in this respect.

(ii) As per the complainant, the alleged threatened to kill her and her family members and that is why she could not take any legal action against him initially and was in depression for a long time and on 22.04.2018, she filed a complaint in PS Mehrauli, but no action was taken and on 26/04/2018 she filed a complaint to the office of the Commissioner of Police, IP Estate. The complainant has stated that she was called at PS Mehrauli on 16/06/2018, 17/06/2018 and 18/06/2018 and her statement was

recorded wherein she had submitted that the alleged has committed an offences u/s 376/328/120-B/506 IPC.

(iii) On the complaint of the complainant Ld. MM, Saket Court passed an order to register the case vide order dated 07.07.2018. Revision petition was filed before Ld Sessions Courtr, which was dismissed. Thereafter a quashing petition was filed before the Hon'ble High Court of Delhi whereby the order of Ld MM was upheld by Hon'ble Delhi High Court. A Special Leave Petition No. 7653/2023 was filed before Hon'ble Supreme Court and Hon'ble Supreme Court has declined to interfere with the order passed by Hon'ble High Court vide order dated 16/01/2023. Hence a case u/s 376/328/506 IPC was registered and investigation has been carried out.

CASE PUT FORWARD BY THE POLICE AS CANCELLATION REPORT:

3. After completion of investigation in this matter, police filed cancellation report in the Saket court on 25/04/2023 and the same was transferred to the court of the undersigned vide order of Ld. Principle District & Sessions Judge dated 03/08/2023. The IO has filed the Cancellation Report stating that offences alleged by the complainant are not made out for the following reasons:-

(i) There has been a delay of 4-5 years in lodging of the FIR and since the incident pertains to the year 2018, no exhibits have been collected by the doctor to substantiate the allegations raised by the complainant.

(ii) As per the complainant, alleged called her at Roshan Tent House and the staff of the Roshan Tent House was inquired and he stated that on 12/04/2018 neither alleged Syed Shahnawaz nor the prosecutrix visited the abovesaid tent house.

(iii) CCTV footage of the alleged date of incident of Roshan Tent House was deposited in the PS and the DVR has been collected and it has been found that neither the prosecutrix nor Shahnawaz Hussain visited the said tent house on 12.04.2018.

(iv) In the cancellation report, it is also submitted that during that period two PSOs and one escort vehicle along with driver and four police personnel were deployed for the security of the alleged Syed Shahnawaz Hussain and the statements of the security personnel have been recorded and as per their statement, alleged Syed Shahnawaz Hussain was present at his house till 12 noon and on 12.04.2018, thereafter they along with Syed Shahnawaz Hussain went to Hanuman Mandir, Connaught Place for dharna where they stayed for two hours after which they went to Chandni Chowk along with Syed Shahnawaz Hussain and attended the dharna and later they had gone to office at Asaf Ali Road and from there to Ashok Hotel where they stayed for 2-2.5 hours after which they along with Syed Shahnawaz Hussain reached the alleged's house.

(v) During the course of investigation on the basis of the enquiry conducted from the witnesses, their mobile phone has been seized during inquiry conducted in 2018 and it contains the

video and photos of the said program namely “Upwas” captured at 3.48 pm on 12.04.2018 and it shows the presence of Syed Shahnawaz Hussain along with other ministers.

(vi) Further the statement of Sh. Mahesh Kumar, Attendant at Amartra Gym Ashoka Hotel has been recorded and it was confirmed from the register the presence of Syed Shahnawaz Hussain from 7 pm to 8.30 p.m on 12.04.2018 ie the alleged date of the incident.

(vii) In the cancellation report, it is further submitted that during investigation, CDR, CAF and location chart of the complainant were obtained and as per CDR location, complainant remained present at Dwarka area from 10.52 a.m to 10.44 p.m on 12.04.2018 and thereafter she started moving towards New Delhi via Vasant Vihar and her last location was at Rafi Marg, Udyog Bhawan Metro Station, NR Ministry of textile building and so the CDR of the complainant does not corroborate her allegations at all.

(viii) The details of CDR of Syed Shahnawaz Hussain revealed that he remained present at Ashoka Road on 12.04.2018 till 11.55 am, further remained present at Connaught Place from 12.00 pm till 03.05 p.m. Thereafter he remained present at Chandni Chowk near Town Hall at 04.21 p.m and he was found present at Ashoka Hotel from 07.00 pm to 08.00 pm and finally moved to Parliament House cell tower till 11.29 p.m. So, the CDR locations revealed that complainant, the alleged Syed Shahnawaz Hussain and Rajeev Rana were not present at the

same place at any given time of the alleged date of occurrence and the said fact has been corroborated from the CCTV/DVR footage obtained from Roshan Tent House and also from the CDRs of mobile phone of the complainant, the alleged Syed Shahnawaz Hussain and Rajiv Rana

Hence, in the cancellation report, it is submitted that as per the investigation, no material has come on record to file the charge sheet in the present matter against the accused.

GROUND OF PROTEST PETITION:

4. Opposing the cancellation report filed by the police, complainant filed the protest petition praying for taking of cognizance in the present matter for the offences U/s 376/328/506 IPC on the following grounds :-

(i) The complainant has alleged that right from the beginning itself the police has adopted a negative approach to the case only with the objective of closing the complaint and it took the police five years to register the FIR against the accused and that too when directed by the Hon'ble High Court and Hon'ble Supreme Court.

(ii) Complainant submits that police had deliberately failed to procure any evidence regarding movement of Syed Shahnawaz Hussain after 08.00 pm on the day of incident as the offence was committed by him between 10-12 p.m.

(iii) The complainant has further alleged that the IO has

solely relied upon the CDR of the complainant which cannot be a conclusive proof to exonerate the accused from the offence especially since she has submitted in her statement u/s 164 Cr.PC that her mobile phone was taken by Rana ji. Also it is submitted by the complainant that CDR can be manipulated in many ways especially if the accused is an influential person. It is further submitted by the complainant in her Protest Petition that the IO had conveniently chosen one of the mobile numbers of alleged Syed Shahnawaz Hussain and procured CDR of that mobile phone and the police did not ask about the mobile phone number 9013180552 and landline no. 01123351077 and 01123005700 and did not carry out any investigation qua these numbers.

(iv) It is alleged by the complainant that CCTV footage relied on by the IO has been doctored and the statements of the PSOs recorded by the IO cannot be relied upon as the PSOs are under the employment of the alleged Syed Shahnawaz Hussain and so are not independent witnesses.

Moreover the complainant has relied upon the various judgments of the Hon'ble Supreme Court namely **Phool Singh vs The State of Madhya Pradesh**, (Criminal Appeal No. 1520 of 2021), **Santhosh Moolya & Anr. Vs State of Karnataka**, (Criminal Appeal No. 479 of 2009) and **Ganesan vs State** (Represented by its Inspector of Police) (Criminal Appeal No. 680 of 2020) and has argued that the sole testimony of the victim/prosecutrix if reliable, is sufficient to convict the accused and requires no corroboration and the court should not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix to throw out her case and her

version should not be doubted by the court merely on the basis of assumptions and surmises. In the lights of the above judgments, the complainant has argued that there is sufficient material on record to take cognizance of the offence and summon the accused Syed Shahnawaz Hussain as the matter needs to be decided on merits during trial and cannot be dismissed at the initial stage due to filing of cancellation report by the IO.

In conclusion, Complainant asserts that the accused is involved in a heinous offence and substantial efforts have already been made by the accused to influence the police and he has also managed the entire cancellation report in his favour. It is further submitted by the complainant there there is sufficient evidence on record which requires meticulous examination by the Court which is possible only after accused is brought before the Court.

Hence, complainant has strongly opposed the present cancellation report and prayed for rejection of the same in order to ensure the ends of justice.

REPLY TO THE PROTEST PETITION BY THE IO:

5. In the reply filed by the IO, the assertions made by the complainant have been denied in toto and the IO has reiterated that the investigation was carried out in a fair and impartial manner and during investigation no material was found to link the accused with the offence alleged and so the cancellation report was filed in the present matter.

COURT OBSERVATIONS:

6. Arguments have been heard from Ld. APP for the State as

well as Ld. Counsel for the Complainant. The protest petition as well as the cancellation report and the documents annexed therewith have also been perused.

7. At the outset, it is pertinent to note that in the present matter police has filed cancellation report stating that no case is made out against the Accused.

8. In the above background, the first question that arises before the court is as to whether this court is bound to accept the cancellation report filed by the police or court can take alternative steps as well. The answer to this question can be found in the ratio laid down by several judicial authorities. Some of the leading judgments elucidating the law on the aspect of filing of final police report as *cancellation report*, consequent filing of *protest petition* and recourse available to the court thereafter are discussed below for ready reference.

8.1. Vide its judgment titled as **Gangadhar Janardan Mhatre vs. State Of Maharashtra [(2004) 7 SCC 768]**, the Supreme Court of India highlighted different situations which may arise before the Court when a final police report is filed before the court and the recourse available with the judge, in the following words:

The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he has again option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under

Section 156(3). The position is, therefore, now well-settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(l)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(l)(b) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officers gives an opinion that the investigation has made out a case against the accused.' The Magistrate can ignore the conclusion arrived at by the Investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(l)(b) and direct the issue of process to the accused.

8.2. Also, in its leading judgment titled as **H.S. Bains vs. State [AIR 1980 SC 1883]**, it was held by the Apex Court as follows:

On receiving the police report the Magistrate may take cognizance of the offence under Sec. 190(1)(b) and straightaway issue process. This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The Police report under Sec. 173 will contain the facts discovered or unearthed by the police and the conclusion drawn by the police therefrom. The Magistrate is not bound by the conclusions drawn by the Police and he may decide to issue process even if the Police recommend that there is no sufficient ground for proceeding further.

.....

The Magistrate is not bound by the conclusions arrived at by the police even as he is not bound by the conclusions arrived at by the complainant in a complaint. If a complainant states the relevant facts in his complaint and alleges that the accused is guilty of an offence under Sec. 307 Indian Penal Code the Magistrate is not bound by the conclusion of the complainant. He may think that the facts disclose an offence under Sec. 324 Indian Penal Code only and he may take cognizance of an offence under Sec. 324 instead of Sec. 307. Similarly if a police report mentions that half a dozen persons examined by them

claim to be eye witnesses to a murder but that for various reasons the witnesses could not be believed, the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses. He may prefer ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report. He would be taking cognizance upon the facts disclosed by the police report though not on the conclusions arrived at by the police.

8.3. Further, in **M/s India Carat Private Ltd. vs. State of Karnataka & Anr., (1989) 2 SCC 132**, a three judges bench of the Supreme Court held as follows:

The position is, therefore, now well settled that upon receipt of a police report under section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused.

8.4. It is further pertinent to note that in a recent decision of the Supreme Court of India in the matter titled as **Vishnu Kumar Tiwari vs The State Of Uttar Pradesh [AIR 2019 SC 3482]** the duty of the Magistrate receiving a protest petition was underlined in the following words:

26. It is undoubtedly true that before a Magistrate proceeds to accept a final report under Section 173 and

exonerate the accused, it is incumbent upon the Magistrate to apply his mind to the contents of the protest petition and arrive at a conclusion thereafter. While the Investigating Officer may rest content by producing the final report, which, according to him, is the culmination of his efforts, the duty of the Magistrate is not one limited to readily accepting the final report. It is incumbent upon him to go through the materials, and after hearing the complainant and considering the contents of the protest petition, finally decide the future course of action to be, whether to continue with the matter or to bring the curtains down.

8.5. In view of the above referred judicial precedents and legal aspects, it is amply clear that the Magistrate is not bound to accept the cancellation report submitted by the police and irrespective of the protest petition, Magistrate can take cognizance of the matter and summon the Accused. Meaning thereby, that on the basis of same material on which the Investigating agency has reached a conclusion that no offence has been committed, court can apply its mind independently and conclude that the offence is prima-facie made out.

In view of the law discussed above, the case at hand shall be examined to ascertain as to whether this is a case where Cancellation report is to be accepted or taking of cognizance is merited.

9. Coming now to the facts of the case at hand, complainant has alleged that she was intoxicated and raped by accused Syed Shahnawaz Hussain. The complaint given by the Complainant to the police, complaint given by the Complainant to the court as well as the statement of the Complainant u/s 164 Cr.P.C. have been perused by the Court. It is observed that Complainant has

remained consistent in her allegation of rape and threat against Accused Syed Shahnawaz Hussain. However, Ld. APP for the State has argued that Complainant's veracity is questionable as she has improved her statement with the passage of time and so is not reliable. The above submissions of Ld. APP for the State do not carry much weight and appear to be pre-emptive for the simple reason that at this stage, the court taking cognizance is only required to see whether prima-facie an offence appears to have been committed or not and not to test the authenticity of witnesses and see whether there is sufficient material on record to secure guilt of the accused. Here is a woman before the Court who is stating before the police and before the court, repeatedly, that she has been raped by being intoxicated; unless IO brings such material on record to establish that there is no possibility that she could have been raped, this court has no reason to throw out her case at the outset. Statement of the Prosecutrix u/s 164 Cr.P.C. is the most clinching piece of evidence especially in cases of rape as there are seldom any eye-witnesses to such heinous offences. Whether the statement of the Complainant is reliable or not can be found out only after the same is put to scrutiny before the Court of Trial.

CONCLUSION:

10. This court after going through the cancellation report, protest petition filed by the complainant, the reply to the protest petition filed by the IO and other material on record is of the view that the complainant has given consistent statements to the police, to the court in her application u/s 156 (3) Cr.PC and before the Ld. Magistrate in her statement u/s 164 Cr.PC.

Minor contradictions in the statements of the complainant cannot be a ground to disbelieve a version in toto. The judgments of the Hon'ble Supreme Court relied upon by the complainant show that the sole testimony of the prosecutrix if reliable, is sufficient to convict the accused so it is safe to say that the consistent sole testimony of the prosecutrix is sufficient to summon the accused and to take the case to trial. The issues raised by the IO while filing the cancellation report regarding the presence of the complainant and the accused at the place of the offence are matters which can be decided during trial. Moreover this court is of the view that the version of the complainant and her trustworthiness can be tested only during trial when she is cross examined by the accused and so this court on the basis of material placed on record along with the cancellation report especially the statement of the complainant/victim u/s 164 Cr.P.C. wherein she has supported her allegation of rape and threats by accused Syed Shahnawaz Hussain and in exercise of powers u/s 190(1)(b) Cr.PC, **this court takes cognizance of the offences u/s 376/328/506 IPC. Accordingly, Accused Syed Shahnawaz Hussain be summoned through SHO PS Concerned for next date of hearing.**

Accordingly, Protest Petition of the Complainant is disposed off as allowed to the extent mentioned above.

**Announced in open
Court Dt. 10.10.2023**

**(VAIBHAV MEHTA)
ACMM-03/RADC/New Delhi**