

GAHC040006752023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Crl. Rev. P./10(AP)/2023

Shri Rishabh Sarma, aged about 35 years,
S/o- Shri Rohini Kanta Sarma
R/o Lane Q, West Milan Nagar, Dibrugarh,
P.O. and P.S. Dibrugarh,
District Dibrugarh, Assam, PIN- 786001.

...PETITIONER

VERSUS

- 1. The State of Arunachal Pradesh,**
represented by the Public Prosecutor.
- 2. Smt. Ome Moyong,**
D/o Shri Olen Moyong,
R/o Abotani Colony, Itanagar,
P.O. & P.S. Itanagar,
Arunachal Pradesh, PIN – 791111.

...RESPONDENTS

Advocate for the Petitioner : Mr. P. D. Nair

Advocate for the Respondent : Mr. T. Ete, Addl. P.P.

Mr. T. Tapak

:::BEFORE:::

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing & Judgment : 31.07.2023

JUDGMENT & ORDER (ORAL)

Heard Mr. P. D. Nair, learned counsel for the petitioner. Also heard Mr. T. Ete, learned Additional Public Prosecutor for the State respondent and Mr. T. Tapak, learned counsel appearing for the private respondent.

2. This is an application under Sections 397 and 401 Cr.P.C, read with Section 482 Cr.P.C for quashing of impugned FIR dated 20.07.2020 in Itanagar Women P.S. Case No. 51/2020 under Sections 376/417 IPC, the impugned Charge-Sheet No. 78/2020 dated 18.11.2020 and the impugned order dated 28.02.2023 passed by the learned Sessions Judge, Yupia, in Sessions Case No. 22/2021 framing charges against the petitioner under Sections 376, 417 and 509 of the Indian penal Code.

3. It is stated that the petitioner is the employee of the State Bank of India and is currently working as a Relationship Manager of the bank in its main branch at Dibrugarh. During his posting in the Regional Office of State Bank of India at Itanagar, Arunachal Pradesh, the petitioner had developed a friendly relation with the respondent No. 2, who operates a business of foreign currency exchange at Itanagar. In the month of May,

2019, he got transfer to Bihpuria Branch at Lakhimpur and thereafter, he transferred to Dibrugarh on 27.06.2022. On 12.06.2020, the respondent No. 2 severely assaulted the petitioner with a broken glass bottle causing grievous injuries on his person and she also attempted to kill him. The petitioner accordingly lodged the FIR on 13.06.2020 in Bhipuria Police Station, Lakhimpur against the respondent No. 2 which is registered as Bhipuria P.S Case No. 232/2020, under Sections 326/307 IPC. The respondent No. 2 was accordingly arrested and forwarded in connection with the said Case on 14.06.2020 and after completion of the investigation, the case was also charge-sheeted against the respondent No. 2. After filing of the charge-sheet, the case is pending before the Court of the learned Additional District & Sessions Judge, (Fast Track Court), Lakhimpur. The respondent No. 2 was released on bail on 25.06.2020 and after releasing from the custody, in order to wreak vengeance on the petitioner, the respondent No. 2 had lodged the impugned FIR dated 20.07.2020 in Itanagar Police Station alleging *inter alia* that the petitioner proposed to marry her, though it was impossible as they belong to different communities, however, they entered into a romantic relationship and got sexually physical with each other. He had sexual relationship with her only to deceive her and he never had any intention to marry her. On the basis of the said FIR, one Case is registered under Itanagar Women Police Station, being Itanagar Women P.S. Case No. 51/2020 under Sections 376/417 IPC. On the basis of the said FIR, the present petitioner got arrested in connection with this Case and subsequently released on bail. The statement of the respondent No. 2 was also recorded under Section 164 Cr.P.C. After investigation, the case was

charge-sheeted against the present petitioner and presently the Case is pending before the Court of learned Sessions Judge, Yupia.

4. On 20.04.2022, the petition was filed before the learned Trial Court objecting to framing of charges against the petitioner. However, hearing the arguments on charges, the learned Court below was pleased to frame charges against the present petitioner under Sections 376/417/509 IPC and the learned Sessions Judge also rejected the petition filed by the present petitioner.

5. On being aggrieved by and dissatisfied with the said impugned FIR as well as the charge-sheet and also against the framing of charges, the present petitioner has preferred the present petition seeking quashing of the impugned FIR, charge-sheet and also for setting aside of the order dated 28.02.2023.

6. It is further stated by the learned counsel for the petitioner that the accusation and imputation made in the impugned FIR and the Charge-Sheet do not disclose the commission of any offence by the present petitioner and hence, the impugned order dated 28.02.2023, passed by the Court of the learned Sessions Judge, Yupia, amounts to abuse of the process of the Court and the FIR along with the Charge-Sheet and the subsequent proceeding are liable to be set aside and quashed. The crux of the offence of rape under Section 375 IPC is sexual intercourse by a man with a woman against her will and without her consent under any one of the seven circumstances mentioned therein. The consent means an intelligent, positive, concurrence of the woman. A woman is said to

consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical or moral power to act in a manner she wanted. But the Court of the learned Sessions Judge as well as the Investigating Officer fails to consider this fact that there was no misconception fact and the consent was free and willing from the respondent No. 2.

7. Further, it is stated that as per Section 90 of the IPC "A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear or injury, or under a misconception of fact, and if the person doing the act know, or has reason to believe, that the consent was given in consequence of such fear or misconception...". But here in the instant Case, from the FIR and from the statement made under Section 164 Cr.P.C, it is very much clear that she was aware about the fact that the marriage between her and the petitioner was impossible, but still she engaged herself in sexual relationship with him and she also stayed with him for three and a half months in the same house and only after altercation between them she assaulted him for which an FIR was lodged under Sections 326/307 IPC and the respondent No. 2 was arrested in connection with this Case. More so, there is no single evidence in the Charge-Sheet, or statement made by her or any materials to suggest that the petitioner had involved in fraudulent or dishonest inducement of the respondent No. 2 and/or that he had induced her in any manner to attract Section 417 IPC. Further, there is also no evidence at all to attract Section 509 IPC.

8. Further, the learned counsel for the petitioner submitted that in the

affidavit-in-opposition, filed by the respondent No. 2, it is seen that one counter FIR was lodged by the respondent No. 2 on 14.06.2020 with the allegation of assault on her on 12.06.2020. But from the report, it is seen that the respondent No. 2 was forwarded in connection with FIR lodged by the present petitioner which was registered under Section 326/307 IPC and the subsequent FIR was lodged by the respondent No. 2 only after thought as a counter FIR. Further, it is seen that the present respondent No. 2 lodged the counter FIR only on 20.07.2020 after her released on bail on 25.06.2020. Further, the learned counsel for the petitioner stressed on the point that there is no misconception of fact which is clear from the statement made in the FIR as well as under Section 164 Cr.P.C, wherein, it is clearly stated that she was aware of the fact that the marriage is not possible as the petitioner is a Brahmin and she belongs to Tribal community. So, knowing about the fact that marriage is not possible, she participated in the physical relationship with the petitioner and thus, there cannot be any misconception of fact to attract Section 376 IPC nor there is any material to establish that there was any fraudulent or dishonest inducement of the respondent No. 2 or he induced her in any manner to have sexual intercourse with him to attract Section 417 IPC.

9. In support of his submission, the learned counsel for the petitioner further relied on the following judgements of Hon'ble Supreme Court:

- (i) **Pramod Suryabhan Pawar Vs. State of Maharashtra**, reported in **(2019) 9 SCC 608**;
- (ii) **Dr. Dhruvaram Murlidhar Sonar Vs. State of**

Maharashtra & Ors. reported in (2019) 18 SCC 191;

(iii) **Kaini Rajan Vs. State of Kerala**, reported in **(2013) 9 SCC 113** and;

(iv) **Naim Ahamed Vs. State (NCT of Delhi)**, reported in **(2023) SCC OnLine SC 89.**

10. Citing those judgments, it is submitted by the learned counsel for the petitioner that to establish whether “consent” was vitiated by a “misconception of fact” arising out of a false promise to marry must be a false with a intention not to marry her or given in a bad faith without having any intention to marry her. He mainly stressed on the para-9, 10 & 18 of the above referred judgment reported in (2019) 9 SCC 608, which read as under:

“9. The present proceedings concern an FIR registered against the appellant under [Sections 376, 417, 504, and 506\(2\)](#) of the IPC and [Sections 3\(1\) \(u\), \(w\) and 3\(2\) \(vii\)](#) of SC/ST Act. [Section 376](#) of the IPC prescribes the punishment for the 2018 SCC OnLine SC 3100 offence of rape which is set out in [Section 375](#). [Section 375](#) prescribes seven descriptions of how the offence of rape may be committed. For the present purposes only the second such description, along with [Section 90](#) of the IPC is relevant and is set out below.

“375. Rape – A man is said to commit “rape” if he – ... under the circumstances falling under any of the following seven descriptions-
Firstly ... Secondly. – Without her consent.

... Explanation 2. – Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of

penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity."

"90. Consent known to be given under fear or misconception - A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or..."

10. Where a woman does not "consent" to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section-90 does not define the term "consent", a "consent" based on a "misconception of fact" is not consent in the eyes of the law.

18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

11. Accordingly, it is submitted that in the instant case also it is seen that though the respondent No. 2 brought the allegation of false promise of marriage, yet the consent was not obtained under misconception of fact and the respondent No. 2 was very much aware about the fact that the marriage between the petitioner and the respondent No. 2 was not possible as they belong to different community. But in spite of that she gave her consent and there was consensual relationship between the petitioner and the respondent No. 2 and even she stayed along with petitioner for more than three and a half months together in a same house. More so, there is also no ingredients at all to attract Section 417 IPC that he had the intention to deceive her from the very beginning of

their relationship. Accordingly, it is submitted that it is a fit case where Section 482 Cr.P.C can be invoked for quashing the FIR, Charge-Sheet and the impugned order of framing the charges against the present petitioner. There is no prima facie case to frame the charges against the present petitioner and if the proceeding is allowed to be continued, there will be an abuse of the process of the Court.

12. Further, he submitted that the present Case is also squarely covers by the judgment of the **Hon'ble Apex Court passed in Bhajan Lal's Case**, as the present Case is also lodged out of wreak vengeance.

13. The learned counsel appearing for the respondent No. 2 has submitted that the learned Session Judge frame the charges against the present petitioner with an opinion that the materials placed on record if taken to be hypothetically proved, as they stand, in accordance with rule of evidence, he will entail conviction under Sections 376/417/509 IPC. Further it is submitted that before framing the charges the learned Court below perused the evidence collected by the I.O and the statement made by the witnesses as well as the victim/respondent No. 2 and accordingly, finding a prima facie case, framed charges against the present petitioner. Further it is submitted that the only purpose of Section 482 Cr.P.C is to secure the end of justice and to prevent the abuse of the process of any Court. But herein in the instant Case, it is seen that there is a sufficient material to prima facie establish a case against the present petitioner under Sections 376/417/509 IPC and hence, this is not at all a fit case to quash and set aside the FIR, Charge-Sheet and the order of the framing charge by invoking the power under Section 482 Cr.P.C and hence, the

present petition is liable to be dismissed.

14. In this regard, Mr. T. Ete, learned Additional Public Prosecutor, submitted that from the FIR as well as the statement made by the respondent No. 2 under Section 164 Cr.P.C, it is evident that initially she refused to engaged herself in any sexual relationship with the petitioner, and it is also a fact that she was aware of the fact that marriage between the petitioner and the respondent No. 2 may not be possible as they belong to different communities and especially the petitioner belong to Brahmin community. But when it was promised by the petitioner that he will convince his parents and will talk about their marriage and under the said misconception of the fact, the respondent No. 2 gave her consent for sexual relationship with the petitioner. Further, it is submitted that whether there was any intention to deceive the present respondent No. 2 from the very inception of his promise etc. are the matters to be decided or to be looked into at the time of trial and while exercising power under Section 482 Cr.P.C, the Court is not required to conduct the mini trial. Further the learned Court below has framed the charges after going through the statement made by the witnesses as well as the materials on record and accordingly, finding prima facie case, the charges were framed under the said Sections of law. Further it is submitted that the charges are required to be proved only during trial on the basis of evidence led by the parties. He further relied on the decision of *Hon'ble Apex Court in **Central Bureau of Investigation Vs. Aryan Singh etc.**, reported in (2023) SCC online SC 379* and especially stressed on para- 9, 10, 11 & 12 of the said judgment, which are read as under:

- “9. Having gone through the impugned common judgment and order passed by the High Court quashing the criminal proceedings and discharging the accused, we are of the opinion that the High Court has exceeded in its jurisdiction in quashing the entire criminal proceedings in exercise of the limited powers under [Section 482 Cr.P.C.](#) and/or in exercise of the powers under [Article 226](#) of the Constitution of India.*
- 10. From the impugned common judgment and order passed by the High Court, it appears that the High Court has dealt with the proceedings before it, as if, the High Court was conducting a mini trial and/or the High Court was considering the applications against the judgment and order passed by the learned Trial Court on conclusion of trial. As per the cardinal principle of law, at the stage of discharge and/or quashing of the criminal proceedings, while exercising the powers under [Section 482 Cr.P.C.](#), the Court is not required to conduct the mini trial. The High Court in the common impugned judgment and order has observed that the charges against the accused are not proved. This is not the stage where the prosecution / investigating agency is/are required to prove the charges. The charges are required to be proved during the trial on the basis of the evidence led by the prosecution / investigating agency. Therefore, the High Court has materially erred in going in detail in the allegations and the material collected during the course of the investigation against the accused, at this stage. At the stage of discharge and/or while exercising the powers under [Section 482 Cr.P.C.](#), the Court has a very limited jurisdiction and is required to consider “whether any sufficient material is available to proceed further against the accused for which the accused is required to be tried or not”.*
- 11. One another reason pointed by the High Court is that the initiation of the criminal proceedings / proceedings is malicious. At this stage, it is required to be noted that the investigation was handed over to the CBI pursuant to the directions issued by the High Court. That thereafter, on conclusion of the investigation, the accused persons have been chargesheeted. Therefore, the High Court has erred in observing at this stage that the initiation of the criminal proceedings / proceedings is malicious. Whether the criminal proceedings was/were malicious or not, is not required to be considered at this stage. The same is required to be considered at the conclusion of the trial. In any case, at this stage, what is required to be considered is a prima facie case and the material collected during the course of the investigation, which warranted the accused to be tried.*
- 12. In view of the above and for the reasons stated above, when the High Court has exceeded in its jurisdiction in quashing the entire criminal proceedings and applying the law laid down by this Court in catena of decisions on exercise of the powers at the stage of discharge and/or*

quashing the criminal proceedings, the impugned common judgment and order passed by the High Court quashing the criminal proceedings against the accused is unsustainable and the same deserves to be quashed and set aside.”

15. After hearing the submissions made by the learned counsel of both sides and perusing all the relevant documents and the annexures filed along with the petition, it is seen that there is no dispute that both the petitioner and the respondent No. 2 had sexual relationship for a considerable period and it is seen that even after his transfer from Itanagar, they also maintained relationship between them. The respondent No. 2 even stayed along with the petitioner for more than three and a half months in the same house. It is rightly submitted by the learned counsel for the petitioner that in the statement made by the respondent No. 2 under Section 164 Cr.P.C as well as from the statement made in the FIR, she was aware of the fact that the marriage between the respondent No. 2 and the petitioner may not be possible as they belong to different communities. But it also cannot be denied that though she initially refused to have any sexual relationship with the petitioner, but, subsequently, she gave her consent as it was promised by the petitioner that he will marry her and will also convince his parents and accordingly, he obtained her consent and hence, it cannot be said that there was no misconception of fact to attract Section 376 IPC. Further it is seen that after perusing the statement of witnesses and considering the other available case record, the learned Session Judge observed that there is prima facie material to frame charge against the present petitioner under Sections 376/417/506 IPC. More so, to frame charge, only prima facie case has to be established and in the present case, it is seen that there are prima facie materials to

frame charge against the present petitioner and accordingly, I find that the learned Session Judge committed no error or mistake while framing the charge against the present petitioner under the said Sections of law. More so, it is not supposed to conduct any mini trial, as observed by the Hon'ble Apex Court, while dealing with the petition under Section 482 Cr.P.C and it is the duty of the prosecution to prove the charges by producing necessary evidences during the trial. And to frame charge the requirement is to have a prima facie case. The Hon'ble Supreme Court in the case of **State of Haryana & Ors. Vs. Bhajan Lal & Ors.**, reported in **1992 Supp (1) SCC 335**, has held as under:

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

16. But the instant case is not covered by the guideline passed by the Hon’ble Apex Court in Bhajan Lal’s Case and it cannot be held that the case was lodged only due to wreaking vengeance to set aside or quash the criminal proceeding as well as the FIR, Charge-Sheet by invoking the provision of Section 482 Cr.P.C and accordingly, I find that it is not at all a fit case where Section 482 Cr.P.C can be exercised for quashing the FIR dated 20.07.2020.

17. In the result, I find no merit in this criminal revision petition and accordingly, the same stands dismissed.

JUDGE

Comparing Assistant