A AJAY KUMAR PARMAR

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 1496 of 2012)

B SEPTEMBER 27, 2012

[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Code of Criminal Procedure, 1973 – ss. 207 to 209 and C *s. 164 – Power of Magistrate – FIR alleging commission of rape – Thereafter prosecutrix approaching the Chief Judicial Magistrate (CJM) on her own seeking to record her statement u/s. 164 Cr.P.C – As per order of CJM, Judicial Magistrate recording her statement u/s. 164 – The prosecutrix in her* D *statement u/s. 164 exonerating the accused of the allegations – Police filing charge-sheet – The Judicial Magistrate, in view of the statement of the prosecutrix u/s. 164, discharging the accused – The order of Magistrate set aside by Revisional Court as well as High Court – On appeal, held: Order of* E *Magistrate rightly set aside – The statement u/s. 164 was not recorded correctly as the prosecutrix was not produced before the Magistrate by police and that her statement was recorded without identifying her – The order of discharge was a nullity without jurisdiction as the matter was cognizable by the* F *Sessions Court – Magistrate had no jurisdiction to probe into the matter – He was bound under law to commit the case to the Sessions Court – It was also not permissible to examine weight of the evidence at that stage – The signature of the prosecutrix on the papers before CJM and Judicial Magistrate* G *also did not tally with signatures on FIR and Medical Report which creates suspicion.*

Evidence Act, 1872 – s. 73 – Comparison of signature/ writing by the court – Held: There is no legal bar to prevent the court from such comparison – But the court as a matter

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of prudence and caution should be slow to base its findings solely upon the comparison made by it – The court can apply its observation on the expert opinion or that of any other witness.

FIR was lodged against the appellant-accused alleging rape. Prosecutrix, thereafter appeared before Chief Judicial Magistrate and lodged a complaint stating that the police was not investigating the case properly and filed an application that her statement be recorded u/s. 164 Cr.P.C. The application was allowed. Consequently, the Judicial Magistrate recorded the statement of the prosecutrix u/s. 164 Cr.P.C. to the effect that the FIR lodged by her was false; that her statement u/s. 161 Cr.P.C. was also false and that no offence was ever committed by the appellant-accused.

After conclusion of the investigation, police filed charge-sheet against the appellant. The Judicial Magistrate, taking note of the statement u/s. 164 Cr.P.C., passed an order of not taking cognizance of offences u/ss. 376 and 342 IPC and discharged the appellant-accused.

State filed revision and the same was allowed by Sessions Court reversing the order of the Magistrate. The order of Sessions Court was affirmed by High Court. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. The revisional court as well as the High Court have rightly held that the statement under Section 164 Cr.P.C. had not been recorded correctly. The said courts have rightly set aside the order of the Judicial Magistrate, not taking the cognizance of the offence. A statement u/s. 164(5) Cr.P.C. can be recorded, only and only when, the person making such statement is produced before the Magistrate by the police. In case

A such a course of action, wherein such person is allowed to appear before the Magistrate of his own volition, is made permissible, and the doors of court are opened to them to come as they please, and if the Magistrate starts recording all their statements, then too many persons B sponsored by culprits might throng before the portals of the Magistrate courts, for the purpose of creating record in advance to aid the said culprits. [Paras 5] [982-B-D]

Jogendra Nahak and Ors. v. State of Orissa and Ors. AIR 1999 SC2565: 1999 (1) Suppl. SCR 39 – relied on.

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1.2. The Chief Judicial Magistrate, who entertained the application and further directed the Judicial Magistrate, to record the statement of the prosecutrix, was not known to the prosecutrix in the case and the D latter also recorded her statement, without any attempt at identification, by any court officer/lawyer/police or anybody else. The application filed before the Chief Judicial Magistrate, has been signed by the prosecutrix, as well as by her counsel. However, there has been no E identification of the prosecutrix, either by the said advocate or by anyone else. The Chief Judicial Magistrate, proceeded to deal with the application without identification of the prosecutrix and has no where mentioned that he knew the prosecutrix personally. The F Judicial Magistrate, recorded the statement of the prosecutrix after she was identified by the lawyer. There is nothing on record to show that she had appeared before the Chief Judicial Magistrate, or before the Judicial Magistrate, alongwith her parents or any other person related to her. In such circumstances, the statement so G recorded, loses its significance and legal sanctity. The fact-situation reveals that the court proceeded with utmost haste and any action taken so hurridly, can be labelled as arbitrary. [Paras 7, 16 and 17] [982-G-H; 986-G-H; 987-A-B, D-E]

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Mahabir Singh v. State of Haryana **AIR 2001 SC 250: 2001 (1) Suppl. SCR 37 – relied on.**

2.1. When an offence is cognizable by the Sessions court, the Magistrate cannot probe into the matter and discharge the accused. It is not permissible for him to do so, even after considering the evidence on record, as he has no jurisdiction to probe or look into the matter at all. His concern should be to see what provisions of the Penal statute have been mentioned and in case an offence triable by the Sessions Court has been mentioned, he must commit the case to the Sessions Court and do nothing else. Thus, the Magistrate had no business to discharge the appellant. He was bound under law, to commit the case to the Sessions Court, where such application for discharge would be considered. The order of discharge is therefore, a nullity, being without jurisdiction. [Paras 9 and 10] [983-G-H; 984-A-D]

Sanjay Gandhi v. Union of India **AIR 1978 SC 514: 1978 (2) SCR 861 – relied on.**

2.2. It was not permissible for the Judicial Magistrate, to take into consideration the evidence in defence produced by the appellant at the time of framing the charge, the only documents which are required to be considered are the documents submitted by the investigating agency alongwith the charge-sheet. Any document which the accused want to rely upon cannot be read as evidence. If such evidence is to be considered, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Cr.P.C. The provision about hearing the submissions of the accused as postulated by Section 227 means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. Even if, in a rare case it is permissible to consider the defence evidence, if such

A **material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted, the instant case does not fall in that category. [Para 11] [984-D-H]**

B *State of Orissa v. Debendra Nath Padhi* **AIR 2003 SC 1512;** *State ofOrissa v. Debendra Nath Padhi* **AIR 2005 SC 359: 2004 (6) Suppl.SCR 460;** *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla and Anr.* **AIR 2005 SC 3512: 2005 (3) Suppl. SCR 371;** *Bharat Parikh v. C.B.I. and Anr.* **(2008) 10 SCC 109: 2008 (10) SCR 950;** *Rukmini Narvekar v. Vijaya* C *Satardekar and Ors.* **AIR 2009 SC 1013: 2008 (14) SCR 271 – relied on.**

2.3. The court should not pass an order of acquittal by resorting to a course of not taking cognizance, where D ***prima facie* case is made out by the Investigating Agency. More so, it is the duty of the court to safeguard the right and interests of the victim, who does not participate in discharge proceedings. At the stage of application of Section 227, the court has to shift the evidence in order** E **to find out whether or not there is sufficient ground for proceeding against the accused. Thus, appreciation of evidence at this stage, is not permissible. [Para 12] [985-B-D]**

F *P. Vijayan v. State of Kerala and Anr.* **AIR 2010 SC 663: 2010(2) SCR 78 ;** *R.S. Mishra v. State of Orissa and Ors.* **AIR 2011 SC 1103 2011 (2) SCR 338 – relied on.**

2.4. The scheme of Cr.P.C. particularly, the provisions of Sections 207 to 209 Cr.P.C., mandate the Magistrate to G **commit the case to the Court of Sessions, when the charge-sheet is filed. A conjoint reading of these provisions make it crystal clear that the committal of a case exclusively triable by the Court of Sessions, in a case instituted by the police is mandatory. [Para 13] [985-**H **D-E]**

2.5. Where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the FIR, notice to informant and grant of being heard in the matter, becomes mandatory. In the case at hand, admittedly, the Magistrate has not given any notice to the complainant before dropping the proceedings and, thus, acted in violation of the mandatory requirement of law. [Para 15] [986-E-F]

Minu Kumari and Anr. v. State of Bihar and Ors. **AIR 2006 SC 1937: 2006 (3) SCR 1086;** *Bhagwant Singh v. Commissioner of Police andAnr.* **AIR 1985 SC 1285: 1985 (3) SCR 942 – distinguished.**

3.1. In comparision of signatures of the prosecutrix on FIR and on Medical Report with the signatures appearing upon the application filed before the Chief Judicial Magistrate, for recording her statement under Section 164 Cr.P.C., as also with, the signature on the statement alleged to have been made by her under Section 164 Cr.P.C., and after examining the same, *prima facie* it appears that they have not been made by the same person, as the two sets of signatures do not tally, rather there is an apparent dissimilarity between them. [Para 18] [987-E-G]

3.2. From the signatures on the FIR and Medical Report, it appears that she is not an educated person and can hardly form her own signatures. Thus, it leads to suspicion regarding how an 18 year old, who is an illiterate rustic villager, reached the court and how she knew that her statement could be recorded by the Magistrate. [Para 24] [990-G-H; 991-A]

3.3. Evidence of identity of handwriting has been dealt with by three Sections of the Indian Evidence Act, 1872 i.e. Sections 45, 47 and 73. Section 73 of the

A **Evidence Act provides for a comparison made by the Court with a writing sample given in its presence, or admitted, or proved to be the writing of the concerned person. There is no legal bar to prevent the court from comparing signatures or handwriting, by using its own**
B **eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the court cannot itself become an expert in this regard and must refrain**
C **from playing the role of an expert, for the simple reason that the opinion of the court may also not be conclusive. Therefore, when the court takes such a task upon itself, and findings are recorded solely on the basis of comparison of signatures or handwritings, the court must**
D **keep in mind the risk involved, as the opinion formed by the court may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison**
E **made by it. However, where there is an opinion whether of an expert, or of any witness, the Court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision. [Paras 19 and 23] [987-H; 988-A; 989-F-H;**
F **990-A-B]**

Ram Chandra and Anr. v. State of Uttar Pradesh **AIR 1957 SC 381;** *Ishwari Prasad Misra v. Mohammad Isa* **AIR 1963 SC 1728: 1963 SCR 722;***Shashi Kumar Banerjee and*
G *Ors. v. Subodh Kumar Banerjee* **AIR 1964 SC 529;** *Fakhruddin v. The State of Madhya Pradesh* **AIR 1967 SC 1326;** *State of Maharashtra v. Sukhdeo Singh and Anr.* **AIR 1992 SC 2100: 1992 (3) SCR 480 ;** *Murari Lal v. State of Madhya Pradesh* **AIR 1981 SC 363;** *Neelalohithadasan*
H *Nadar v. George Mascrene and Ors.* **1994 Supp. (2) SCC**

619; *O. Bharathan v. K. Sudhakaran and Anr.* **AIR 1996 SC 1140;** *Lalit Popli v. Canara Bank and Ors.* **AIR 2003 SC 1795;** *Jagjit Singh v. State of Haryana and Ors.* **(2006) 11 SCC 1: 2006 (10) Suppl. SCR 521 ;** *Thiruvengada Pillai v. Navaneethammal* **AIR 2008 SC 1541: 2008 (3) SCR 23;** *G. Someshwar Rao v. Samineni Nageshwar Rao and Anr.* **(2009) 14 SCC 677: 2009 (11) SCR 676 – relied on.**

Case Law Reference:

1999 (1) Suppl. SCR 39	**Relied on**	**Para 5**
2001 (1) Suppl. SCR 37	**Relied on**	**Para 6**
1978 (2) SCR 861	**Relied on**	**Para 8**
AIR 2003 SC 1512	**Relied on**	**Para 11**
2004 (6) Suppl. SCR 460	**Relied on**	**Para 11**
2005 (3) Suppl. SCR 371	**Relied on**	**Para 11**
2008 (10) SCR 950	**Relied on**	**Para 11**
2008 (14) SCR 271	**Relied on**	**Para 11**
2010 (2) SCR 78	**Relied on**	**Para 12**
2011 (2) SCR 338	**Relied on**	**Para 12**
2006 (3) SCR 1086	**Distinguished**	**Para 15**
1985 (3) SCR 942	**Distinguished**	**Para 15**
AIR 1957 SC 381	**Relied on**	**Para 19**
1963 SCR 722	**Relied on**	**Para 19**
AIR 1964 SC 529	**Relied on**	**Para 19**
AIR 1967 SC 1326	**Relied on**	**Para 19**
1992 (3) SCR 480	**Relied on**	**Para 19**
AIR 1981 SC 363	**Relied on**	**Para 20**

A	**1994 Supp. (2) SCC 619**	**Relied on**	**Para 21**
	AIR 1996 SC 1140	**Relied on**	**Para 22**
	AIR 2003 SC 1795	**Relied on**	**Para 22**
B	**2006 (10) Suppl. SCR 521**	**Relied on**	**Para 22**
	2008 (3) SCR 23	**Relied on**	**Para 22**
	2009 (11) SCR 676	**Relied on**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
C No. 1496 of 2012.

From the Judgment & Order dtaed 9.1.2012 of the High Court of Judicature for Rajasthan at Jodhpur in S.B. Criminal Revision Petition No. 458 of 1998.

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Aishwarya Bhati, Jyoti Upadhyay for the Appellant.

Irshad Ahmad for the Respondent.

The Judgment of the Court was delivered by

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DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and order dated 9.1.2012 passed by the High Court of Judicature for Rajasthan at Jodhpur in S.B. Criminal Revision Petition No. 458 of 1998, by way of which, the High Court has upheld the judgment and
F order dated 25.7.1998, passed by the Sessions Judge in Revision Petition No. 5 of 1998. By way of the said revisional order, the court had reversed the order of discharge of the appellant for the offences under Sections 376 and 342 of the Ir.dian Penal Code, 1860 (hereinafter referred to as the 'IPC')
G dated 25.3.1998, passed by the Judicial Magistrate, Sheoganj.

2. The facts and circumstances giving rise to this appeal are as follows:

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A. An FIR was lodged by one Pushpa on 22.3.1997,

against the appellant stating that the appellant had raped her on 10.3.1997. In view thereof, an investigation ensued and the appellant was medically examined. The prosecutrix's clothes were then also recovered and were sent for the preparation of FSL report. The prosecutrix was medically examined on 22.3.1997, wherein it was opined by the doctor that she was habitual to sexual intercourse, however, a final opinion regarding fresh intercourse would be given only after receipt of report from the Chemical Examiner.

B. The statement of the prosecutrix was recorded under Section 161 of Code of Criminal Procedure, 1973, (hereinafter referred to as 'the Cr.P.C.'), by the Dy.S.P., wherein she narrated the incident as mentioned in the FIR, stating that she had been employed as a servant at the residence of one sister Durgi for the past six years. Close to the residence of sister Durgi, Dr. D.R. Parmar and his son Ajay Parmar were also residing. On the day of the said incident, Ajay Parmar called Pushpa, the prosecutrix home on the pretext that there was a telephone call for her. When she reached the residence of Ajay Parmar, she was raped by him and was restrained from going out for a long period of time and kept indoors without provision of any food or water. However, the next evening, she was pushed out surreptitiously from the back exit of the said house. She then tried to commit suicide but was saved by Prakash Sen and Vikram Sen and then, eventually, after a lapse of about 10 days, the complaint in question was handed over to the SP, Sirohi. Subsequently, she herself appeared before the Chief Judicial Magistrate, Sirohi on 9.4.1997, and moved an application before him stating that, although she had lodged an FIR under Section 376/342 IPC, the police was not investigating the case in a correct manner and, therefore, she wished to make her statement under Section 164 Cr.P.C.

C. The Chief Judicial Magistrate, Sirohi, entertained the said application and disposed it of on the same day, i.e.

A 9.4.1997 by directing the Judicial Magistrate, Sheoganj, to record her statement under Section 164 Cr.P.C.

D. In pursuance thereof, the prosecutrix appeared before the Judicial Magistrate, Sheoganj, which is at a far distance from Sirohi, on 9.4.1997 itself and handed over all the requisite B papers to the Magistrate. After examining the order passed by the Chief Judicial Magiastrate, Sirohi, the Judicial Magistrate, Sheoganj, directed the public prosecutor to produce the Case Diary of the case at 4.00 P.M. on the same day.

C E. As the public prosecutor could not produce the Case Diary at 4.00 P.M, the Judicial Magistrate, Sheoganj, directed the Public prosecutor to produce the Case Diary on 10.4.1997 at 10.00 A.M. The Case Diary was then produced before the said court on 10.4.1997 by the Public prosecutor. The D Statement of the prosecutrix under Section 164 Cr.P.C., was recorded after being identified by the lawyer, to the effect that the said FIR lodged by her was false; in addition to which, the statement made by her under Section 161 Cr.P.C., before the Deputy Superintendent of Police was also false; and finally that E no offence whatsoever was ever committed by the appellant, so far as the prosecutrix was concerned.

F. After the conclusion of the investigation, charge sheet was filed against the appellant. On 25.3.1998, the Judicial Magistrate, Sheoganj, taking note of the statement given by the F prosecrutix under Section 164 Cr.P.C., passed an order of not taking cognizance of the offences under Sections 376 and 342 IPC and not only acquitted the appellant but also passed strictures against the investigating agency.

G G. Aggrieved, the public prosecutor filed a revision before the Learned Sessions Judge, Sirohi, wherein, the aforesaid order dated 25.3.1998 was reversed by order dated 25.7.1998 on two grounds, firstly, that a case under Sections 376 and 342 IPC was triable by the Sessions Court and the Magistrate, H therefore, had no jurisdiction to discharge/acquit the appellant

on any ground whatsoever, as he was bound to commit the case to the Sessions Court, which was the only competent court to deal with the issue. Secondly, the alleged statement of the prosecutrix under Section 164 Cr.P.C. was not worth reliance as she had not been produced before the Magistrate by the police. A B

H. Being aggrieved by the aforesaid order of the Sessions Court dated 25.7.1998, the appellant moved the High Court and the High Court vide its impugned judgment and order, affirmed the order of the Sessions Court on both counts. C

Hence, this appeal.

3. Ms. Aishwarya Bhati, learned counsel appearing on behalf of the appellant, has submitted that in view of the statement of the prosecutrix as recorded under Section 164 Cr.P.C., the Judicial Magistrate, Sheoganj, has rightly refused to take cognizance of the offence and has acquitted the appellant stating that no fault can be found with the said order, and therefore it is stated that both, the Revisional Court, as well as the High Court committed a serious error in reversing the same. D E

4. On the contrary, Shri Ajay Veer Singh Jain, learned counsel appearing for the State, has opposed the appeal, contending that the Magistrate ought not to have refused to take cognizance of the said offences and has committed a grave error in acquitting the appellant, after taking note of the statement of the prosecutrix which was recorded under Section 164 Cr.P.C. The said statement was recorded in great haste. It is further submitted that, as the prosecutrix had appeared before the Magistrate independently, without any assistance of the police, her statement recorded under Section 164 Cr.P.C. is not worth acceptance. Thus, no interference is called for. The appeal is liable to be dismissed. F G

5. We have considered the rival submissions made by the H

A learned counsel for the parties and perused the records.

A three Judge bench of this Court in *Jogendra Nahak & Ors. v. State of Orissa & Ors.*, AIR 1999 SC 2565, held that Sub-Section 5 of Section 164, deals with the statement of a B person, other than the statement of an accused i.e. a confession. Such a statement can be recorded, only and only when, the person making such statement is produced before the Magistrate by the police. This Court held that, in case such a course of action, wherein such person is allowed to appear C before the Magistrate of his own volition, is made permissible, and the doors of court are opened to them to come as they please, and if the Magistrate starts recording all their statements, then too many persons sponsored by culprits might throng before the portals of the Magistrate courts, for the purpose of creating record in advance to aid the said culprits. D Such statements would be very helpful to the accused to get bail and discharge orders.

6. The said judgment was distinguished by this Court in *Mahabir Singh v. State of Haryana,* AIR 2001 SC 2503, on E facts, but the Court expressed its anguish at the fact that the statement of a person in the said case was recorded under Section 164 Cr.P.C. by the Magistrate, without knowing him personally or without any attempt of identification of the said person, by any other person.

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7. In view of the above, it is evident that this case is squarely covered by the aforesaid judgment of the three Judge bench in *Jogendra Nahak & Ors.* (Supra), which held that a person should be produced before a Magistrate, by the police for recording his statement under Section 164 Cr.P.C. The G Chief Judicial Magistrate, Sirohi, who entertained the application and further directed the Judicial Magistrate, Sheoganj, to record the statement of the prosecutrix, was not known to the prosecutrix in the case and the latter also recorded her statement, without any attempt at identification, by any court H officer/lawyer/police or anybody else.

8. In *Sanjay Gandhi v. Union of India,* AIR 1978 SC 514, this court while dealing with the competence of the Magistrate to discharge an accused, in a case like the instant one at hand, held :

> "....it is not open to the committal Court to launch on a process of satisfying itself that a prima facie case has been made out on the merits. *The jurisdiction once vested in him under the earlier Code but has been eliminated now under the present Code.* Therefore, to hold that he can go into the merits even for a prima facie satisfaction is to frustrate the Parliament's purpose in re-moulding Section 207-A (old Code) into its present non-discretionary shape. Expedition was intended by this change and this will be defeated successfully if interpretatively we hold that a dress rehearsal of a trial before the Magistrate is in order. In our view, the narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of Session. Assuming the facts to be correct as stated in the police report, ...*the Magistrate has simply to commit for trial before the Court of Session.* If, by error, a wrong section of the Penal Code is quoted, he may look into that aspect. If made-up facts unsupported by any material are reported by the police and a sessions offence is made to appear, it is perfectly open to the Sessions Court under Section 227 CrPC to discharge the accused. This provision takes care of the alleged grievance of the accused."
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> (Emphasis added)

9. Thus, it is evident from the aforesaid judgment that when an offence is cognizable by the Sessions court, the Magistrate cannot probe into the matter and discharge the accused. It is not permissible for him to do so, even after considering the

A evidence on record, as he has no jurisdiction to probe or look into the matter at all. His concern should be to see what provisions of the Penal statute have been mentioned and in case an offence triable by the Sessions Court has been mentioned, he must commit the case to the Sessions Court and
B do nothing else.

10. Thus, we are of the considered opinion that the Magistrate had no business to discharge the appellant. In fact, Section 207-A in the old Cr.P.C., empowered the Magistrate to exercise such a power. However, in the Cr.P.C. 1973, there
C is no provision analogous to the said Section 207-A. He was bound under law, to commit the case to the Sessions Court, where such application for discharge would be considered. The order of discharge is therefore, a nullity, being without jurisdiction.
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11. More so, it was not permissible for the Judicial Magistrate, Sheoganj, to take into consideration the evidence in defence produced by the appellant as it has consistently been held by this Court that at the time of framing the charge,
E the only documents which are required to be considered are the documents submitted by the investigating agency alongwith the charge-sheet. Any document which the accused want to rely upon cannot be read as evidence. If such evidence is to be considered, there would be a mini trial at the stage of framing
F of charge. That would defeat the object of the Code. The provision about hearing the submissions of the accused as postulated by Section 227 means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing
G more. Even if, in a rare case it is permissible to consider the defence evidence, if such material convincingly establishes that the whole prosecution version is totally absurd, preposterous or concocted, the instant case does not fall in that category. (Vide: *State of Orissa v. Debendra Nath Padhi,* AIR 2003 SC 1512; *State of Orissa v. Debendra Nath Padhi,* AIR 2005 SC
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359; *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr.*, AIR 2005 SC 3512; *Bharat Parikh v. C.B.I. & Anr.*, (2008) 10 SCC 109; and *Rukmini Narvekar v. Vijaya Satardekar & Ors.*, AIR 2009 SC 1013)

12. The court should not pass an order of acquittal by resorting to a course of not taking cognizance, where prima facie case is made out by the Investigating Agency. More so, it is the duty of the court to safeguard the right and interests of the victim, who does not participate in discharge proceedings. At the stage of application of Section 227, the court has to shift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. Thus, appreciation of evidence at this stage, is not permissible. (Vide: *P. Vijayan v. State of Kerala & Anr.*, AIR 2010 SC 663; and *R.S. Mishra v. State of Orissa & Ors.*, AIR 2011 SC 1103).

13. The scheme of the Code, particularly, the provisions of Sections 207 to 209 Cr.P.C., mandate the Magistrate to commit the case to the Court of Sessions, when the charge-sheet is filed. A conjoint reading of these provisions make it crystal clear that the committal of a case exclusively triable by the Court of Sessions, in a case instituted by the police is mandatory.

The scheme of the Code simply provides that the Magistrate can determine, whether the facts stated in the report make out an offence triable exclusively, by the Court of Sessions. Once he reaches the conclusion that the facts alleged in the report, make out an offence triable exclusively by the Court of Sessions, he must commit the case to the Sessions Court.

14. The Magistrate, in exercise of its power under Section 190 Cr.P.C., can refuse to take cognizance if the material on record warrants so. The Magistrate must, in such a case, be satisfied that the complaint, case diary, statements of the witnesses recorded under Sections 161 and 164 Cr.P.C., if

A any, do not make out any offence. At this stage, the Magistrate performs a judicial function. However, he cannot appreciate the evidence on record and reach a conclusion as to which evidence is acceptable, or can be relied upon. Thus, at this stage appreciation of evidence is impermissible. The B Magistrate is not competent to weigh the evidence and the balance of probability in the case.

15. We find no force in the submission advanced by the learned counsel for the appellant that the Judicial Magistrate, Sheoganj, has proceeded strictly in accordance with law laid C down by this Court in various judgments wherein it has categorically been held that a Magistrate has a power to drop the proceedings even in the cases exclusively triable by the Sessions Court when the charge-sheet is filed by the police. She has placed very heavy reliance upon the judgment of this D Court in *Minu Kumari & Anr. v. State of Bihar & Ors.*, AIR 2006 SC 1937 wherein this Court placed reliance upon its earlier judgment in *Bhagwant Singh v. Commissioner of Police & Anr.*, AIR 1985 SC 1285 and held that where the Magistrate decides not to take cognizance and to drop the proceeding or E takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the FIR, notice to informant and grant of being heard in the matter, becomes mandatory.

F In the case at hand, admittedly, the Magistrate has not given any notice to the complainant before dropping the proceedings and, thus, acted in violation of the mandatory requirement of law.

16. The application filed before the Chief Judicial G Magistrate, Sirohi, has been signed by the prosecutrix, as well as by her counsel. However, there has been no identification of the prosecutrix, either by the said advocate or by anyone else. The Chief Judicial Magistrate, Sirohi, proceeded to deal with the application without identification of the prosecutrix and

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has no where mentioned that he knew the prosecutrix personally. The Judicial Magistrate, Sheoganj, recorded the statement of the prosecutrix after she was identified by the lawyer. There is nothing on record to show that she had appeared before the Chief Judicial Magistrate, Sirohi or before the Judicial Magistrate, Sheoganj, alongwith her parents or any other person related to her. In such circumstances, the statement so recorded, loses its significance and legal sanctity.

17. The record of the case reveals that the Chief Judicial Magistrate, Sirohi, passed an order on 9.4.1994. The prosecutrix appeared before the Judicial Magistrate, Sheoganj, at a place far away from Sirohi, on the same date with papers/ order etc. and the said Judicial Magistrate directed the public prosecutor to produce the Case Diary on the same date at 4.00 P.M. The case Diary could not be produced on the said day. Thus, direction was issued to produce the same in the morning of the next day. The statement was recorded on 10.4.1997. The fact-situation reveals that the court proceeded with utmost haste and any action taken so hurridly, can be labelled as arbitrary.

18. The original record reveals that the prosecutrix had lodged the FIR herself and the same bears her signature. She was medically examined the next day, and the medical report also bears her signature. We have compared the aforementioned signatures with the signatures appearing upon the application filed before the Chief Judicial Magistrate, Sirohi, for recording her statement under Section 164 Cr.P.C., as also with, the signature on the statement alleged to have been made by her under Section 164 Cr.P.C., and after examining the same, *prima facie* we are of the view that they have not been made by the same person, as the two sets of signatures do not tally, rather there is an apparent dissimilarity between them.

19. Evidence of identity of handwriting has been dealt with by three Sections of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act') i.e. Sections 45, 47 and 73.

A Section 73 of the said Act provides for a comparison made by the Court with a writing sample given in its presence, or admitted, or proved to be the writing of the concerned person. (Vide: *Ram Chandra & Anr. v. State of Uttar Pradesh,* AIR 1957 SC 381; *Ishwari Prasad Misra v. Mohammad Isa,* AIR B 1963 SC 1728; *Shashi Kumar Banerjee & Ors. v. Subodh Kumar Banerjee,* AIR 1964 SC 529; *Fakhruddin v. The State of Madhya Pradesh,* AIR 1967 SC 1326; and *State of Maharashtra v. Sukhdeo Singh & Anr.,* AIR 1992 SC 2100).

C 20. In *Murari Lal v. State of Madhya Pradesh,* AIR 1981 SC 363, this Court, while dealing with the said issue, held that, in case there is no expert opinion to assist the court in respect of handwriting available, the court should seek guidance from some authoritative text-book and the courts own experience and knowledge, however even in the absence of the same, it should D discharge its duty with or without expert, with or without any other evidence.

21. In *A. Neelalohithadasan Nadar v. George Mascrene & Ors.,* 1994 Supp. (2) SCC 619, this Court considered a case E involving an election dispute regarding whether certain voters had voted more than once. The comparison of their signatures on the counter foil of the electoral rolls with their admitted signatures was in issue. This Court held that in election matters when there is a need of expeditious disposal of the case, the F Court takes upon itself the task of comparing signatures, and thus it may not be necessary to send the said signatures for comparison to a handwriting expert. While taking such a decision, reliance was placed by the Court, on its earlier judgments in *State (Delhi Administration) v. Pali Ram,* AIR 1979 SC 14; and *Ram Pyarelal Shrivastava v. State of Bihar,* G AIR 1980 SC 1523.

22. In *O. Bharathan v. K. Sudhakaran & Anr.,* AIR 1996 SC 1140, this Court considered a similar issue and held that the facts of a case will be relevant to decide where the Court H will exercise its power for comparing the signatures and where

it will refer the matter to an expert. The observations of the Court are as follows:

> "The learned Judge in our view was not right.....taking upon himself the hazardous task of adjudicating upon the genuineness and authenticity of the signatures in question even without the assistance of a skilled and trained person whose services could have been easily availed of. Annulling the verdict of popular will is as much a serious matter of grave concern to the society as enforcement of laws pertaining to criminal offences, if not more. Though it is the province of the expert to act as Judge or jury after a scientific comparison of the disputed signatures with admitted signatures, the caution administered by the Court is to the course to be adopted in such situations could not have been ignored unmindful of the serious repercussions arising out of the decision to the ultimately rendered."

(See also: *Lalit Popli v. Canara Bank & Ors.,* AIR 2003 SC 1795; *Jagjit Singh v. State of Haryana & Ors.,* (2006) 11 SCC 1; *Thiruvengada Pillai v. Navaneethammal,* AIR 2008 SC 1541; and *G. Someshwar Rao v. Samineni Nageshwar Rao & Anr.,* (2009) 14 SCC 677).

23. The opinion of a handwriting expert is fallible/liable to error like that of any other witness, and yet, it cannot be brushed aside as useless. There is no legal bar to prevent the Court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the Court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the opinion of the Court may also not be conclusive. Therefore, when the Court takes such a task upon itself, and findings are recorded solely on the basis of comparison of signatures or handwritings, the Court must keep in mind the risk involved, as the opinion formed by the Court

A may not be conclusive and is susceptible to error, especially when the exercise is conducted by one, not conversant with the subject. The Court, therefore, as a matter of prudence and caution should hesitate or be slow to base its findings solely upon the comparison made by it. However, where there is an B opinion whether of an expert, or of any witness, the Court may then apply its own observation by comparing the signatures, or handwritings for providing a decisive weight or influence to its decision.

C 24. The aforesaid discussion leads to the following inferences:

I. In respect of an incident of rape, an FIR was lodged. The Dy.S.P. recorded the statement of the prosecutrix, wherein she narrated the facts alleging D rape against the appellant.

II. The prosecutrix, appeared before the Chief Judicial Magistrate, Sirohi, on 9.4.1997 and lodged a complaint, stating that the police was not investigating the case properly. She filed an E application that her statement be recorded under Section 164 Cr.P.C.

III. The prosecutrix had signed the said application. It was also signed by her lawyer. However, she was F not identified by any one.

IV. There is nothing on record to show with whom she had appeared before the Court.

V. From the signatures on the FIR and Medical G Report, it appears that she is not an educated person and can hardly form her own signatures.

VI. Thus, it leads to suspicion regarding how an 18 year old, who is an illiterate rustic villager, reached

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the court and how she knew that her statement could be recorded by the Magistrate.

VII. More so, she appeared before the Chief Judicial Magistrate, Sirohi, and not before the area Magistrate at Sheoganj.

VIII. The Chief Judicial Magistrate on the same day disposed of the application, directing the Judicial Magistrate, Sheoganj, to record her statement.

IX. The prosecutrix appeared before the Judicial Magistrate, Sheoganj, at a far distance from Sirohi, where she originally went, on 9.4.1997 itself, and her statement under Section 164 Cr.P.C. was recorded on 10.4.1997 as on 9.4.1997, since the public prosecutor could not produce the Case Diary.

X. Signature of the prosecutrix on the papers before the Chief Judicial Magistrate, Sirohi and Judicial Magistrate, Sheoganj, do not tally with the signatures on the FIR and Medical Report. There is apparent dissimilarity between the same, which creates suspicion.

XI. After completing the investigation, charge-sheet was filed before the Judicial Magistrate, Sheoganj, on 20.3.1998.

XII. The Judicial Magistrate, Sheoganj, vide order dated 25.3.1998, refused to take cognizance of the offences on the basis of the statement of the prosecutrix, recorded under Section 164 Cr.P.C. The said court erred in not taking cognizance on this count as the said statement could not be relied upon.

XIII. The revisional court as well as the High Court have

A rightly held that the statement under Section 164 Cr.P.C. had not been recorded correctly. The said courts have rightly set aside the order of the Judicial Magistrate, Sheoganj, dated 25.3.1998, not taking the cognizance of the offence.

B XIV. There is no provision analogous to Section 207-A of the old Cr.P.C. The Judicial Magistrate, Sheoganj, should have committed the case to the Sessions court as the said application could be entertained only by the Sessions Court. More so, it C was not permissible for the court to examine the weight of defence evidence at that stage. Thus, the order is insignificant and inconsequential being without jurisdiction.

D 25. In view of the above, we do not find any force in the appeal. It is, accordingly, dismissed. The judgment and order of the revisional court, as well as of the High Court is upheld. The original record reveals that in pursuance of the High Court's order, the case has been committed by the Judicial E Magistrate, Sheoganj, to the Court of Sessions on 23.4.2012. The Sessions Court is requested to proceed strictly in accordance with law, expeditiously and take the case to its logical conclusion without any further delay. We make it clear that none of the observations made herein will adversely affect F either of the parties, as the same have been made only to decide the present case.

K.K.T. Appeal dismissed.