

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

+ **CRL.REV.P. 720/2007**

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Decided on: 11th July, 2011

VINOD SHARMA

..... Petitioner

Through: Mr. Vijay Aggarwal & Gurpreet Singh,
Advocates

versus

STATE

..... Respondent

Through: Mr. Pawan Bahl, APP for State.
Mr. Narender Barnala, Advocate
Mr. Suinanshu Upadhyaya, Advocate
for R-2.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

MUKTA GUPTA, J.

1. By the present petition the Petitioner lays a challenge to the impugned order dated 24th August, 2007 passed by learned Sessions Judge directing the framing of charge under Section 376 IPC against the Petitioner and for quashing of the charge sheet filed by the police in case FIR No. 513/2006 PS Sarai Rohilla under Section 376 IPC.

2. Briefly the prosecution case is that on 31st July, 2006 the prosecutrix gave a complaint to SHO PS Sarai Rohilla alleging that the Petitioner who was posted in Delhi Traffic Police used to reside in the same street as she was. Since her childhood, she used to go to his house for taking tuitions from him and his sister Deepa Sharma. He had been misguiding her from the year 2001 and made physical relations with her forcibly when she was aged 17½ years. When she wanted to disclose about the offence, the Petitioner threatened her saying that he being in service with Delhi Police, he will make life miserable for her as well as her brothers. Thereafter he took her forcibly to Nainital on 13th February, 2003 where he kept her at Hotel Prashant for 3-4 days and forcibly made physical relations with her and every time threatened her of kidnapping her brothers and throwing acid on her face. At the hotel, he married her in a room, photographs of which were available with her. Thereafter since April, 2003 both of them started residing as husband and wife in a flat at Rohini, where he asked her to make physical relations with his friends due to which she came back to her parental house, as he used to beat her on refusal. After apologizing he brought her back from her parents' house. Her mother and sister who used to meet her and stated that until the sister of the Petitioner would get married they cannot take her to their home. On 30th October, 2005 they shifted to A-243, Sudarsharshan Park where again

they resided as husband and wife and then to B-1108 Avantika, Rohini where again he started beating her. Since her parents brought her back to their home, in her absence the Petitioner took away all the belongings and ran away from there. The complainant alleged that after living for four years as her husband now he is refusing to accept her as his wife and trying to marry somewhere else and prayed for action. After registration of FIR the statement of the prosecutrix was recorded under Section 164 Cr.P.C. by the learned Metropolitan Magistrate wherein she reiterated the facts alleged in the complaint. She further stated that on 15th February 2001, when she was around sixteen and a half year, Vinod asked her to come to his house. Since the prosecutrix was searching for a job, he called her saying that he knew people in the placement agency. He also stated that his sister was at home. When she went to his house, the Petitioner was in his bedroom and no one else was present there. When the complainant asked about his sister, the Petitioner stated that he was joking. He made a phone call ostensibly to a placement agency. Thereafter, when she wanted to leave he did not permit her to leave and locked the door from inside and committed rape on her. She went back to her house but did not tell anyone due to hesitation. Later the Petitioner met her, apologized and promised to marry her and kept on having

intercourse with her. On filing of the charge sheet, the learned Additional Sessions Judge was pleased to pass the impugned order.

3. Learned counsel for the Petitioner challenging the order states that the allegations made in the FIR and the complaint filed by the complainant are self contradictory. The complaint case filed before the learned Metropolitan Magistrate and also the allegations leveled by her during the pendency of the complaint before the CAW cell are also contradictory. In the letters to the CAW cell the complainant has admitted that she was not married to the Petitioner. It is contended that when contrary complaints are made by the complainant, at the stage of framing of charge this Court will look into all of them and see whether a case of framing charge is made out against the petitioner or not. Relying upon *Sunil Bansal vs. State, 2007 (2) JCC 1415* it is contended that at this stage the Court will perform the exercise of sifting of the material. Keeping in mind the existence of two contrary statements it would not be a case where grave suspicion exists for commission of the offence. Moreover, when two views are possible then the view favourable to the accused should be preferred. It is next contended that in the FIR it is concealed that the complainant made earlier complaint before the police and the Learned Magistrate giving contrary versions and in view of the fact that she has not approached the Court with clean hands this charge sheet should be

quashed. Reliance is placed on *Pradeep Kumar Verma Vs. State of Bihar and Anr.*, 2007 IV AD. (CR.) S.C. 413, *Uday Vs. State of Karnataka* 2003 SCC (CRI) 775, *Deelip Singh Vs. State of Bihar*, 2005 SCC (CRI) 253, *Deepa Bajwa vs. State*, 115 (2004) DLT 202, *Zandu Pharmaceutical Works Ltd. and others vs. Mohd. Sharaful Haque and another*, 2005 (3) JCC 1583, *All Cargo Movers (I) Pvt. Ltd. and others vs. Dhanesh Badarmal Jaij and another*, 2007 (14) SCC 776, *Baldev Singh and others vs. State of Punjab and another*, II (2006) CCR 161, *Sunil Kapoor and another vs. State and another*, 2009 (4) JCC 2995 and *Oswal Fats and Oils Ltd. vs. Additional Commissioner (Administration) Bareilly Decision, Bareilly and others*, Civil Appeal No. 7982/2002 decided on 1st April, 2010.

4. It is next contended that the offences punishable under Section 376 IPC and Section 493 IPC are distinct and are in different chapters of IPC. They cover totally different fact situations in two different chapters of the IPC. The two offences cannot co-exist and even if reliance is placed on the statements of the complainant at best an offence punishable under Section 493 IPC is made out which is non-cognizable and since in the present case a charge sheet has been filed on FIR, the entire charge sheet is required to be quashed. Reliance is placed on *A. Krishna Raj vs. State of Mysore*, 1969 (1) Mysore Law Journal 304.

5. Learned APP on the other hand contends that the complaint dated 31st July, 2006 on the basis of which FIR was registered on 27th December, 2006 and the statements of the prosecutrix under Section 161 Cr.P.C. and Section 164 Cr.P.C. recorded by the learned Metropolitan Magistrate clearly make out allegations for offence defined in Section 375 thirdly punishable under Section 376 IPC. The complaint filed by the complainant before the learned magistrate was withdrawn before any effective order or cognizance thereon could be taken. Moreover the complaint is not part of the charge sheet and hence the Petitioner is not entitled to rely upon the material which was not before the learned Trial Court in the present revision petition.

6. It is contended that the letters to the CAW cell are for the purpose of reconciliation. They are not the encyclopedia of the case of the complainant and thus anything stated or any omission therein cannot be a base for contradicting the version of the complainant made in the FIR or under Section 164 Cr.P.C. before the learned Metropolitan Magistrate. The complainant should be provided a chance to appear in the witness box and at that stage the defence can check the veracity of the testimony through cross-examination. Learned APP further states that Section 493 IPC has no application to the facts of the present case as both the parties knew that they were not legally married and in such a situation when they have sexual intercourse the act is

not an offence within the ambit of Section 493 IPC. Reliance is placed on *Moideenkutty Haji and Ors. v. Kunhikoya and Ors.*, AIR 1987 Kerala 184. Relying on *Soma Chakarvorty vs. State*, 2007 (5) SCC 403 it is contended that the value of the statement of the complainant/witnesses cannot be gone into at this stage and the same has to be decided during the trial and thus there is no error in the impugned order and the present petition deserves to be dismissed.

7. I have heard learned counsel for the parties and perused the records. There are three sets of allegations against the Petitioner in the complaints made by the complainant. Firstly, that when the prosecutrix used to go the tuitions to his house the Petitioner misguided her and forcibly made physical relations with her and thereafter continued making physical relations. He also threatened her that in case she tells about the said acts to anybody, the consequences would be dire for her and her family members. This threat continued even at Nainital. From this allegation in the complaint and the statement under Section 164 Cr.P.C. before the learned Metropolitan Magistrate the allegations for commission of an offence punishable under Section 376 IPC are clearly made out against the Petitioner. The fact that these allegations are not set out in the complaint made to the CAW Cell on 19th September, 2006 cannot be given too much of significance at this stage because the proceedings before the CAW cell were conciliatory in nature.

Moreover this omission cannot be treated as a contradiction at this stage and the complainant deserves to be granted an opportunity to prove her case during the trial. Section 81 of Arbitration and Conciliation Act reads as under:-

“81.Admissibility of evidence in other proceedings.- The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings-

- (a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- (b) admissions made by the other party in the course of the conciliation proceedings;
- (c) proposals made by the conciliator;
- (d) the fact that the other party had indicated to accept a proposal for settlement made by the conciliator.”

A bare perusal of the Section shows that any views, suggestions and admissions made by either party cannot be relied upon as evidence in any of the proceedings. Thus, the contention of learned APP that such statement of complainant being conciliatory in nature cannot be attached too much of significance succeeds.

8. The next set of allegations against the Petitioner is that at Nainital Petitioner and she performed marriage in their room and thereafter lived as husband and wife though this wedding was not recognized by anybody and

thus had physical relations. These allegations will not fall within the ambit of an offence punishable under Section 493 IPC which reads as under:-

“493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage- Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

9. Section 493 IPC contemplates that a man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual relations with him shall be punished with an imprisonment of either description for a term which may extend to ten years. In this case both the parties were well aware of the fact that the wedding performed in the room at a hotel in Nainital was not a legal wedding. This is a case which falls within the ambit of Section 375 thirdly IPC where the consent of the woman has been sought by putting her in fear. Section 90 of the Indian Penal Code provides that a consent known to be given under fear or misconception is not a consent as envisaged in the Code. In this case initially sexual intercourse was performed with the complainant by putting her in a fear of injury to her and her brothers and thereafter on misconceptions of fact that he would marry her. She states that he refused to marry her as marriage offers of Rs. 10-12 lakhs were being received by him.

Thus the present case falls within the ambit of Section 375 thirdly IPC punishable under Section 376 IPC. In view of these findings the contention that since it is a case under Section 493 and the same being non-cognizable the present charge sheet is liable to be quashed does not survive.

10. The reliance of the learned counsel for the Petitioner on the decision in *Pradeep Kumar Verma* (supra) is wholly misconceived. The allegations as set out therein were that the consent of the prosecutrix was taken on the promise of marriage. In the present case the offence of rape was committed on the prosecutrix and when she protested, it is thereafter that a promise to marry her was made. Their Lordships of the Hon'ble Supreme Court while discussing the element of consent held that reading the judgment in *Uday's* case as a whole it did not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact and, thus, remanded back the matter for fresh consideration. Their Lordships laid emphasis on the fact that the stage of analyzing the factual material was yet to be undertaken and it is in cases where a bare reading of the FIR shows that no offence has been made out for proceeding the situation would be different. Thus, the law laid down by the Hon'ble Supreme Court in *Pradeep Kumar Verma, Uday and Deelip Singh* (supra) clearly laid down that misconception of fact which has an impact on the consent given by the

prosecutrix is a question to be determined on the analysis of evidence adduced during trial.

11. I also do not find any merit in the contention of the learned counsel for the Petitioner that since the earlier complaints filed before the Magistrate and withdrawn did not make such an allegation the allegations leveled in the FIR now, are an afterthought and, thus, the Petitioner should be discharged on the said count. The scope of each petition is different. Even if the allegations in earlier complaint to the Magistrate did not allege about sexual intercourse without consent or the promise to marry rather asserted that she was married to the Petitioner, the same would be a question to be determined during the trial after confronting the witness with her previous statements. The law is well settled that if two views are possible at the end of the trial one in favour of the accused should be taken, however, if two views are possible at the stage of framing of charge and the facts alleged raise a strong suspicion, then the view in favour of the prosecution should be taken.

12. The petition is thus devoid of merit and is dismissed accordingly. The trial Court record be sent back.

(MUKTA GUPTA)
JUDGE

JULY 11, 2011
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