

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRR No. 243 of 2020

- Devanand Sahu S/o Ghanshyam Sahu, Aged About 31 Years, R/o Village Parsatthi, Police Station Fingeshwar, District - Gariyaband Chhattisgarh., District : Gariyabandh, Chhattisgarh

---- Applicant

Versus

- State of Chhattisgarh Through Police Station Fingeshwar, District Gariyaband Chhattisgarh., District : Gariyabandh, Chhattisgarh

--- Non-applicant

For Applicant– Shri Mohammad Afroz Athar, Advocate.

For State/Non-applicant – Shri Adil Minhaj, Govt. Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Order on Board

03-03-2020

Heard.

1. By this revision petition the order dated 10-01-2020 passed in S.T. No.81/2019 by the Additional Sessions Judge, Fast Track Special Court (POCSO and Rape cases), Gariyaband, District Gariyaband, Chhattisgarh framing the charge against the applicant is under challenge.
2. The applicant has been charged for offence under Section 376 and 493 of the IPC.
3. It is submitted by learned counsel for the applicant that according to the complaint given by the complainant/prosecutrix herself, she and the applicant got acquainted. The complainant herself was a divorcee. The applicant made her believe that he has also divorced his previous wife. The applicant performed marriage with the complainant on 26-12-2017 in a temple. Subsequent to that, both of them resided together for some time. On 15-08-2019 the complainant asked the applicant to perform regular marriage with her, on which the applicant denied and stated that he has not divorced his previous wife.

It is submitted that the contents of this complaint and the statement given by the prosecutrix herself do not in any manner constitute offence under Section 376 of the IPC. The relationship of the applicant with the prosecutrix was based on consent. It is only for the reason that the applicant did not perform regular marriage with the complainant, this complaint has been given.

It is further submitted that offence under Section 493 of the IPC is also not made out because the complainant knew from the beginning that the marriage that was performed in a temple was not a lawful marriage and the complainant who herself is a police Constable cannot be said to be ignorant of this fact, that what is a lawful marriage. Hence, it is prayed that the revision petition be allowed and the applicant be discharged.

4. Learned counsel for the State/respondent opposes the submission made by learned counsel for the applicant and submits that the applicant has made sexual exploitation of the prosecutrix by making her believe that he has divorced his wife and therefore the complainant gave consent for the relationship and that too after performance of marriage in the temple. Hence, it is a case in which the consent of the prosecutrix has been obtained by deceit. Therefore, offence under Section 376 of the IPC is made out and also there is sufficient material to hold the charge against the applicant under Section 493 of the IPC. Hence, the revision petition be dismissed.

5. Heard learned counsel for the parties and perused the documents.

6. On perusal of the copy of the charge sheet filed along with the petition, it is found that details of the complaint are mentioned as it has been submitted by learned counsel for the applicant. The statement of the prosecutrix that the applicant made a statement to her that he has divorced his previous wife and convinced her accordingly and it was subsequent to that, the applicant and the prosecutrix performed marriage in temple, though it was not a lawful marriage under the law. According to the evidence in charge sheet, the applicant then

later on revealed that he has not divorced his previous wife, this was new fact and on this basis it can be held that the earlier statement of the applicant to the prosecutrix has led to a misconception and made the prosecutrix believe that in future she and the applicant can get legally married.

7. Section 90 of the IPC itself defines that 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 of injury, or under a misconception of fact, therefore, in such a situation the consent for having physical relation with the applicant given by the prosecutrix at the initial stage cannot be regarded as a free consent in the stage of framing the charge on prima facie basis.

8. In the case of **Deepak Gulati Vs. State of Haryana**, (2013) 7 SCC 675 Hon'ble the Supreme Court has held in paras 18, 19, 20 and 21 that:-

18. Section 114-A of the Indian Evidence Act, 1872 (hereinafter referred to as the "Act 1872") provides, that if the prosecutrix deposes that she did not give her consent, *then the court shall presume that she did not in fact, give such consent*. The facts of the instant case do not warrant that the provisions of Section 114-A of the Act 1872 be pressed into service. Hence, the sole question involved herein is whether her consent had been obtained on the false promise of marriage. Thus, the provisions of Sections 417, 375 and 376 IPC have to be taken into consideration, alongwith the provisions of Section 90 of the IPC. Section 90 of the IPC provides, that any consent given under a misconception of fact, would not be considered as valid consent, so far as the provisions of Section 375 IPC are concerned, and thus, such a physical relationship would tantamount to committing rape.

19. This Court considered the issue involved herein at length in *Uday v. State of Karnataka*, AIR 2003 SC 1639; *Deelip Singh @ Dilip Kumar v. State of Bihar*, AIR 2005 SC 203; *Yedla Srinivasa Rao v. State of A.P.*, (2006) 11 SCC 615; and *Pradeep Kumar Verma v. State of Bihar*, AIR 2007 SC 3059, and came to the conclusion that in the event that the accused's promise is not false and has not been made with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act(s) would not amount to rape. Thus, the same would only hold that

where the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned.

20. Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamounts to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks.

21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.”

9. In view of the settled position of law referring to the facts and circumstances of this case, I am of this view that nature of consent was whether free or misconception cannot be determined at the stage of charge. Therefore, the applicant has to undergo trial to establish his case for charge under Section 376 of the IPC.

The charge under Section 493 of the IPC against the applicant is not made out on the basis of the evidence that is present in the charge sheet as the complainant herself had this believe from the very beginning that she herself and the applicant are not lawfully married. Therefore, there was no question of the applicant to make her believed that he is her lawfully married husband. Hence, framing of charge under Section 493 of the IPC is erroneous which needs to be interfered with.

10. Consequently, this revision petition is allowed in part. Charge under Section 376 of the IPC against the applicant is upheld. However, the charge against him under Section 493 of the IPC is set aside.

Sd/-

(Rajendra Chandra Singh Samant)
Judge