

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRR No. 400 of 2020

- Kishan Singh Thakur S/o Shri Chaitram Thakur, Aged About 23 Years, R/o Sirgitti, Near Baijnath Talab, Police Station - Sirgitti, Tahsil and District - Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh

---- Petitioner

Versus

- State Of Chhattisgarh Through -the Station House Officer, Police Station - Sarkanda, District - Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh

---- Respondent

For Petitioner – Shri Rishi Rahu Soni, Advocate.

For State/Respondent – Shri Adil Minhaj, Govt. Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant
Order on Board

27-11-2020

1. This revision petition has been brought against the order of framing charge passed by the Special Court (F.T.C.), Bilaspur (C.G.) on 30-01-2020 in S.T. No.15/2020. Learned trial Court has framed charges against the petitioner under Sections 376(2) and 506 of the IPC.

2. It is submitted by learned counsel for the petitioner that the framing of charges against the petitioner is erroneous and bad in the eyes of law. There is no material present in the charge sheet to hold that a prima facie case is made out against the petitioner for framing of charges under Section 376(2) and 506 of the IPC.

It is submitted that the prosecutrix has clearly stated before the Magistrate under Section 164 of the Cr.P.C. that she was acquainted with the petitioner since 2017. They used to have talks with each other and there was love affair between them. The petitioner had expressed his intention to marry with the prosecutrix. She has stated that whenever the petitioner used to visit her he would make statement of marrying her and then have physical relation with her. Subsequent to which the petitioner refused to make call to the

prosecutrix and he also blocked his phone number for the prosecutrix, then the prosecutrix came to know that the petitioner has performed engagement for marriage with some other girl. Then, the prosecutrix talked with petitioner who threatened her and abused her. It is submitted that on the basis of this statement it is very clear that the relationship of the petitioner with the prosecutrix was consensual. The prosecutrix being of age 27 years was competent to give consent for such relation.

On behalf of the petitioner reliance has been placed on the judgment of M.P. High Court in case of **Hemant Choubey Vs. State of M.P.**, 2015 (II) MPJR 62. It is submitted that the single Judge of Madhya Pradesh High Court has held that physical relation based on promise to marry in which the promise was not kept does not amount to commission of offence of rape.

It is submitted that the impugned order passed is not sustainable which may be set aside and it is prayed that the petitioner be discharged.

3. Learned counsel for the State/respondent opposes the submission and submits that there is ample material present in the charge sheet to make out a case against the petitioner for framing charges under Sections 376(2) and 506 of the IPC. The prosecutrix has given a written complaint stating that the petitioner/applicant has obtained her consent on promise to marry her, on the basis of which the FIR has been lodged and she has given similar statement in the investigation. Therefore, the present revision petition is without any substance which may be dismissed.

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

5. Considered on the submissions. The statement of the prosecutrix in her complaint, in her statement under Section 161 and 164 of the Cr.P.C. appear to be the same. She has stated that when she met with the petitioner, the petitioner expressed his love for her and also his intention to marry her, therefore, the petitioner and the prosecutrix started having physical relation.

This continued for about two years, thereafter, the petitioner started withdrawing him from the company of the prosecutrix. At some later point of time the prosecutrix came to know that the petitioner has performed engagement ceremony with some other girl. Then she met with the petitioner and in that conversation she alleges that the petitioner threatened and abused her. Subsequent to which the FIR has been lodged.

According to the statement given by the prosecutrix, it appears that during the two years of relationship the prosecutrix never insisted the petitioner to marry her. When the petitioner withdrew from her company she had some anxiety, but when she came to know of engagement of the petitioner with some other girl she has acted and lodged the FIR against the petitioner.

The prosecutrix is major and she was well aware of the situation in which she submitted for physical relation with the petitioner. To make out a specific case for prosecution there is requirement of material in this respect that the petitioner had no intention to marry the prosecutrix from the very beginning when the relation started about two years prior to the lodging of the FIR.

The definition under Section 375 of the IPC does not mention about obtaining of consent for physical relation by committing fraud upon the prosecutrix. However, consent is dealt in Section 90 of the IPC, which says that a consent is not 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.

In case of **Uday Vs. State of Karnataka**, (2003) 2 SCC 46, Hon'ble the Supreme Court has held that:

"A. Penal Code 1860 - Ss. 375 & 90 and 376 - Rape -- "Consent"
Voluntary consent or consent under misconception of fact -
Determination of - Consent given by the prosecutrix to sexual intercourse
with accused - appellant, with whom she was deeply in love, on a

promise that he would marry her on a later date - Prosecutrix continuing to meet accused and often having sexual intercourse and becoming pregnant - Complaint lodged on failure of appellant to marry her - In such case, held, the consent cannot be said to be given under misconception of fact - A false promise is not a fact within the meaning of the Penal Code - For determining whether consent given by the prosecutrix was voluntary or under a misconception of fact, held, there is no straitjacket formula and each case has to be decided considering the evidence and surrounding circumstances of that case - Where (i) the prosecutrix (aged 19 years on the date of occurrence) had sufficient intelligence to understand the significance and moral quality of the act she was consenting to, (ii) she was conscious of the fact that her marriage with the appellant was difficult on account of caste considerations, (iii) it was difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise, and (iv) there was no evidence to prove conclusively that the appellant never intended to marry the prosecutrix, held, appellant's conviction and sentence under S. 376 IPC was liable to be set aside - Question as to whether in a case of rape the misconception of fact must be confined to the circumstances falling under S. 375 fourthly and fifthly, or whether consent given under misconception of fact contemplated by S. 90 has a wider application so as to include circumstances not enumerated in S. 375, held, not necessary to be considered herein."

The case of Uday Vs. State of Karnataka (supra) has been referred in the judgment of M.P. High Court in matter of Hemant Choubey Vs. State of M.P. (supra).

6. On considering the circumstances of this case, it is found that the petitioner was eligible to marry at the time he made acquaintance with the prosecutrix and after expressing his intention to marry her both of them engaged in physical relation which continued for almost two years, during which the prosecutrix never objected or never insisted the petitioner to marry her, therefore, her continued submission for physical relation to the petitioner shows that the consent for physical relation was not based on the promise to

marry alone. It was her willingness to engage in such relationship because of which the relationship continued for so long until the circumstances changed and the petitioner withdrew from her society. Hence, I am of this view that in the present case there had been no misconception of fact and therefore the consent given by the prosecutrix for physical relation with the petitioner was willful without any exception. Therefore, I am of this opinion that framing of charge against the petitioner under Section 376(2) of the IPC is without any substance as there is no such prima facie case present.

7. As regards the framing of charge under Section 506 of the IPC, I am of this view that there is material present for framing of such charge.

8. Therefore, after discussion made hereinabove and over all consideration of the material present in the case, this revision petition is partly allowed. The impugned order to the extent of framing of charge against the petitioner under Section 376(2) of the IPC is set aside. However, the order framing charge under Section 506 of the IPC is affirmed. The petitioner be tried for the offence under Section 506 of the IPC by the Court having jurisdiction.

9. The petition stands disposed off.

Sd/-

(Rajendra Chandra Singh Samant)
Judge