

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****CRR No. 401 of 2017**

Sanjay Kumar Sori S/o Samu Ram Sori Aged About 37 Years R/o
New G.A.D. Colony, Behind Kali Mandir, Dantewada District- South
Bastar Dantewada, Chhattisgarh.

---- Applicant**Versus**

State Of Chhattisgarh Through, District Magistrate- Dantewada,
Chhattisgarh.

---- Respondent

For applicant - Shri P.R. Patankar, Advocate.
For State -Shri Sameer Behar, PL.

Hon'ble Shri Justice Goutam Bhaduri**Order****25/04/2017**

1. Challenge in this petition is to the order dated 9/01/2017 passed by Additional Sessions Judge (F.T.C.), Dantewada in Sessions Case No.287/2016 wherein the application for discharge of the applicant was dismissed.
2. Brief facts of this case are that report was made by the complainant/victim aged about 28 years that she was working as AG-II in the office of Collectorate Sukma and was living at Dantewada from 2010 to obtain the degree of B.Ed. At the relevant time the applicant Sanjay Kumar Sori was posted as AG-III at District Hospital Sukma and they came to know each other and subsequently had developed the cordial relations. It is further alleged that the applicant disclosed his identity to be an unmarried boy and on 9/02/2016 the applicant performed marriage at Raipur and thereafter physical relation was developed for period from 9/02/2016 to 13/02/2016. Subsequently, they came back to Dantewada and it was disclosed by the applicant that the family members of the

applicant would be angry with such marriage and was kept separately however subsequently when she went along with the applicant to his home, it revealed that the applicant was already married having two children. Having known such fact that the applicant has played fraud with the victim she objected to it wherein she was assaulted and was given threat that nude pictures which were taken that of victim would be made public. Thereafter, she was forcefully deserted and left by the applicant accused. Initially the report was not lodged as after the incident she was in panic that obscene picture would be made public, however subsequently with the consultation of other person report was made. It was stated that on the basis of fraud and concealment of fact the applicant committed sexual intercourse which resulted into mental and physical torture. On the basis of such report FIR was lodged on 4/08/2016 and after investigation charge sheet was filed on 1/11/2016 (Annexure A-3) u/s 376, 494, 506 read with section 34 of IPC.

3. After filing of charge sheet the applicant had moved an application for discharge. The predominant ground was taken that victim is a major lady had consented for sexual intercourse further the report was made after six months of the incident and mainly the cognizance of Section 494 IPC which is covered under chapter XX of the IPC could not have been taken by the court since no separate complaint was filed by the complainant. It was further contended that she herself performed marriage with the applicant, therefore case under Section 376 IPC would not be made out. It is stated that in order to prosecute a person U/s. 494 of I.P.C., the rider of Section 198 of Cr.P.C. would come into play and police could not have taken cognizance of it.

4. Learned counsel Shri P.R. Patankar during his argument before the court strenuously pressed his contention and would submit that as per law laid down in case of **Mahesh Kumar Dhawan Vs. State of M.P. and Anr.** reported in **2012 (2) MPHT 158** the cognizance taken under Section 494

IPC would be without any jurisdiction as section 198 Cr.P.C. do not allow the same. He would further submit that offence under Section 376 IPC alleged sexual intercourse was out of result of marriage, therefore it would not fall under the category of rape. He placed his reliance in case of **Mahendra Kumar Jain and Ors. Vs. State of U.P. and Anr.** reported in **1988 CRI.L.J 544** of Allahabad High Court. It is contended that complaint is defined under Section 2(d) of the Cr.P.C which necessarily point out that written complaint should have been filed which do not include police complaint and the written complaint having not been filed cognizance under Section 494 of IPC could not have been taken by the court and can be investigated by police.

5. The initial reading of the first schedule appended to IPC indicate that offence under Section 494 IPC is non-cognizable and bailable. It is thus obvious that police should not take cognizance of the offence and that complaint had to be filed before Magistrate by the victim.

6. Section 198 of the Cr.P.C. deals with prosecution for offences against marriage which reads as under:-

“198. Prosecution for offences against marriage- (1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:

Provided that—

(a) where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of Sub-Section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under section 494 or section 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's, brother or sister, with the leave of the Court, by any other person related to her by blood, marriage or adoption.

(2) For the purpose of Sub-Section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code;

Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.

(3) When in any case falling under clause (a) of the proviso to Sub-Section (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable

opportunity of being heard.

(4) The authorisation referred to in clause (b) of the proviso to Sub-Section (1), shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(5) Any document purporting to be such an authorisation and complying with the provisions of Sub-Section (4), and any document purporting to be a certificate required by that Sub-Section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.

(6) No Court shall take cognizance of an offence under section 376 of the Indian Penal Code (45 of 1860), where such offence consists of sexual inter-course by a man with his own wife, the wife being under fifteen years of age, if more than one year has elapsed from the date of the commission of the offence.

(7) The provisions of this section apply to the abetment of, or attempt to commit, an offence as they apply to the offence.”

7. At this juncture the Section 155 of Cr.P.C. would also be relevant. Section 155 of Cr.P.C. deals with information as to non-cognizable cases and investigation of such cases. Sub-section (4) of the section clearly provides that where the case relates to two offences of which one is cognizable, the case shall be deemed to be a cognizable case notwithstanding that the other offence or offences are non-cognizable.

Therefore, sub-section (4) creates a legal fiction and provides that although a case may comprise of several offences of which some are cognizable and others are not, it would not be open to the police to investigate the cognizable offences only and omit the non-cognizable offences and the entire case to be treated as cognizable. It being so the police had no option but to investigate the whole of the case and to submit a charge sheet in respect of all the offences, cognizable or non-cognizable both and if police finds it after primary investigation offence appears to have been committed prima facie it has to proceed further. Sub-section (4) of Section 155 is a provision introduced for the first time in the Cr.P.C. in the year 1973. This was done to overcome the controversy about investigation of non-cognizable offences by the police without the leave of the Magistrate. Therefore the statutory provision being specific, precise and clear and there is no ambiguity in the language employed in sub-section (4). It is apparent that if the facts reported to the police disclose both cognizable and non-cognizable offences, the police would be acting within the scope of its authority in investigating both the offences as the legal fiction enacted in sub-section (4) of Section 155 provides that even non-cognizable case shall, in that situation, be treated as cognizable.

8. The similar proposition came up for consideration in case of **State of Orissa Vs. Sharat Chandra Sahu and another** reported in **AIR 1997 SC 1** and in between **Ushaben Vs. Kishorbhai Chunilal Talpada** reported in **AIR 2012 SCW 2398** wherein it was held that section 494 of the IPC falls in Chapter XX of the IPC. Chapter XX pertains to offences relating to marriage. So far as it is relevant Section 494 of IPC reads as under:-

“494. Marrying again during lifetime of husband or wife.—Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such

husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

9. Section 190 of the Cr.P.C and Chapter XIV states when cognizance of offences can be taken by a Magistrate. Section 190 of Cr.P.C. reads as under:-

“190. Cognizance of offences by Magistrates-(1) Subject to the provisions of this Chapter, any Magistrate of the first class, specially empowered in this behalf under Sub-Section (2), may take cognizance of any offence-

- (a) upon receiving a complaint of facts which constitute such offence;
- (b) upon a police report of such facts;
- (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under Sub-Section (1) of such offences as are within his competence to inquire into or try.”

10. Complaint is defined under Section 2(d) of the Cr.P.C. which reads as under:-

“2(d) complaint means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.”

Explanation-A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant. Explanation to Section 2(d) makes it clear that a report made by a police officer after investigation non-cognizable offence is to be treated as complaint and the police officer by whom such report is made shall be deemed to be the complainant.

11. Therefore, conjoint reading of section 155 (4), 198 (1)(c) of Cr.P.C. would make it clear that no fetters can be put on the police preventing

them from investigating the complaint which alleges offences u/s 376 IPC as also under Section 494 of IPC. Therefore, in the facts of this case cognizance taken by the police, investigation and the complaint filed is held to be according to law.

12. Further coming to the fact that whether offence under Section 376 IPC is made out or not? The FIR which is lodged by the prosecutrix would show that by giving false assurance of marriage sexual intercourse was committed. Considering such statement at this stage when the complainant has not been examined before the court, in what manner consent was obtained and whether it was on the basis of fraud or otherwise cannot be ascertained. Considering the allegations made prima facie which raises strong presumption of commission of offence, therefore, and defence raised by the applicant at this stage cannot be considered.

13. The Supreme Court in a case law reported in **AIR 2013 SC 52 -Shoraj Singh Ahlawat Vs. State of U.P.** has observed that the Court trying the case can direct discharge only for the reasons to be recorded by it and only if it considers that the charges against the accused to be groundless. Therefore, upon consideration of report and the police report if any presumption exist that offence has been committed, at the threshold applicant cannot claim for discharge. Defence raised by the accused cannot be considered by accepting his solitary statement.

14. In view of this, at this stage the discharge too cannot be ordered for simplicitor besides it is held that cognizance so taken by the Court is valid and legal. Taking the totality of the facts, I am of the considered view that no illegality has been committed by the court below which warrants interference. Accordingly, the revision has no merit and it is dismissed.

Sd/-
(Goutam Bhaduri)
JUDGE