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

% ***Date of Decision: 16th January, 2024***

\+ CRL.M.C. 375/2024

KUNAL KASHYAP, THROUGH PAIROKAR/ GUARDIAN ..... Petitioner

Through: Mr. Madhav Khurana and Mr. Vignaraj Pasayat, Advocates.

versus

STATE OF NCT OF DELHI ..... Respondent

Through: Mr. Yudhvir Singh Chauhan, APP for State with SI Prince Kumar, P.S. Hauz Khas.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

CRL.M.A. 1466/2024 (exemption)

1. Allowed, subject to all just exceptions.

2. Application stands disposed of.

CRL.M.C. 375/2024 & CRL.M.A. 1465/2024 (for stay)

3. This petition has been filed under Section 482 Cr.P.C. on behalf of the Petitioner, laying a challenge to the impugned order dated 05.01.2024 passed by learned Sessions Court in CRL.A. 256/2019 titled *'Kunal Kashyap v. State',* on the ground that the learned Sessions Court has fixed the matter for order on sentence on 18.01.2024, without first adjudicating on the applications filed by the Petitioner under Section 4 read with Section 11 of the Probation of Offenders Act, 1958 (hereinafter referred to as the '1958 Act') and Section 105 of the Mental Healthcare Act, 2017 (hereinafter

referred to as the '2017 Act'), respectively. Direction is sought to the Sessions Court to refer the case of the Petitioner to the Probation Officer under Section 4 of the 1958 Act and call for a report as well as to refer the case to Medical Board as mandated under Section 105 of the 2017 Act, before passing the order on sentence.

4. Issue notice.

5. Learned APP accepts notice on behalf of the State.

6. Genesis of the present petition is an FIR No. 355/2012 registered on 02.12.2012 under Sections 279/337 IPC at PS: Hauz Khas. Charge Sheet was filed on 11.04.2013 before the learned MM, South District, Saket Courts, New Delhi against the Petitioner for commission of offences punishable under Sections 279/337/304A IPC. On 25.11.2014, learned MM framed notice under Section 251 Cr.P.C. for commission of the aforementioned offences and Petitioner pleaded 'not guilty' and claimed trial.

7. By judgment dated 24.04.2019, Petitioner was convicted of offences punishable under Sections 279/337/304A IPC. On 03.06.2019, order on sentence was passed by the learned MM sentencing the Petitioner to two years of rigorous imprisonment for offence punishable under Section 304A IPC; six months of simple imprisonment for offence punishable under Section 337 IPC and two months of simple imprisonment for offence punishable under Section 279 IPC. Petitioner filed an appeal on 01.07.2019 before the learned Sessions Court, assailing the judgment dated 24.04.2019 and order on sentence dated 03.06.2019. Appeal filed by the Petitioner was dismissed by the learned Sessions Court on 05.12.2023, upholding the order of conviction passed by the learned MM. On the same day, the two

applications filed by the Petitioner under Section 4 of 1958 Act and under Section 105 of 2017 Act were taken on record and the case was adjourned to 15.12.2023. On 15.12.2023, part arguments were heard on both the applications and the matter was directed to be listed on 05.01.2024 for further arguments on the same/consideration on the point of sentence. On 05.01.2024, the case was adjourned and posted for order on sentence on 18.01.2024, after recording that further arguments were heard on behalf of the convict on the pending applications and no arguments were adduced on behalf of the State, as none represented the State, post lunch.

8. Impugned order dated 05.01.2024 is assailed before this Court on two-fold grounds by the Petitioner. Arguing on behalf of the Petitioner, Mr. Madhav Khurana, learned counsel, submits that Petitioner has been suffering from schizophrenia, depression, psychosis, paranoia and hallucinations, for which he has been under treatment since 2015 till date. The illnesses have rendered him incapable of even carrying out his daily activities without the assistance of his sister, who is his guardian and looking after him since 2015. The aforesaid illnesses fall under the definition of 'mental illness', defined under Section 2(1)(s) of the 2017 Act and therefore, as per the mandate of Section 105 of the said Act, case of the Petitioner ought to have been referred by the Court for further scrutiny to the concerned Board for its opinion, which procedure was not followed. The illnesses, from which the Petitioner suffers, impair his thinking, mood, perception, orientation or memory, as also the ability to meet ordinary demands of life and therefore, if the order on sentence is passed and Petitioner is imprisoned without assessment of his mental condition by a Competent Board, he will be vulnerable to further deterioration of his

mental condition and this would be contrary to the express provisions and spirit of the 2017 Act. Reliance is placed on the judgment of this Court in ***Ankur Abbot v. Ekta Abbot, 2023 SCC OnLine Del 4074,*** where the Court has highlighted and emphasised the mandate of Section 105 and the obligations it casts on various agencies including Magistrates etc.

9. The second contention is premised on Section 4 of the 1958 Act. It is urged that this provision vests the Court with power to release persons on probation for offences not punishable with death or imprisonment for life and in the present case, since the Petitioner has been convicted for offences punishable under Sections 279/337/304A IPC, none of which are punishable with death or life imprisonment and the maximum sentence that can be imposed is imprisonment for two years, Petitioner is eligible for being released on probation. Reliance is placed on the judgment of the Supreme Court in ***MCD v. State of Delhi and Another (2005) 4 SCC 605,*** where the Supreme Court has observed that Section 4 applies to all kinds of offenders whether under or above 21 years of age and the provision is intended to attempt possible reformation of an offender instead of inflicting on him the normal punishment of his crime. The Supreme Court further observed that while extending the benefit of this provision, the discretion of the Court has to be exercised having regard to the circumstances, in which the crime was committed, the age, character and antecedents of the offender and the exercise needs a sense of responsibility. The Court is thus bound to call for a report as per Section 4 of the 1958 Act, though the Court is not bound by the report. It is, therefore, submitted by the learned counsel that the learned Sessions Court ought to have first called for a report from the Probation Officer under Section 4 before proceeding to fix the matter on 18.01.2024

for passing the sentence. In a nutshell, the contention of the Petitioner is that calling for a report from the Board under Section 105 of the 2017 Act and a report from the Probation Officer under Section 4 of the 1958 Act, is a condition precedent, before the Court proceeds to pass an order on sentence and therefore, the Sessions Court be directed to defer the order on sentence and first decide the applications filed by the Petitioner.

10. Learned APP for the State, *per contra*, contends that insofar as the application under Section 4 of the 1958 Act is concerned, the same is misconceived, in view of the observations of the Supreme Court in ***Dalbir Singh v. State of Haryana, (2000) 5 SCC 82,*** wherein the Supreme Court observed that bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal Courts cannot treat the nature of offence under Section 304A IPC, as attracting the benevolent provisions of Section 4 of the 1958 Act and that while considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. Learned APP submits that the Supreme Court in ***State of Punjab v. Balwinder Singh and Others, (2012) 2 SCC 182***, endorsed the view expressed by the Supreme Court in ***Dalbir Singh (supra)*** and reiterated that while considering the quantum of sentence to be imposed for offence causing death or injury by rash and negligent driving of automobiles, one of the prime considerations should be deterrence and the persons driving motor vehicles cannot and should not take a chance thinking that even if they are convicted, they would be dealt with leniently by the Court. Therefore, the learned Sessions Court was not bound to decide the application under Section 4 of the 1958 Act, before proceeding to pass an

order on sentence as the very provision is inapplicable to a case involving commission of an offence under Section 304A IPC, for which the Petitioner stands convicted by the learned MM and the conviction has been upheld by the Sessions Court.

11. As far as the application under Section 105 of the 2017 Act is concerned, the argument of the State is that the application is still pending and has not been dismissed and the same will be decided by the Sessions Court at the time of passing the order on sentence. The impugned order does not indicate that the order on sentence will be passed without a decision on the application and thus the apprehension of the Petitioner to this effect is wholly unfounded.

12. Arguing in rejoinder, counsel for the Petitioner contends that it cannot be stated as a thumb rule that in no case, benefit of Section 4 of the 1958 Act will be granted to a person convicted for an offence under Section 304A IPC and the discretion is to be exercised by the Court in a given case on the facts and circumstances arising therein. To support this submission, learned counsel places reliance on the judgment of the Supreme Court in ***State through Central Bureau of Investigation, Anti Corruption Branch, Chandigarh v. Sanjiv Bhalla and Another, (2015) 13 SCC 444.*** Reliance is also placed on the judgments of this Court in ***Rakesh Singh v. State, 2004 SCC OnLine Del 214; Pappan v. State (Govt. of N.C.T. of Delhi), 2009 SCC OnLine Del 3619;*** and ***Parmod Kumar Kushwaha v. State of Delhi, 2023 SCC OnLine Del 240,*** wherein this Court has directed release of the convicts on probation for offence punishable under Section 304A IPC.

13. Refuting the submission of the learned APP that the application under Section 105 of the 2017 Act will be considered on 18.01.2024 by the learned

Court at the time of passing the order on sentence, counsel for the Petitioner vehemently contends that this procedure is unknown to law and is contrary to Section 105 and objective of the Act. Section 105 of the 2017 Act mandates that if during any judicial process before any Competent Court, proof of mental illness is produced and is challenged by the other party, Court shall refer the same for further scrutiny to the concerned Board, who shall after examination of the person, either itself or through a Committee of Experts submit its opinion to the Court. A bare reading of the provision shows that until a report is received from the Board, which would be a relevant factor, the Court cannot proceed to pass an order on sentence and therefore, the Court cannot decide the application filed by the Petitioner on 18.01.2024 and pass a sentence on the same day. Decision on the application will have to precede the order on sentence, according to the Petitioner.

14. I have heard the learned counsel for the Petitioner and the learned APP for the State and examined their rival contentions.

15. As noted above, the limited relief sought by the Petitioner in the present petition is a direction to the learned Sessions Court to decide the applications filed by the Petitioner under Section 4 of the 1958 Act and Section 105 of the 2017 Act before proceeding to pass an order on sentence and in this backdrop, challenge is laid to the impugned order dated 05.01.2024, whereby the case has been posted for order on sentence on 18.01.2024 at 02:00 PM, without a decision on the aforesaid two applications. The first question therefore that arises before the Court is whether powers under Section 105 of the 2017 Act should have been exercised by the Sessions Court before proceeding to list the matter for order on sentence, in view of the categorical stand of the Petitioner that he was

suffering from mental illness as defined under Section 2(1)(s) of the 2017 Act and an application having been filed under Section 105 of the 2017 Act seeking reference of the case to the Board constituted under the said Act.

16. Before proceeding further, it would be useful and relevant to allude to the observations of the Supreme Court in ***Ravinder Kumar Dhariwal and Another v. Union of India and Others, (2023) 2 SCC 209,*** where the Supreme Court observed that the 2017 Act provides a rights-based framework of mental healthcare and has a truly transformative potential in stark contradiction to the earlier Acts. Relevant passages are as follows:-

> ***"C.2.1. The Indian Legal Framework***
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> ***60.*** *The National Mental Health Survey of India 2015-2016 (Prevalence, Pattern and Outcomes), was a study undertaken by the Ministry of Health and Family Welfare, Government of India in collaboration with the National Institute of Mental Health and Neuro Sciences, Bengaluru. The survey estimated that nearly 150 million individuals in India suffer from one or more mental illnesses. The Indian Lunacy Act, 1912 was enacted to provide treatment and care for lunatic persons. Section 3(5) defined a "lunatic" as an idiot or a person of unsound mind. The Act dealt with the treatment of lunatics in asylums, and the procedure for the "treatment" of such persons. The Act proceeded on the premise that "lunatics" are dangerous for the well-being of society and the fellow humans who inhabit the planet. Section 13 of the Act provided wide powers to the police officers to arrest persons whom they have reason to believe to be "lunatics".*
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> ***61****. The Mental Health Act, 1987 ("the 1987 Act") was enacted, as the Preamble states, "to consolidate and amend the law relating to the treatment and care of mentally ill persons, to make better provision with respect to their property and affairs". This Act replaced the Indian Lunacy Act. The 1987 Act was a huge transformative leap from the Lunacy Act which did not confer any right to live a life of dignity to mentally ill persons. However, even the 1987 Act did not confer any agency or personhood to mentally ill persons. The Act did not provide a rights-based framework for mental disability but was rather restricted to only establishing psychiatric hospitals and psychiatric nursing homes, and administrative exigencies of such establishments. Under the Act, the "mentally ill person" was defined as a person "who is in need of*

treatment by reason of any mental disorder other than mental retardation".

62. *The Mental Healthcare Act, 2017 ("the 2017 Act") was enacted by Parliament in pursuance of India's obligations under CRPD, repealing the 1987 Act. Section 2(1)(s) of the 2017 Act defines "mental illness" as follows:*

> *"2.(1)(s) "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence;"*

63. *Section 2(1)(o) of the Act defines "mental healthcare" to include both the diagnosis of the mental health condition of persons and rehabilitation for such persons with mental illness:*

> *"2. (1)(o) "mental healthcare" includes analysis and diagnosis of a person's mental condition and treatment as well as care and rehabilitation of such person for his mental illness or suspected mental illness;"*

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65. The 2017 Act provides a rights-based framework of mental healthcare and has a truly transformative potential. *In stark difference from the provisions of the 1985 Act, the provisions of the 2017 Act recognise the legal capacity of persons suffering from mental illness to make decisions and choices on treatment, admission, and personal assistance. Section 2(1)(o) includes within the definition of mental healthcare — diagnosis, treatment, and rehabilitation. Section 4 of the Act states that every person with mental illness shall be "deemed" to have the capacity to make decisions regarding their mental healthcare and treatment if they are able to understand the relevant information, and the reasonably foreseeable consequence of their decision. Sub-section (3) of Section 4 states that merely because the decision by the person is perceived inappropriate or wrong by "others", it shall not mean that the person does not have the capacity to make decisions. The recognition of the capacity of persons living with mental illness to make informed choices is an important step towards recognising their agency. This is in pursuance of Article 12 of CRPD which shifts from a substitute decision-making model to one based on supported decision-making.*

(emphasis supplied)

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68. *The Indian mental healthcare discourse has undergone a substantial and progressive change. Persons living with mental illness were considered as "lunatics" under the Indian Lunacy Act, 1912 and were criminalised and subject to harassment. There was a moderate shift in the mental health discourse with the repeal of the Lunacy Act, 1912 and the enactment of the 1987 Act.* ***However, the transformation in the mental health rights framework was profound when the 2017 Act was enacted since it placed a person having mental health issues within the rights framework."***

(emphasis supplied)

17. The 2017 Act was enacted by the Parliament repealing the Mental Health Act, 1987, pursuant to India's obligations under the United Nations Convention on the Rights of Persons with Disabilities, which was ratified by the Government of India in October, 2007. The purpose of enacting the 2017 Act was to ensure healthcare, treatment and rehabilitation of persons with mental illness as well as to protect and promote their rights and as observed by the Supreme Court in the aforementioned judgment and is an Act which provides for a rights-based framework with a transformative potential. Section 2(1)(s) of the 2017 Act defines 'mental illness', as follows:-

"2. Definitions.—*(1) In this Act, unless the context otherwise requires,—*

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(s) "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence;"

18. Chapter XIII of the 2017 Act provides '*responsibilities of other agencies'* and Section 105 of the 2017 Act, which falls in Chapter XIII, stipulates the procedure required to be followed by the Competent Court if during any judicial process, proof of mental illness is produced by a person alleged to be suffering from a mental illness, which has been separately defined in Section 2(1)(s) of the 2017 Act. Be it noted that the Legislature has carefully used the word 'shall' in Section 105, which indicates the legislative intent that the procedure prescribed is mandatory in nature. This Court in ***Ankur Abbot (supra),*** has held that the purpose of Section 105 of the 2017 Act is only with respect to an enquiry with regard to a person alleged to have a mental illness and the provision creates a statutory right in favour of the person, who claims to have a mental illness, as provided under Section 2(1)(s) of the 2017 Act. The mandatory nature of the provision does not leave any discretion with the Competent Court, in case such a claim is made during judicial process pending before it and therefore, if such a claim is made, the mandate of the Section is that the Competent Court shall refer the same to the concerned Board as provided in the Section and the Court cannot prejudge the said claim before making appropriate directions under the said Section. 'Board' has been defined in Section 2(1)(d) of the 2017 Act and means the Mental Health Review Board constituted by the State Authority under sub-Section (1) of Section 73 in such manner as may be prescribed. Be it also mentioned that Section 120 of the 2017 Act has given an overriding effect to 2017 Act, which is a special Statute, over any other law for the time being in force.

19. From a conjoint reading of the Statement of Objects and Reasons of the 2017 Act and Sections 2(1)(s), 105 and 120 thereof as well as from the

observations of the Supreme Court and this Court in the aforementioned judgments, there can be no debate that Section 105 creates a statutory right in favour of a person, who claims to be suffering from mental illness, as defined under Section 2(1)(s) of the 2017 Act, to seek reference of his case to the Board for its opinion during any judicial process and casts a consequential obligation on the Competent Court to make a reference and seek an opinion from the Board when such a claim is made before it. This is a clear mandate of Section 105 of the 2017 Act and is open to no exception or discretion by the Court. The inexorable conclusion therefore is that if a claim of mental illness is made before the Court, whether orally or by an application, with some supporting material that the person is suffering from mental illness, an onerous responsibility is cast on the Competent Court to follow the procedure laid down in Section 105 of the 2017 Act.

20. First contention of the Petitioner needs to be examined in this backdrop. Indisputably, an application under Section 105 of 2017 Act was filed by the Petitioner claiming that he suffers from mental illnesses such as schizophrenia, depression, psychosis, paranoia and hallucinations and seeking reference of his case to the Board for assessment. Medical documents were filed along with the application in support of the plea. The Sessions Court took the application on record on 05.12.2023 and heard part arguments on 15.12.2023 and directed '*put up for further arguments on the same/consideration on the point of sentence on **05.01.2024** at **02:00 PM***'. On 05.01.2024, the Court recorded that further arguments were heard on the application and no arguments were adduced on behalf of the State, however, without deciding the application, directed the case to be put up for order on the point of sentence on 18.01.2024 at 02:00 PM. From the order-sheets, it is

therefore clear that while the learned Court proceeded to hear arguments on the application under Section 105 of the 2017 Act but did not decide the same, which is contrary to the express provision and spirit of Section 105 of the 2017 Act. The procedure adopted by the learned Sessions Court to list the matter for order on sentence without deciding the application under Section 105 of the 2017 Act contravenes the mandate of Section 105 and cannot be accepted. The argument of the State that the application will be decided on 18.01.2024 contemporaneously with the order on sentence is wholly flawed. Section 105 of the 2017 Act envisages reference of the claim of mental illness to a Board, which would then assess the alleged mental illness, after examining the case of the person itself or by a Committee of Experts and submit its opinion to the Court. This opinion would undoubtedly be a relevant factor for deciding the quantum of sentence including for deciding an application under Section 4 of the 1958 Act, in a given case. Therefore, as rightly argued on behalf of the Petitioner, decision on the application under Section 105 of the 2017 Act will impact the order on sentence and the application was thus required to be adjudicated prior to listing the case for order on sentence.

21. Insofar as the application under Section 4 of the 1958 Act is concerned, while it is the argument of the State that the said provision is inapplicable to a case where the offence is under Section 304A IPC, Petitioner urges that this cannot be treated as a thumb rule in every case. Both sides have relied on various judgments in this context, as referred above. However, since this Court is not called upon, at this stage, to decide the application on merits and the only relief pressed by the learned counsel for the Petitioner, during the course of hearing, is to direct the learned

Sessions Court to decide the application before pronouncing the order on sentence, this Court is not entering into the merits of the application. It is the domain and jurisdiction of the learned Sessions Court to decide the application, both on maintainability and merits, keeping in view the provisions of Section 4 of the 1958 Act and the judgments relied upon by both sides. This Court nonetheless does find merit in the contention of the Petitioner that the application cannot be left undecided and will require to be adjudicated, post the decision on the application under Section 105 of the 2017 Act.

22. The present petition is, therefore, disposed of with a direction to the learned Sessions Court to decide the application filed by the Petitioner under Section 105 of the 2017 Act and pass an order thereon, since arguments have already been heard. Thereafter, the learned Court shall proceed to decide the application under Section 4 read with Section 11 of the 1958 Act and pronounce the order on sentence. The impugned order dated 05.01.2024 is thus set aside to the extent it directs listing the matter on 18.01.2024 for order on sentence.

23. It is made clear that this Court has not expressed any opinion on the merits of both the applications and it is open to the concerned Court to decide the applications in accordance with law in the backdrop of the facts and circumstances of the case, without being influenced by any observations in the present judgment.

24. Pending application also stands disposed of.

JYOTI SINGH, J

JANUARY 16, 2024/kks/shivam