

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL REVISION CASE No.2181 of 2017

ORDER:

Aggrieved by the order dated 11.07.2017 passed in CrI.M.P.No.16 of 2017 in S.C.No.435 of 2015 by the Assistant Sessions Judge at Narayanpet preferred this revision under Section 397 and 401 of Code of Criminal Procedure (for short "Cr.P.C.") and prayed to set aside the order passed by the Assistant Sessions Judge and discharge the petitioner for the offence punishable under Section 376 (2) (n) of Indian Penal Code (for short "I.P.C.")

Petitioner filed a petition under Section 239 of Cr.P.C. to discharge him on the ground that on scrutiny of the records of the case, statements and documents referred under Section 173 of Cr.P.C. disclosed no sufficient grounds for presuming that the petitioner/accused committed the alleged offence for proceeding against him, framing the charges. Entire case rests on circumstantial evidence or indirect evidence of L.Ws.2 to 8. The statements recorded under Section 161 Cr.P.C. did not make out any case and that proceeding against the petitioner further, for the grave offence under Section 376 (2) (n) of I.P.C. would not serve any purpose and it would be a futile exercise, thereby the petitioner put to serious inconvenience besides harassment and prayed to discharge him for the offence punishable under Section 376 (2) (n) of I.P.C.

Learned Additional Public Prosecutor filed counter denying material allegations inter alia contending that the petition filed under Section 239 of Cr.P.C. is not maintainable and that the material on record disclosed the ingredients of Section 376 of I.P.C. Moreover, FSL report clearly establishes that the petitioner/accused is biological father of the son born to the victim girl and prayed for dismissal of the petition.

Upon hearing argument of both the counsel, the trial Court passed a cryptic order perusing the statement of victim, who categorically stated about the promise made by the petitioner and had sexual intercourse with her, as a result of which she became pregnant. Therefore, material available on record would prima facie attract the offence under Section 376 (2) (n) of I.P.C. and dismissed the petition.

Aggrieved by the order passed by the trial Court, petitioner filed the present revision on various grounds, mainly contending that the statements of L.Ws.2 to 8 recorded under Section 161 of Cr.P.C. would not disclose *prima facie* case against the petitioner and that too sexual intercourse is not one day's affair, it is for a period of more than one year as admitted by the victim in her statement recorded under Section 161 of Cr.P.C., so also in the complaint. In such case, it is difficult to conclude whether the petitioner had sexual intercourse without her consent. Apart from that summoning of accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a

matter of course. Filing of such complaint, framing of charges and proceed to trial would amount to harassment unnecessarily, but the Sessions Court did not consider this aspect in proper perspective and committed an error in dismissing the petition and prayed to set aside the order dated 11.07.2017 passed in Crl.M.P.No.16 of 2017 in S.C.No.435 of 2015 by the Assistant Sessions Judge, Narayanpet and discharge the petitioner for the offence punishable under Section 376 (2) (n) of I.P.C. by allowing the revision.

Sri P.Vishnuvardhana Reddy, learned counsel for the petitioner, contended that the victim had sexual intercourse continuously for a period of one year, even then she did not complain to anyone and the act, if any, committed by the petitioner is only consensual sex but not rape. Even if the entire material is taken into consideration, it would not make out any *prima facie* case to frame charges and proceed against the petitioner for the offence punishable under Section 376 (2) (n) of I.P.C. and placed reliance on a judgment of Apex Court reported in “**K.P.Thimmappa Gowda v. State of Karnataka**”¹ to contend that when the sexual intercourse is with consent and there is unexplained delay of 8 months in filing the complaint, the accused is entitled to acquittal as no case of rape as defined under Section 375 of I.P.C. was made out. On the strength of the principle laid down in the above

¹ (2011) 14 SCC 475

judgment, learned counsel for the petitioner requested this Court to allow the revision setting aside the impugned order passed by the Sessions Court and discharge the petitioner by exercising power under Section 397 and 401 of Cr.P.C.

Learned Public Prosecutor for the State of Telangana supported the order passed by the Sessions Court in all respects though it is a brief order and contended that when the Sessions Judge found that there is prima facie material to proceed against the petitioner, this Court cannot allow the petition filed by the petitioner for his discharge for the offence punishable under Section 376 (2) (n) of I.P.C.

Considering rival contentions and perusing material available on record, the point that arises for consideration is as follows:

“Whether material available on record is sufficient to proceed against the accused for the offence punishable under Section 376 (2) (n) of I.P.C.?”

P O I N T:

The present petition is filed under Section 397 and 401 of Cr.P.C. Jurisdiction of this Court under Section 397 and 401 of Cr.P.C. is limited and the High Court may exercise such power only when the Court found that there is a manifest perversity in the order or the finding recorded by the Court is without any evidence or material, though section 401 of Cr.P.C. confers a kind of paternal and supervisory

jurisdiction on the High Court over all other criminal Courts established in the State in order to correct miscarriage of justice arising from a misconception of law, irregularity or procedure, neglect or proper precautions or apparent harshness of treatment which has on the one hand resulted in some injury to the due maintenance of law and order or, on the other hand, in some underserved hardship to individuals. The revisional power conferred on the High Court by Section 401 of Cr.P.C. is discretionary power, has to be exercised in the aid of justice. Whether or not the High Court will exercise its revisional jurisdiction in a given case, must depend upon facts and circumstances of each case. The discretion conferred on the High Court by Section 401 of I.P.C. has to be exercised judicially, on judicial principles and not arbitrarily. Therefore, keeping in mind the scope of revision, I would like to decide the present issue before this Court.

Section 239 of Cr.P.C. deals with discharge of the accused, whereas Section 238 of Cr.P.C. deals with power of the Court to discharge the accused in cases instituted on a police report, but quoting wrong provision of law is not a ground to deny the relief if the petitioner is otherwise entitled.

According to sections 238 and 239 of Cr.P.C. if the Court is of the opinion upon considering the police report and documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate or Sessions Judge thinks necessary and after giving the

prosecution and the accused an opportunity of being heard, the Magistrate or Sessions Judge considers the charge against the accused to be groundless, he shall discharge the accused and record his reasons for so doing.

The documents referred to in Section 207 of Cr.P.C. also must relate to such documents which can be subsequently transferred into evidence at the time of the trial. Hearing of the prosecution and the accused under this section does not mean the hearing of arguments only, it includes the hearing of the evidence if needed. The word “groundless” would mean the absence of reasonable ground to expect a conviction. “Groundless” is equivalent to saying that there is no ground for framing the charges, which depends on the facts and circumstances of each case. Therefore, only when the Magistrate or Sessions Judge comes to conclusion that there are no grounds to frame a charge for specific offence, the Court can discharge the accused for such offence. Even the scope of Section 238 and 239 Cr.P.C. is limited, such power has to be exercised only when the Magistrate or Sessions Judge came to conclusion that it is groundless, based on charge sheet and documents filed under Section 173 of Cr.P.C.

Consideration of records and documents at the stage of framing charge is for the limited purpose of ascertaining whether or not there is sufficient ground to proceed against the accused. Whether the material at the hands of the

prosecution is sufficient and whether the trial will end in conviction or acquittal are not relevant considerations at the stage of framing of charge as held by the Apex Court in **“P.Vijayan v. State of Kerala²”**

During hearing, learned counsel for the petitioner filed copy of charge sheet and statements of witnesses recorded by the police under Section 161 of Cr.P.C. and drawn the attention of this Court to the contents of complaint lodged with the police dated 03.09.2014. In the said complaint, victim made a specific allegation that the petitioner/accused by making a false promise that he would marry her enjoyed her sexually for the last one year and thereafter refused to marry her and requested the police to take action against the person, who enjoyed her sexually and refused to marry her when she conceived.

Statement of the victim recorded under Section 161 of Cr.P.C. is also on the same lines, but the contents clearly disclosed that the petitioner/accused had sexual intercourse with her making a false promise, but refused to marry her when she conceived. Taking advantage of the statement of the victim and the complaint dated 03.09.2014, learned counsel for the petitioner contended that the sexual intercourse by the petitioner with the victim is not against her will and it is with the consent only. If it is a consensual intercourse, it would not fall within the definition of rape under Section 376

² AIR 2010 SC 663

of I.P.C. But the allegations in the complaint dated 03.09.2014, which set the criminal law into motion, would disclose that the petitioner had sexual intercourse with her for the last one year prior to 03.09.2014, the date of complaint. Victim was aged about 19 years as per the details mentioned in her statement recorded under Section 161 Cr.P.C. on 03.09.2014. When the petitioner/accused had sexual intercourse with a woman with or without consent when she is under 18 years of age, which would attract the offence punishable under Section 376 of I.P.C. Therefore, *prima facie* material on record would show that the case would fall *prima facie* within clause (6) of Section 375 of I.P.C. Apart from that there is a presumption under Section 114-A of Evidence Act as to the absence of consent in certain prosecutions for rape. According to Section 114-A of Evidence Act in a prosecution for rape under clause (a) to (n) of subsection (2) of Section 376 of I.P.C., where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. Explanation thereto further explained the word “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of Section 375 of I.P.C.

When the Court draws such presumption, the burden will automatically shift on to the petitioner/accused in a case

of prosecution for the offence punishable under Section 376 of I.P.C as it is rebuttable. Therefore, adducing rebuttable evidence would arise only on examination of victim girl before the Court. As on today the material on record would disclose that the petitioner had sexual intercourse with the victim girl for the last one year prior to 03.09.2014 and by then she must be aged less than 18 years. Therefore, all these questions are matter of evidence and at this stage, it is difficult to conclude whether the victim is a consenting party and had sexual intercourse and when the consent is not voluntary, but based on false promise made by the petitioner/accused allegedly, such questions have to be decided after full-fledged trial and at this stage it is difficult to conclude that there are no grounds to proceed against the petitioner for the offence punishable under Section 376 of I.P.C.

It is also contended that when the material available on record is groundless, the Court cannot proceed, since, it would amount to harassment. No doubt, summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine

the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused as held by the Apex Court in “**Pepsi Foods Ltd. v. Special Judicial Magistrate**”³

The law declared by the Apex Court in the above judgment is not in quarrel, but in the present facts of the case several question cannot be decided at this stage. The judgment rendered in “**K.P.Thimmappa Gowda v. State of Karnataka**” (referred supra) relates to a judgment after full-fledged trial, there is unexplained delay of 8 months in filing the complaint and prosecution failed to prove that the victim therein is less than 16 years of age as on the date of alleged rape. When the judgment of the Apex Court is based on appreciation of evidence, the same cannot be applied to the present facts of the case while considering the application

³ AIR 1998 SC 128

filed under Section 238 or 239 of Cr.P.C. Therefore, judgment referred supra is of no assistance to the petitioner.

While deciding a petition filed under Section 238 and 239 of Cr.P.C. the Court has to look into the entire material on record including the evidence oral and documentary, taken together must justify framing of a charge for an offence as held by the Apex Court in “**R.S.Nayak v. A.R.Antulay**”⁴

Thus, it is obligatory on the part of the Court while deciding an application filed under Section 238 and 239 of Cr.P.C. to go into the material available on record including the statements recorded by the police under Section 161 of Cr.P.C. or confessional statements recorded by the Magistrate under Section 164 of Cr.P.C. In the present case, no confessional statements recorded by the Magistrate, but police recorded the statements of witnesses under Section 161 of Cr.P.C., but those statements are previous statements of witnesses and not substantive piece of evidence and at this stage, facts stated in the said statements would suggest that the petitioner had sexual intercourse with the victim and if she is able to prove that by the date of alleged sexual intercourse she is less than 18 years age, then consent, if any, given by her is immaterial or her consent was obtained fraudulently. Therefore, in those circumstances even if the entire material is taken into consideration coupled with clause (6) of Section 375 of I.P.C. and Section 114-A of

⁴ AIR 1986 SC 2045

Evidence Act, it is difficult to conclude at this stage that there are no grounds to proceed against the petitioner for the offence punishable under Section 376 (2) (n) of I.P.C.

Though the order of the trial Court is cryptic without considering any material, this Court has considered the material available on record with reference to law and concluded that there is sufficient *prima facie* material against the petitioner to proceed further while disbelieving the contention that the charge is groundless. Therefore, when there are certain disputed questions as to the age of the victim and whether the consent given by her is voluntary or free, it is difficult, at this stage, to conclude that the charge is groundless to proceed further against the petitioner.

Therefore, I find no ground to discharge the petitioner for the offence punishable under Section 376 (2) (n) of I.P.C. and the dismissal of the petition by the Sessions Court by cryptic order, which needs no interference of this Court while exercising power under Section 397 and 401 of Cr.P.C. in view of my foregoing discussion. Consequently, the revision is liable to be dismissed as it is devoid of merits.

In the result, the revision is dismissed.

The miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

02.08.2017

Note:

Issue C.C. by 03.08.2017

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