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

% ***Reserved on: 28.07.2023***
Pronounced on: 12.10.2023

\+ **CRL.REV.P.788/2023 & CRL.M.A. 19745/2023**

S ..... Petitioner

Through: Mr. Prateek Baghel and Mr. Deepak Arya, Advocates.

versus

THE STATE AND ORS. ..... Respondents

Through: Mr. Naresh Kumar Chahar, APP for the State with SI Reena, P.S. Dwarka Sector 23 and SI Anil P.S. Paschim Vihar, Delhi.

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

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SWARANA KANTA SHARMA, J.

1. The instant revision petition has been filed on behalf of the petitioner under Sections 397/401 read with Section 482 of the Code of Criminal Procedure, 1973 (*'Cr.P.C.'*) assailing the order on charge dated 15.02.2023 passed by learned Additional Sessions Judge (FTSC) RC-01, West, Tis Hazari Courts, Delhi (*'Trial Court'*) and seeking framing of charges for offences punishable under Sections 376/323/354/354B/506/34 of Indian Penal Code, 1860 (*'IPC'*) in case arising out of FIR No. 43/2019, registered at Police Station Paschim Vihar East, Delhi for offences punishable under Sections 323/354/354B/509/506/34 of IPC.

FACTUAL BACKGROUND

2. Briefly stated, the facts of the present case are that on 10.01.2019, a PCR call was received vide D.D. No. 14A, regarding a quarrel between the prosecutrix and the accused/respondent no. 2. When the police had reached the spot, it was found that the prosecutrix and her sister-in-law had already been taken to the Hospital for medical examination by the PCR. The MLCs of the prosecutrix and her sister-in-law were conducted on 10.01.2019, in which both the victims had given an account of the incident. However, after that, the matter had been compromised between the parties on the same day and the parties did not initiate any legal action. On 25.01.2019, however, the prosecutrix had sent a complaint to P.S. Paschim Vihar alleging that on 10.01.2019, at around 09:00 AM, while she was taking a stroll with her two sister-in-laws and was passing near her house, accused/respondent no. 2 i.e. Yogesh, who was the tenant in the house owned by prosecutrix, had called her and attempted to rape her. It was also stated that he had threatened the prosecutrix that in case she informs the police, he would kill her and her family, and would also falsely implicate them in criminal case. It was also alleged that the accused Yogesh had even threatened the prosecutrix that he would retain illegal possession of her property, in which he is tenant. Thereafter, as alleged, the son of accused Yogesh/ respondent no. 3, wife of accused Yogesh/respondent no. 4 and the daughter of accused Yogesh/respondent no. 5 had also given beatings to the prosecutrix, and respondent no. 3 had also sexually assaulted sister-in-law of the prosecutrix. It was further alleged that accused Yogesh had also made his dog attack the prosecutrix and her sister-

in-law. On the basis of these allegations, the present FIR was registered against all the accused persons under Sections 323/354/354B/506/509/34 of IPC. The statements of the prosecutrix/petitioner and her sister-in-law was recorded before the learned Magistrate on 31.01.2019. After completion of investigation, chargesheet was filed against the accused persons under Sections 323/354/354B/376/506/509/34 of IPC. The allegations against respondent no. 2 were under Sections 323/354/354B/376/506/509/34 of IPC, against respondent no. 3 were under Sections 323/354/354B/506/509/34 of IPC, against respondent no. 4 and 5 were under Sections 323/506/34 of IPC.

SUBMISSIONS BEFORE THIS COURT

3. Learned counsel for petitioner/prosecutrix states that there are specific allegations against respondent no. 2 and 3 regarding sexually assaulting the petitioner and her sister-in-law respectively. It is also stated that the said allegations leveled by the prosecutrix are corroborated by her MLC and the statement recorded under Section 164 of Cr.P.C. It is argued that the learned Trial Court has committed an error by relying upon a polygraphic test report of the petitioner and respondent no.2 as the same is not conclusive proof of innocence of accused and no inference can be drawn from the said report. It is also stated that this report is not relevant especially at the stage of charge since the prosecutrix/petitioner was put on limited intoxication and it depends upon anatomy of each person as to how much he/she can tolerate a certain level of intoxication. It is also

argued that the learned Trial Court has also erroneously relied upon a CCTV footage without applying its judicial mind to the allegations leveled by the prosecutrix and the contents of her statements. it is stated that learned Trial Court has committed an error by framing charges only under Sections 323/354/354B/506/34 of IPC against respondent no. 2 and 3 and by discharging respondent no. 4 and 5 from all offences alleged. Therefore, it is prayed that charges under Sections 376/323/354/354B/506/34 of IPC be framed against all the accused i.e. respondent no. 2 to 5.

4. *Per contra*, learned counsel for the respondents argues that there is no infirmity in the order of learned Trial Court and it is stated the learned Trial Court has discharged all accused persons under Sections 376/34 of IPC and respondent no.4 and 5 from all offences by way of reasoned order, after considering polygraph test report, CCTV footage and statements of witnesses, which warrants no interference. Thus, it is prayed that present petition be dismissed.

5. This Court has heard arguments advanced by learned counsel for petitioner and learned counsel for respondents, and has perused the material placed on record.

CHARGE & DISCHARGE: STATUTORY LAW & JUDICIAL PRECEDENTS

6. The statutory law of framing of charge and discharge, as provided in Sections 227 and 228 of Cr.P.C., is extracted as under for reference:

"**228. Framing of charge**.

(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

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."

7. The principles laid down by the Hon'ble Apex Court in case of ***Sajjan Kumar v. CBI*** *(2010) 9 SCC 368*, on the scope of Section 227 and 228 of Cr.P.C., read as under:

"21. On consideration of the authorities about scope of Sections 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."

(Emphasis supplied)

8. In ***Amit Kapoor v. Ramesh Chander*** *(2012) 9 SCC 460,* the Hon'ble Apex Court had observed that to form an opinion that the accused is certainly guilty of committing an offence is an approach

which is impermissible in terms of Section 228 of Cr.P.C. The relevant observations in this regard read as under:

> "17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the "record of the case" and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. **There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code**."
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> (Emphasis supplied)

9. The observations of Hon'ble Apex Court on the limited power of sifting the material on record at the stage of charge, in case of ***Dipakbhai Jagdishchandra Patel v. State of Gujarat*** *(2019) 16 SCC 547*, are reproduced as under:

> "23. At the stage of framing the charge in accordance with the principles which have been laid down by this 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 by the prosecution. The sifting is not to be meticulous in the sense that 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..."
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> (Emphasis supplied)

10. It was observed in ***Asim Shariff v. National Investigation Agency*** *(2019) 7 SCC 148* by the Hon'ble Apex Courtthat at the stage of framing of charge, the trial court is not expected or supposed to hold a mini trial for the purpose of marshalling the evidence on record. The relevant observations in this regard read as under:

> "18. Taking note of the exposition of law on the subject laid down by this Court, it is settled that the Judge while considering the question of framing charge under Section 227 CrPC in sessions cases(which is akin to Section 239 CrPC pertaining to warrant cases) 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 material placed before the Court discloses grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, the trial Judge will be justified in discharging him. **It is thus clear that while examining the discharge application filed under Section 227 CrPC, it is expected from the trial Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. It is true that in such proceedings, the Court is not supposed to hold a mini trial by marshalling the evidence on record.**"
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> (Emphasis supplied)

11. On the aspect of standard of proof at the stage of charge, the Hon'ble Supreme Court in ***Bhawna Bai v. Ghanshyam*** *(2020) 2 SCC 217*has observed as under:

> "13. ...At the time of framing the charges, only prima facie case is to be seen; whether case is beyond reasonable doubt, is not to be seen at this stage. At the stage of framing the charge, the court has to see if there is sufficient ground for proceeding against the accused. While evaluating the materials, strict standard of proof is not required; only prima facie case against the accused is to be seen."

12. Thus, in light of aforesaid judicial precedents, this Court examines the **crucial question** as to whether the result of a polygraph test can become ground of discharge of an accused at stage of charge and could the learned Judge while passing order on application for grant of anticipatory bail, pass an order suggesting to the IO to conduct polygraph test of accused and victim to ascertain the truth of the matter without there being a prayer by accused or prosecution.

POLYGRAPH TEST

i. Understanding 'Polygraph Test'

13. The literal meaning of 'polygraph' as per Cambridge dictionary is 'a piece of electronic equipment used to try to discover if someone is telling lies.' To conduct the polygraph test or a 'lie detector test' as commonly known, the guilty subject is tested on the basis of measurement of hyper aroused state, based on number of parameters such as the heart rate, the blood pressure measurement, respiratory rate, skin conductance and electromyography.

14. The Hon'ble Apex Court in case of ***Selvi v. State of Karnataka*** *(2010) 7 SCC 263* had discussed the historical and theoretical

perspective as well as practical aspects of the polygraph test, in the following manner:

> "13. The origins of polygraph examination have been traced back to the efforts of Lombroso, a Criminologist who experimented with a machine that measured blood pressure and pulse to assess the honesty of per. sons suspected of criminal conduct. His device was called a hydrosphygmograph. A similar device was used by Psychologist William Marston during World War I in espionage cases, which proved to be a precursor to its use in the criminal justice system. In 1921, John Larson incorporated the measurement of respiration rate and by 1939 Leonard Keeler added skin conductance and an amplifier to the parameters examined by a polygraph machine.
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> 14. The theory behind polygraph tests is that when a subject is lying in response to a question, he/she will produce physiological responses that are different from those that arise in the normal course. During the polygraph examination, several instruments are attached to the subject for measuring and recording the physiological responses. The examiner then reads these results, analyses them and proceeds to gauge the credibility of the subject's answers. Instruments such as cardiographs, pneumographs, cardio-cuffs and sensitive electrodes are used in the course of the polygraph examinations. They measure changes in aspects such as respiration, blood pressure, blood flow, pulse and galvanic skin resistance. The truthfulness or falsity on part of the subject is assessed by relying on the records of the physiological responses. [See *Laboratory Procedure Manual--Polygraph Examination* (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi, 2005)].
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> 15. There are three prominent polygraph examination techniques:
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> (i) The relevant-irrelevant (R-I) technique.
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> (ii) The control-question (CQ) technique.
>
> (iii) Directed lie control (DLC) technique.
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> Each of these techniques includes a pre-test interview during which the subject is acquainted with the test procedure and the examiner gathers the information which is needed to finalise the questions that are to be asked. An important objective of this exercise is to mitigate the possibility of a feeling of

surprise on the part of the subject which could be triggered by unexpected questions. This is significant because an expression of surprise could be mistaken for physiological responses that are similar to those associated with deception. [*Refer* David Gallai, "Polygraph Evidence in Federal Courts: Should it be Admissible?.] Needless to say, the polygraph examiner should be familiar with the details of the ongoing investigation. To meet this end the investigators are reguired to share conies of documents such as the first information report (FIR), medico-legal reports (MLR) and post-mortem reports (PMR) depending on the nature of the facts being investigated.

16. The control-question (CQ) technique is the most commonly used one and its procedure as well as scoring system has been described in the materials submitted on behalf of CBI. The test consists of control questions and relevant questions. The control questions are irrelevant to the facts being investigated but they are intended to provoke distinct physiological responses as well as false denials. These responses are compared with the responses triggered by the relevant questions. Theoretically, a truthful subject will show greater physiological responses to the control questions which he/she has reluctantly answered falsely, than to the relevant questions, which the subject can easily answer truthfully. Conversely, a deceptive subject will show greater physiological responses while giving false answers to the relevant questions in comparison to the responses triggered by false answers to the control questions. In other words, a guilty subject is more likely to be concerned with lying about the relevant facts as opposed to lying about other facts in general. An innocent subject will have no trouble in truthfully answering the relevant questions but will have trouble in giving false answers to the control questions. The scoring of the tests is done by assigning a numerical value, positive or negative, to each response given by the subject. After accounting for all the numbers. the result is compared to a standard numerical value to indicate the overall level of deception. The net conclusion may indicate truth, deception or uncertainty..."

ii. Reliability of Polygraph Test in a Criminal Trial

15. The criticism of the Polygraph Test has been that such major changes such as heartbeat rates, blood pressure measurement etc. may not necessarily be triggered by lying or deception, but can also be triggered by nervousness, anxiety, fear, confusion, fear psychosis, depression, substance induced/substance withdrawal state or other emotions that a person may be undergoing at the time of conducting the test. Moreover, there is possibility that every person reacts differently to a particular situation and one particular person may feel anxiety etc., on merely being asked a question by investigating officer or a person conducting polygraph test, and a person who is trained in lying and is a habitual liar or deceitful person will be able to control or suppress such symptoms and, therefore, the reliability of this test has always been questionable.

16. Research also reveals that a polygraph test is based on a person's psychological reactions to questions posed at a particular time and place, and as already stated above, a person may produce completely different set of emotions, and therefore polygraph chart, in response to the same questions asked by different person on a different day in a different set.

17. The limitations of a Polygraph Test and its reliability were also taken note of by the Hon'ble Apex Court in ***Selvi*** *(supra)*, and the relevant observations are reproduced as under:

> "20. Polygraph tests have several limitations and therefore a margin for errors. The premise behind these tests is questionable because the measured changes in physiological responses are not necessarily triggered by lying or deception. Instead, they could be triggered by nervousness, anxiety, fear, confusion or other emotions. Furthermore, the physical conditions in the

polygraph examination room can also create distortions in the recorded responses. The test is best administered in comfortable surroundings where there are no potential distractions for the subject and complete privacy is maintained. The mental state of the subject is also vital since a person in a state of depression or hyperactivity is likely to offer highly disparate physiological responses which could mislead the examiner. In some cases the subject may have suffered from loss of memory in the intervening time-period between the relevant act and the conduct of the test. When the subject does not remember the facts in question, there will be no self-awareness of truth or deception and hence the recording of the physiological responses will not be helpful. Errors may also result from `memory-hardening', i.e. a process by which the subject has created and consolidated false memories about a particular incident. This commonly occurs in respect of recollections of traumatic events and the subject may not be aware of the fact that he/she is lying.

21. The errors associated with polygraph tests are broadly grouped into two categories, i.e., `false positives' and `false negatives'. A `false positive' occurs when the results indicate that a person has been deceitful even though he/she answered truthfully. Conversely a `false negative' occurs when a set of deceptive responses is reported as truthful. On account of such inherent complexities, the qualifications and competence of the polygraph examiner are of the utmost importance. The examiner needs to be thorough in preparing the questionnaire and must also have the expertise to account for extraneous conditions that could lead to erroneous inferences. However, the biggest concern about polygraph tests is that an examiner may not be able to recognize deliberate attempts on part of the subject to manipulate the test results. Such `countermeasures' are techniques which are deliberately used by the subject to create certain physiological responses in order to deceive the examiner. The intention is that by deliberately enhancing one's reaction to the control questions, the examiner will incorrectly score the test in favour of truthfulness rather than deception. The most commonly used `countermeasures' are those of creating a false sense of mental anxiety and stress at the time of the interview, so that the responses triggered by lying cannot be readily distinguished.

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35. On the issue of reliability, the Court took note of some Circuit Court decisions which had permitted trial courts to

consider polygraph results in accordance with the Daubert factors. However, the following stance was adopted, Id. at p. 312:

> "... Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams. Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be admitted. We cannot say, then, that presented with such widespread uncertainty, the President acted arbitrarily or disproportionately in promulgating a per se rule excluding all polygraph evidence."

36. Since a trial by jury is an essential feature of the criminal justice system in the U.S.A., concerns were expressed about preserving the jury's core function of determining the credibility of testimony. It was observed, Id. at p. 314:

> " ... Unlike other expert witnesses who testify about factual matters outside the jurors' knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in respondent's case, a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt. ..."

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38. We have also come across a decision of the Canadian Supreme Court in R v Beland, [1987] 36 C.C.C. (3d) 481. In that case the respondents had been charged with conspiracy to commit robbery. During their trial, one of their accomplices had given testimony which directly implicated them. The respondents contested this testimony and after the completion of the evidentiary phase of the trial, they moved an application to re-open their defence while seeking permission for each of them to undergo a polygraph examination and produce the results in evidence. The trial judge denied this motion and the respondents

were convicted. However, the appellate court allowed their appeal from conviction and granted an order to re-open the trial and directed that the polygraph results be considered. On further appeal, the Supreme Court of Canada held that the results of a polygraph examination are not admissible as evidence. The majority opinion explained that the admission of polygraph test results would offend some well established rules of evidence. It examined the `rule against oath-helping' which prohibits a party from presenting evidence solely for the purpose of bolstering the credibility of a witness. Consideration was also given to the `rule against admission of past or out-of-court statements by a witness' as well as the restrictions on producing `character evidence'. The discussion also concluded that polygraph evidence is inadmissible as `expert evidence'.

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41. Mcintyre, J. offered the following conclusions (at Paras. 18, 19 and 20):

> "18. In conclusion, it is my opinion, based upon a consideration of rules of evidence long established and applied in our courts, that the polygraph has no place in the judicial process where it is employed as a tool to determine or to test the credibility of witnesses. It is frequently argued that the polygraph represents an application of modern scientific knowledge and experience to the task of determining the veracity of human utterances. It is said that the courts should welcome this device and not cling to the imperfect methods of the past in such an important task. This argument has a superficial appeal, but, in my view, it cannot prevail in the face of realities of court procedures.
>
> 19. I would say at once that this view is not based on a fear of the inaccuracies of the polygraph. On that question we were not supplied with sufficient evidence to reach a conclusion. However, it may be said that even the finding of a significant percentage of errors in its results would not, by itself, be sufficient ground to exclude it as an instrument for use in the courts. Error is inherent in human affairs, scientific or unscientific. It exists within our established court procedures and must always be guarded against. The compelling reason, in my view, for the exclusion of the evidence of polygraph results in judicial proceedings is two-fold. First, the admission of polygraph evidence would run counter to the well established rules of evidence which have been referred to. Second, while there is no reason why the

> rules of evidence should not be modified where improvement will result, it is my view that the admission of polygraph evidence will serve no purpose which is not already served. It will disrupt proceedings, cause delays, and lead to numerous complications which will result in no greater degree of certainty in the process than that which already exists.
>
> 20. Since litigation replaced trial by combat, the determination of fact, including the veracity of parties and their witnesses, has been the duty of judges or juries upon an evaluation of the statements of witnesses. This approach has led to the development of a body of rules relating to the giving and reception of evidence and we have developed methods which have served well and have gained a wide measure of approval. They have facilitated the orderly conduct of judicial proceedings and are designed to keep the focus of the proceedings on the principal issue, in a criminal case, the guilt or innocence of the accused. What would be served by the introduction of evidence of polygraph readings into the judicial process? To begin with, it must be remembered that however scientific it may be, its use in court depends on the human intervention of the operator. Whatever results are recorded by the polygraph instrument, their nature and significance reach the trier of fact through the mouth of the operator. Human fallibility is therefore present as before, but now it may be said to be fortified with the mystique of science. ..."

iii. Conducting Polygraph Test on an Accused

18. This issue is also well-settled with the judgment of Hon'ble Apex Court in case of ***Selvi*** *(supra)*, in which it was held that (i) compulsory or involuntary administration of polygraph test on an accused violates the 'right against self-incrimination', (ii) guidelines issued by the National Human Rights Commission i.e. 'Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused, 2000' should be strictly adhered to, and (iii) even if such test is conducted after obtaining consent, it cannot be admitted as

evidence, but any information subsequently discovered with help of such test conducted voluntarily can be admitted in accordance with Section 27 of Indian Evidence Act, 1872. The concluding portion of the decision in case of ***Selvi*** *(supra)*reads as under:

> "262. In our considered opinion, the compulsory administration of the impugned techniques violates the `right against self-incrimination'. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible `conveyance of personal knowledge that is relevant to the facts in issue'. The results obtained from each of the impugned tests bear a `testimonial' character and they cannot be categorised as material evidence.
>
> 263. We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of `substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases, i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of `ejusdem generis' and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also

amount to `cruel, inhuman or degrading treatment' with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the `right to fair trial'. Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the `right against self-incrimination'.

264. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872.

265. The National Human Rights Commission had published `Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused' in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the `Narcoanalysis technique' and the `Brain Electrical Activation Profile' test. The text of these guidelines has been reproduced below:

> (i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.
>
> (ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.
>
> (iii) The consent should be recorded before a Judicial Magistrate. (iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.
>
> (v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not

> be a `confessional' statement to the Magistrate but will have the status of a statement made to the police.
> (vi)The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.
> (vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.
> (viii) A full medical and factual narration of the manner of the information received must be taken on record."

iv. Conducting Polygraph Test on a Victim

19. While analysing the issue of conducting tests such as polygraph test on an accused and its impact on 'right against self-incrimination', the Hon'ble Supreme Court in ***Selvi*** *(supra)* was also conscious of the fact that at times, even victims may be forced to undergo such tests to test the veracity of their statements. In the final analysis, the Hon'ble Apex Court had categorically held that a victim of an offence cannot be compelled to undergo any of the tests in questions i.e. polygraph test, narco-analysis test and BEAP test. In this regard, the relevant portion of the decisions is extracted hereunder:

> "18. Another controversial use of polygraph tests has been on victims of sexual offences for testing the veracity of their allegations. While several states in the U.S.A. have enacted provisions to prohibit such use, the text of the Laboratory Procedure Manual for Polygraph Examination [supra.] indicates that this is an acceptable use. In this regard, Para 3.4 (v) of the said Manual reads as follows:
> "(v) In cases of alleged sex offences such as intercourse with a female child, forcible rape, indecent liberties or perversion, it is important that the victim, as well as the accused, be made available for interview and polygraph examination. It is essential that the polygraph examiner get a first hand detailed statement

> from the victim, and the interview of the victim precede that of the suspect or witnesses. ..."
>
> ***
>
> 254. Lastly, we must consider the possibility that the victims of offences could be forcibly subjected to any of these techniques during the course of investigation. We have already highlighted a provision in the Laboratory Procedure Manual for Polygraph tests which contemplates the same for ascertaining the testimony of victims of sexual offences. In light of the preceding discussion, it is our view that irrespective of the need to expedite investigations in such cases, no person who is a victim of an offence can be compelled to undergo any of the tests in question. Such a forcible administration would be an unjustified intrusion into mental privacy and could lead to further stigma for the victim."

20. As far as the evidentiary value of the result of a polygraph test conducted on a victim is concerned, this Court notes that though the decision in ***Selvi*** *(supra)*and the observations made therein primarily relate to an accused, in para 264 of the decision, it was categorically held that such test results, even when the 'subject' has given consent, by themselves cannot be admitted as evidence because the 'subject' does not exercise control over the responses during the process of such test. In light of such observations, there is no reason for this Court to not hold that such observations would also apply in relation to admissibility and evidentiary value of the result of a polygraph test conducted on a victim, and such a test if conducted with the consent of a victim, could serve only as an aid in the investigation.

ANALYSIS AND FINDINGS

i. Impugned Order on Charge

21. Since the present petition assails the order on charge dated 15.02.2023 passed by learned Trial Court, the relevant portion of the said order is extracted hereunder for reference:

> "23. It is also a matter of record that the present FIR was lodged by the prosecutrix after 15 days from the incident ie. on25.01.2019, by sending her complaint to the PS through speed post. The prosecutrix in her complaint also mentioned that accused Yogesh Kumar had attempted to commit certain misdeed with her, though she did not specifically mention as to what act had been committed by the accused. In the MLC of the prosecutrix dated 10.01.2019, the prosecutrix mentions that the accused Yogesh Kumar had inserted finger in her vagina. However, the MLC does not report about any injury on any private part of the prosecutrix.
>
> 24. The polygraph test of the prosecutrix, even though only a corroborative piece of evidence, cannot be overlooked at this stage. The said polygraph report of the prosecutrix mentioned that she had given deceptive answers to the questions put to her, which questions as mentioned on page 4 of the said report, are specifically qua the act or attempt of rape by accused Yogesh Kumar on the prosecutrix. On the contrary, the responses of the accused Yogesh Kumar to specific questions regarding commission of act of rape upon the prosecutrix, which he categorically denied in his answers, were found truthful as per the polygraph test report.
>
> 25. Further, the prosecutrix stated that her two sister-in-laws were also present with her on the day of the incident, but upon interrogation from the said sister-in-laws of the prosecutrix also, no fact of any rape or any attempt to rape upon the prosecutrix was revealed by them.
>
> 26. It is also pertinent to refer to an order dated 06.03, 2019 which was passed during the investigation while anticipatory bail application of accused Parvesh Kumar. The said order mentions about a CCTV footage, hid & Wasp 3 id collected by the IO during the investigation and which pertains to the time of the incident. The perusal of the said order shows that a break of 1 minute and & 8 seconds is found in the recording of the said CCTV Footage, while it was played in the Court. However, the order also mentions that at 9:20:24 A.M, a lady is seen entering the house, after which two more ladies enter the house at 9:20:29 A.M. and then at 9:21:42 AM., the

persons can be seen coming out of the house fighting with each other and the quarrel / man handling/ beatings/ pulling etc. is continuous in the gali in front of the house till 9:37 AM. Thus, it is clear from the said facts that the sister-in-laws of the prosecutrix had entered the premises within 5 seconds of the prosecutrix entering the same. It is highly improbable that an act of attempt to rape or the sexual assault which the prosecutrix had alleged about, could take place in this small span of 5 seconds. Also, it is clear that all the persons had come out of the house within almost about one minute itself, which fact also is important to draw an inference that no act of rape or attempt to rape could have occurred in this short period.

27. However, at the same time, it is also undisputed that quarrel, beating, manhandling etc. had occurred on the day of the incident between the prosecutrix and the accused Yogesh Kumar Sarsuniya. But, the prosecutrix has not alleged any specific role of other co-accused persons especially accused Rekha, who is the wife of accused Yogesh Kumar, or against accused Tarshi, who is the daughter of the accused Yogesh Kumar. There are only vague and general allegations that they had collectively given beatings to the prosecutrix and her sister-in-laws. Though, there is one specific allegation against accused Parvesh Kumar for sexually assaulting the sister-in-law of the prosecutrix at the time of the incident by pressing her breasts.

28. It is also pertinent to state at this stage that this court has to be mindful of the fact that it is cannot appreciate the evidence, but at the same time, has to find out that whether the facts alleged in the FIR and the accompanying charge-sheet disclose a prima facie case and raise a strong suspicion of commission of the offences by the accused. This Court is entitled to sift and weigh the evidence for this limited purpose.

31. It is also settled that when any law relating to procedure and evidence requires some sort of interpretation, the interpretation is made usually in favour of the accused, which is, upholding the presumption of innocence.

32. Accordingly, in view of the above said settled propositions of law and further in view of the observations made by this Court in the preceding paragraphs and taking into account the entire material available on record in totality, this Court is of considered opinion that prima facie offence of rape u/s 376 IPC is not made out against accused Yogesh Kumar Sarsuniya. Further, from the material available on record, prima facie

> allegations of sexual assault, hurt and criminal intimidation are only made out against the accused persons Yogesh Kumar Sarsuniya and Parvesh Kumar.
>
> 33. Further, from the material available on record, it is also undisputed that accused Rekha and Tarshi were present at the spot. However, there are only vague allegations of beatings given by the said two accused persons to the prosecutrix, which are prima facie not sufficient to inculpate the said accused namely Rekha and Tarshi.
>
> 34. In view of these observations, all accused persons are discharged for offence u/s 376/34 IPC. Also, accused Reka and Tarshi are discharged for all the offences mentioned in the charge-sheet as there is prima facie no sufficient inculpatory evidence to raise suspicion against them regarding the commission of the alleged offences..."

ii. Order granting Anticipatory Bail

22. This Court notes with dismay that at the time of grant of anticipatory bail to the accused a suggestion was made in the order to the IO by the learned Additional Sessions Judge that the prosecutrix in this case be made to undergo polygraph test with a view to test genuineness, authenticity and truth of her statement in a case under Section 376 of IPC, when the chargesheet was not even filed. The genesis of this controversy is the order dated 06.03.2019 passed by learned Additional Sessions Judge, Tis Hazari Court, who while granting interim protection to the accused persons in an anticipatory bail application, relevant portion of which reads as under:

> "…The court at this stage restrains itself from commenting on the merits of the allegations made in the FIR or the averments made in the bail application, but in view of the CCTV footage, in the opinion of the court the investigating Officer needs to conduct thorough investigation in the allegations and in view of the property dispute and CCTV footage the Investigating Officer may, in order to ascertain truth, subject the

> complainant as well as accused to lie detection test, subject to law in this regard…"

23. This Court notes with strong disapproval that the learned Judge who granted interim protection and thereafter anticipatory bail to the accused, who was neither the Trial Court nor was appreciating evidence at the stage of trial nor supervising the investigation in any manner but was only holding a bail roster and was dealing with bail application, has on his own asked the police to conduct polygraph test, not only of the accused but also of the victim.

24. In this background, this Court also takes note of the decision of Hon'ble Supreme Court in case of ***Sangitaben Shaileshbhai Datanta v. State of Gujarat*** *(2019) 14 SCC 522*.

25. In this case, the Hon'ble Apex Court was dealing with an appeal decided in case of ***Sunilkumar Virjibhai Damor v. State of Gujarat*** *2018 SCC OnLine Guj 2153*, wherein, at stage of hearing of bail application of the accused persons, the Court had directed that since the Narco Analysis test, Lie Detector/Polygraph Test and Brain Mapping test of the accused had shown that they were innocent, these tests should also be conducted on the first informant, her son and the mother of victim, and if they resist undergoing such test, the same by itself will be an indication of their guilty conscience. The Hon'ble Apex Court, while setting aside the said bail order, had observed as under:

> "4. The learned counsel for the appellant as well as the State have brought to our notice that the present order of the High Court is in clear violation of the settled principles of criminal law jurisprudence and statutory prescriptions. It was also contended that, while considering the bail application, the

High Court traversed the settled principles of law. The learned counsel for appellant has brought to our notice that the High Court directed respondent-Accused 2 as well as the appellant, who is grandmother of the victim along with parents of the victim to undergo scientific tests viz. lie detector, brain mapping and narco analysis. After receiving the reports of the same, it examined the same before enlarging Respondent 2 on bail vide impugned order dated 27-4-20181. Further, it is also brought to our notice that the learned Judge has throughout the course of his order disclosed the identity of the "victim".

5. Counsel for Respondent 2 has contended that the respondent has already been enlarged on bail by the High Court, and thus, seeks non-interference by this Court.

6. Having heard the counsel for the parties, it is surprising to note the present approach adopted by the High Court while considering the bail application. **The High Court ordering the abovementioned tests is not only in contravention to the first principles of criminal law jurisprudence but also violates statutory requirements. While adjudicating a bail application, Section 439 of the Code of Criminal Procedure, 1973 is the guiding principle wherein the court takes into consideration, inter alia, the gravity of the crime, the character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the witnesses and obstructing the course of justice and such other grounds**. Each criminal case presents its own peculiar factual matrix, and therefore, certain grounds peculiar to a particular case may have to be taken into account by the court. However, the court has to only opine as to whether there is prima facie case against the accused. **The court must not undertake meticulous examination of the evidence collected by the police, or rather order specific tests as done in the present case**.

7. In the instant case, **by ordering the abovementioned tests and venturing into the reports of the same with meticulous details, the High Court has converted the adjudication of a bail matter to that of a mini trial in-deed**. This assumption of function of a trial court by the High Court is deprecated..."

26. It is also settled law that as a general rule, investigation is the prerogative of the Investigating Agency and the Courts usually do not interfere in the process of investigation and do not direct as to what should be investigated and how [Refer: ***Manohar Lal Sharma v. Principal Secretary and Ors.*** *(2014) 2 SCC 532*].

27. Thus, the observations of the learned Judge in the order dated 06.03.2019, at the stage of grant of anticipatory bail to the accused, were unwarranted and against the law laid down by the Hon'ble Apex Court regarding issuance of directions by a Court for conducting polygraph test at the stage of hearing of bail applications.

iii. Allegations against the Accused Persons

28. Adverting to the facts of the present case, a perusal of the statement of the prosecutrix recorded under under Section 164 of Cr.P.C. reveals that the prosecutrix has stated that on 10.01.2019, she was called by the accused/respondent no. 2 to handover the rent of the house in which the respondent no. 2was residing as a tenant and was owned by the prosecutrix. It was alleged that thereafter, she was locked inside the room and respondent no. 2 had inserted his finger in the private part of the prosecutrix. She had, however, somehow managed to get out and shout for help. It was further alleged that when her sister-in-law had come at the spot, other family members of respondent no. 2 i.e. respondent no. 3 to 5 had also gathered and had assaulted the prosecutrix and her sister-in-law. The other victim i.e. sister-in-law of the prosecutrix had also alleged in her statement under Section 164 of Cr.P.C. that she was molested by the son of the

respondent no. 2 i.e. respondent no. 3. Thus, during the course of investigation, Section 376 of IPC was added in the present case.

29. In her MLC, the prosecutrix had disclosed the details of incident wherein she had alleged that respondent no. 2 had called her into the house to collect rent, and had then locked the room from inside and tried to remove the clothes of the prosecutrix as well as his own clothes. However, when the prosecutrix had opposed such acts, he had physically assaulted her and had torn her clothes and had forcefully inserted his finger in her private part. The MLC of the sister-in-law of prosecutrix records that she had heard the prosecutrix shouting for help from the house of tenants and when she had started shouting for help, the son of respondent no. 2 i.e. respondent no. 3 had grabbed her from behind and had pressed her chest repeatedly.

iv. Consideration of Polygraph Test Report at the Stage of Framing of Charge

30. The Hon'ble Supreme Court has since long held that the credibility of the witness testimony has to be determined beyond reasonable doubt in a criminal case at the relevant stage of trial i.e. after testimony is recorded and is tested on the touchstone of the cross-examination. In the absence of the 'lie detector tests' and advancements of technology in this regard, from time immemorial, it has been the judge who was the lie detector.

31. In the present case, the comments of the learned Trial Court that the prosecutrix had given deceptive answers are not only unfair to the prosecutrix but also not desirable in a criminal trial when the

trial is yet to commence. The admissibility of the evidence, truthfulness of the statement of the victim or even admissibility of the polygraph test and its extent, could not have been gone into at the stage of framing of charge by the learned Trial Court as settled by way of judicial precedents. The learned Trial Court was not authorized or competent to conduct a mini-trial at the stage of framing of charge.

32. In case, the Courts will start relying in a routine manner on polygraph tests, considering them as admissible and reliable at the stage of framing of charge itself, against the victim, the criminal courts will be failing in their duty in following the laid down principles of criminal trial, its stages and what is to be considered and weighed at what stage.

33. A criminal Court has to explore innumerable factors which could affect the truthfulness of particular testimony of a particular witness as also the accuracy of a particular test at the relevant stage of trial. In case the criminal courts will start discharging accused on the basis of a polygraph test at the stage of charge itself, a criminal trial - **instead of testing the veracity of the statement of the victim or prosecution proving its case beyond reasonable doubt - will wriggle down to appreciation of a polygraph test and not the test of the material collected by the prosecution and the statements and testimonies of the victim**.

34. This Court, therefore, holds that it was against the mandate of law to have asked the IO vide the order at the time of grant of anticipatory bail that the victim may be subjected to polygraph test

and then the Trial Court judge to have relied on it to reach a conclusion at the stage of charge itself that as per polygraph test, the victim was deceitful and lying whereas the polygraph test of the accused proved that he was not lying on the crucial aspects of his side of story was illegal.

35. **The** learned Trial Court **had ignored that he was not appreciate the authenticity of polygraph test or lie detection test at the stage of charge and that the criminal trial had to be run as per provisions of Cr.P.C., Indian Evidence Act and judicial precedents and could not have been relegated to be concluded summarily on the basis of the polygraph tests or its result**.

36. Further, the polygraph test could not have been appreciated or relied upon to discharge the accused at the stage of charge as has been done in this case. In the first place, the polygraph test could not have been asked to be conducted by the learned Judge who had granted anticipatory bail to the accused, before whom no such application was moved either by the prosecution or the accused.

37. Later, during investigation, when the application for conducting polygraph test was moved by the IO before the concerned Court, an order for conducting the same was passed by the learned Metropolitan Magistrate, West, Tis Hazari Courts, Delhi.

38. In cases under Section 376 of IPC, when evidence is available on record with the investigating agency and they are still investigating the case, there can be no interference in the investigation. Without there being any application so moved for conducting polygraph test, the Court cannot direct as to how the

investigation has to be conducted at the stage of grant of anticipatory bail itself.

v. Sufficiency of Material on Record in the Present Case vs. Framing of Charge

39. As already taken note of in the preceding discussion, the prosecutrix had leveled specific allegations against respondent no. 2 of inserting finger in her private parts, which as per Section 375 of IPC, falls within the definition of 'rape'. Though, it is stated that a compromise was affected initially between the parties, however, a few days later,the prosecutrix had got the present FIR lodged and her statement under Section 164 Cr.P.C. had been recorded wherein the above-said allegations were made. Therefore, at the stage of framing of charge, delay of some days in registration of the FIR cannot become a ground for discharge of accused. The chargesheet also mentions that on 25.01.2019, a complaint was also received regarding the allegations.

40. Further, the most crucial fact in this case is that the medical examination of the victims had been conducted on the day of **incident itself i.e. 10.01.2019, which revealed that on 10.01.2019 itself, the prosecutrix had given the history of sexual assault to the doctor concerned**. Thus, the learned Trial Court committed an error by not appreciating that it was on the date of lodging of the first complaint on 10.01.2019 itself that the MLC of the prosecutrix and her sister-in-law were prepared which mention the allegations of

sexual assault, and the delay in lodging FIR of 15 days in such circumstances could not have had an impact to the extent of discharging the accused. The delay had to be explained in any case during the course of trial.

41. The learned Trial Court has overlooked the fact that the Court was not empowered to conduct a mini-trial at the stage of framing of charge, where it has not only gone into discussing the evidence in detail, but has also attached evidentiary value to the statements on record and to the CCTV footage, and has assumed that the incident in question could not have taken place, without the prosecution and the prosecutrix being given a chance for trial as they were entitled to in law.

42. Further, the learned Trial Court did consider the MLC and the history given by the victim on the date of alleged offence itself to the doctor, which corroborates her statement recorded under Section 164 of Cr.P.C. Even if there is no mention or reference to the injuries on the private part of the victim, it would have been explained by the doctor concerned who had prepared the MLC in question.

43. Though the learned Trial Court did mention the facts alleged in the FIR and the accompanying charge-sheet disclose a prima facie case and raise a strong suspicion of commission of the offences by the accused and that the Court is entitled to sift and weigh the evidence for limited purpose, however, despite noting the judicial precedents to be followed and the principles to be followed at the time of framing of charge, the learned Trial Court has, instead of following the same, mentioned that it is also well-settled that when

any law relating to procedure and evidence requires some sort of interpretation, the interpretation is made usually in favour of the accused, which is, upholding the presumption of innocence.

44. The learned Trial Court has thus again committed an error by holding that at the stage of framing of charge, the Court could have appreciated evidence to the extent as if it was being appreciated at the final stages of trial and giving benefit of doubt and interpreting the evidence in favour of the accused upholding presumption of innocence in his favour, which was not permissible in law at the stage of charge.

vi. Material against Respondent No. 4 and 5

45. As regards the discharge of respondent no. 4 and 5 under Sections 323/506/34 of IPC, this Court notes that the prosecutrix had alleged in the FIR that on the day of incident, all four members of the family of respondent no. 2 i.e. including his wife (respondent no. 4) and his daughter (respondent no. 5) had given beatings to her.

46. A perusal of record reveals that the prosecutrix had alleged that respondent no. 4 i.e. wife of respondent no. 2 and respondent no. 5 i.e. daughter of respondent no. 2 had come to the spot and had given beatings to her and her sister-in-law. Similar allegations were levelled against these accused persons by the other victim i.e. sister-in-law of prosecutrix and their statements under Section 164 of Cr.P.C. also mentions about respondent no. 4 and 5 giving beatings to them.

vii. Difference Between Appreciation of Evidence At The Stage of Charge and At The Stage of Final Judgment

47. It is crucial to note that there is a marked difference between the two stages for appreciation of material on record. While at the first stage i.e. at the stage of charge, it is the material on record which is to be appreciated by a court of law which means the chargesheet, the medical or digital evidence, the statements of the witnesses recorded under Section 161 and 164 Cr.P.C., etc., which have to be glanced through and appreciated for making a *prima facie* view of the matter to reach a conclusion as to whether it is sufficient to give rise to strong suspicion against the accused that he had committed the offence which will suffice for the purpose of framing of charge.

48. Whereas at the stage of final decision of the case after a full-fledged trial, it is the testimony of the witnesses, the digital and other corroborative evidence which is to be taken into account on the basis of it being proved by the prosecution on record and also judging the evidentiary value, the evidence as well as the quality of evidence of the testimonies recorded before it, of the prosecution as well as defence witnesses. It is also important to note that at the final stage of judgment and decision, the case has to be proved beyond reasonable doubt and in case, a presumption at that stage arises which is in favour of the accused, the benefit of it can be given to the accused. Therefore, clearly the learned Trial Court has committed an error by holding a mini-trial at the stage of framing of charge itself by relying heavily on the polygraph test to discharge the accused under Section 376 of IPC and assumptions about absence of injury on private part

of the victim and also possibility of interference with the CCTV footage. The abovementioned had to be necessarily decided after giving opportunity to both the sides to lead evidence.

CONCLUSION

49. Every criminal trial is an effort to ensure finding truth of the matter. Though it is important and crucial that our legal system should take better advantage of rapid advances in scientific tools which work as judicial aids, the procedure adopted in the present case by the learned Judge who granted anticipatory bail and passed orders that the IO should get conducted polygraph tests of accused and prosecutrix as per law and later the learned Trial Court relying on the polygraph test and discharging the accused while making an observation that the victim was lying whereas the accused was truthful without even the trial commencing are examples of taking mechanical aid in a mechanical manner against the settled principles of criminal jurisprudence, thus making the very foundation of such orders erroneous and illegal.

50. Further, discharging an accused primarily on the basis of outcome of the polygraph test at the stage of charge was equally erroneous. The result of polygraph test at best could have been considered as a part of investigation and tested during the course of trial on the touchstone of testimonies of prosecutrix and other witnesses, since the polygraph test result by itself is not a piece of independent evidence. The statement of the witnesses, the complainant and the defence of the accused and their veracity has

never been viewed as technical issues. Judicial determinations are made after appreciation of evidence before the Court, at the stage of charge by forming a *prima facie* view, and at the final stages of trial by determination as to whether or not the charge is proved beyond reasonable doubt. A probable truth or a probable lie, presented to the Court through a polygraph test report when neither any medical/expert witness nor the prosecutrix or other witnesses, or electronic evidence etc. had been brought on record by way of their examination, the MLCs and the statements of the prosecutrix and the witnesses under Section 161 Cr.P.C. and Section 164 Cr.P.C. were to be made basis of order on charge and a polygraph test report could not have substituted the said material on record.

51. In such circumstances, it is held that:

i. offence under Section 376 of IPC is made out against accused Yogesh Kumar/respondent no. 2 herein, as there is enough material on record to proceed against the accused for the purpose of trial.

ii. for the reasons mentioned in para no. 45-46 of the judgment, charge for committing offence under Section 323/34 of IPC is also made out against respondent nos. 4 and 5.

52. In view thereof, this Court sets aside the order of the learned Trial Court to the extent whereby respondent no. 2 was discharged under Section 376 of IPC and respondent no. 4 and 5 were discharged under Section 323/34 of IPC. Thus, the impugned order is modified only to this extent.

53. Accordingly, the present petition alongwith pending application stands disposed of in above terms.

54. A copy of the judgment be forwarded to the Director, Academics, Delhi Judicial Academy and the learned Registrar General of this Court for circulation to all the learned judicial officers for their information. The name of the concerned officer whose order has been impugned be not mentioned in the letter vide which the judgment will be circulated in the District Courts.

55. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

OCTOBER 12, 2023/ns