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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 06.08.2020

DELIVERED ON : 21.08.2020

CORAM:

THE HONOURABLE MR.JUSTICE **R. PONGIAPPAN**

Crl.O.P.(MD)No.6574 of 2020

and

Crl.M.P.(MD) Nos.3342 & 3698 of 2020

Ramkumar

... Petitioner / Sole accused

Vs.

1.The Inspector of Police,
All Women Police Station,
Thiruchendur,
Thoothukudi District.

... 1st Respondent/ Complainant

2.Jency Mary

... 2nd Respondent/ Defacto
Complainant

PRAYER : Criminal Original Petition filed under Section 482 of Cr.P.C, to call for the records relating to the impugned First Information Report registered in Crime No.2 of 2020, dated 18.01.2020, on the file of the first respondent, quash the same.

For Petitioner : Mr. R.Anand
for Mr.Thirunavukkarasu

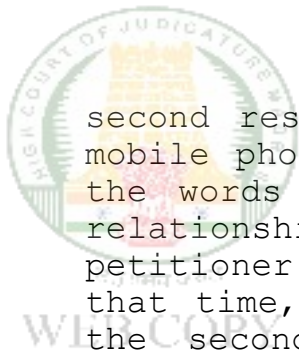
For 1st Respondent : Mr.S.Chandrasekar
Additional Public Prosecutor

For 2nd Respondent : Mr. V.Kathirvelu,
Senior Counsel
for Mr.A.Siva Subramanian

O R D E R

This Criminal Original Petition has been filed seeking the relief to call for the records relating to the impugned First Information Report, registered in Crime No.2 of 2020, dated 18.01.2020, on the file of the first respondent and quash the same as illegal.

2.The case of the prosecution is that the second respondent / de-facto complainant is working as Police at Arumuganeri Police Station. During the year 2016, while she was working at Thiruchendur Temple Police Station, the petitioner / accused, namely, Ramkumar who is also working as Police at Manimutharu 9th Battalion was deputed to the Thiruchendur Temple for bandobust. Before the occurrence, the petitioner managed to obtain the details of the

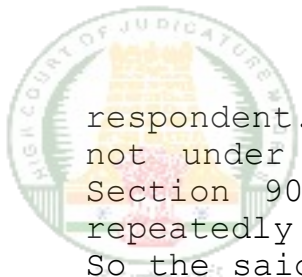


second respondent from the Police Station and contact her through mobile phone and proposed his interest of marrying her. Believing the words of the petitioner, the second respondent developed her relationship with the petitioner and started talking with the petitioner through mobile phone and whats-app video call. During that time, the petitioner has sent his nude and obscene photos to the second respondent and enticed her, for which, the second respondent slammed his behavior and stopped talking with the petitioner. On 16.01.2018, at about 11.00 a.m., the petitioner intercepted the second respondent while she was returning to the police quarters and conveyed apology for his act and insisted to take him to her room. After reaching the room, the petitioner forcibly raped the second respondent and took nude photos of her. Further, the petitioner informed the second respondent that only if she accepts intercourse as per his wish, he would marry her, failing which, he will not marry her. Therefore, the second respondent believing the words of the petitioner, co-operated with him many times.

3.After the said incident, the petitioner used to send obscene photos to the whats-app number of the second respondent and insisted her to send her obscene photos. Subsequent to that on 22.10.2018, 08.06.2019, 24.06.2019, 10.07.2019 and 13.08.2019, the petitioner forcibly had sexual relationship with the second respondent against her wish. At the time, when the second respondent insisted the petitioner to marry her, the petitioner informed that the different community would not be a hindrance and he would obtain necessary consent from his parents for the marriage and assured the second respondent that he will marry her at any cost. Further on 13.10.2019, the petitioner went to the quarters of the second respondent and forcibly had sexual relationship with her many times. Thereafter, abruptly the accused severed the relationship with the second respondent. Therefore, without any alternative, the second respondent lodged a complaint and upon which FIR has been registered in Crime No.2 of 2020, for the offences punishable under Sections 417, 376 and 506(i) of IPC.

4.In this regard, the learned counsel appearing for the petitioner would submit that the petitioner is aged about 28 years and the second respondent is aged about 36 years. Only for the reason that the petitioner was not inclined to accept the proposal made by the second respondent, the second respondent herein had developed animosity and lodged a false complaint against the petitioner.

5.Further, by relying upon the judgment of our Hon'ble Apex Court in **Pramod Suryabhan Pawar Vs. The State of Maharashtra and Others**, reported in **MANU/SC/1142/2019** and made a submission that to attract Section 376 of IPC, the ingredients mentioned in 375 of IPC has to be present. But here is a case where the alleged offence of rape has been committed only after the consent from the second



respondent. Further, the consent given by the second respondent is not under misconception of fact and attract the offence under Section 90 of IPC. Further the alleged occurrence had happened repeatedly in the room, in which, the second respondent was stayed. So the said circumstances, clearly reveals the fact that the consent given by the second respondent is a voluntary one. In this regard, the Judgment of our Hon'ble Apex Court has been referred to by the learned counsel for the petitioner, in which, it has been held as follows :

"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.

11. The primary contention advanced by the complainant is that the appellant engaged in sexual relations with her on the false promise



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of marrying her, and therefore her "consent", being premised on a "misconception of fact" (the promise to marry), stands vitiated.

12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. In Dhruvaram Sonar which was a case involving the invoking of the jurisdiction under Section 482, this Court observed:

"15. ... An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of." This understanding was also emphasised in the decision of this Court in Kaini Rajan v State of Kerala:

"12. ... "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was (2013) 9 SCC 113 consent or not, is to be ascertained only on a careful study of all relevant circumstances."

13. This understanding of consent has also been set out in Explanation 2 of Section 375 (reproduced above). Section 3(1) (w) of the SC/ST Act also incorporates this concept of consent:

"3(1) (w) -

(i) intentionally touches a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste



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or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient's consent;

... Explanation.--For the purposes of sub-clause (i), the expression "consent" means an unequivocal voluntary agreement when the person by words, gestures, or any form of non-verbal communication, communicates willingness to participate in the specific act:

Provided that a woman belonging to a Scheduled Caste or a Scheduled Tribe who does not offer physical resistance to any act of a sexual nature is not by reason only of that fact, is to be regarded as consenting to the sexual activity:

Provided further that a woman's sexual history, including with the offender shall not imply consent or mitigate the offence;"

14. In the present case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In *Anurag Soni v State of Chhattisgarh*, this Court held:

"37. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 of the IPC and can be convicted for the



offence under Section 376 of the IPC." Similar observations were made by this Court in *Deepak Gulati v State of Haryana*¹⁰ ("Deepak Gulati"):

"21. ... 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..."

6.The learned counsel for the petitioner would further submit that in respect of the offence under Section 506 of IPC, the prosecution must prove :

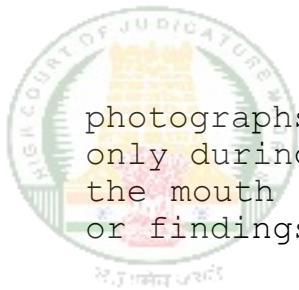
(i) That the accused threatened some person.

(ii) That such threat consisted of some injury to his person, reputation or property; or to the person, reputation or property of some one in whom he was interested;

(iii) That he did so with intent to cause alarm to that person; or to cause that person to do any act which he was not legally bound to do, or omit to do any act which he was legally entitled to do as a means of avoiding the execution of such threat." A plain reading of the allegations in the complaint does not satisfy all the ingredients as noticed above.

He would further submit that applying the above principle in a case in hand, if really the petitioner made a threat, the second respondent should immediately lodged a complaint before the police but only after breach of alleged promise made by the petitioner, she lodged a false before the police. Therefore, the case under Section 506 (i) of IPC can also be a abuse of process of law.

7.In this regard, the learned senior counsel appearing for the second respondent would submit that the consent in the present case is not voluntary, but it was under misconception of fact, which would certainly amounts to rape. On a reading of the First Information Report, it is clear that the only want of the accused was to satisfy his lust which constituted the rape, as the petitioner had not only threatened by black-mailing that he may release the inappropriate pictures of the second respondent but had also promised to marry the second respondent but did not fulfil it. He would rely on the judgment of our Hon'ble Apex Court in **XYZ Vs. State of Gujarat and another**, reported in **(2019) 10 SCC 337** and made a submission as to the continuance of the offence in the room stayed by the second respondent, are the matters for investigation. Further, according to the case of prosecution, before the commissioning of the offence of rape, the petitioner took nude



photographs of the second respondent. So that has to be decided only during the time of trial, particularly, if let in evidence from the mouth of the second respondent. In otherwise, any observations or findings of this Court will affect the investigation and trial.

8. During the course of hearing, the learned counsel for the second respondent relied on Section 114 of Indian Evidence Act and made a submission that a reading of the aforesaid Section makes it clear that, where sexual intercourse by the accused is proved and the question is as to 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 give her consent, the Court shall presume that she did not consent. Ultimately, he concluded the submission that exercise of Section 114 depends on the content of the complaint and the materials placed on record. Further he would submit that for the offences registered under the provisions of Information Technology Act, 2000, the same has to be dealt with only at the time of enquiry, particularly, after recovering the photographs from the petitioner's mobile phone. Therefore, this is not a fit case to quash the First Information Report as prayed for by the petitioner.

9. Heard, the learned counsel appearing for the petitioner, the learned Additional Public Prosecutor appearing for the first respondent and the learned Senior Counsel appearing for the second respondent.

10. Upon considering the arguments advanced by either side, it is not in dispute that the petitioner and the second respondent are working as Police in Tamil Nadu Police Department. Further the alleged occurrence had happened repeatedly in the room, in which the second respondent was stayed. Further, the said situation creates suspicious circumstances that the alleged rape has been committed by the petitioner with the voluntary consent of the second respondent. However, the averments set out in the First Information Report clearly disclose the fact that only after making promise for marrying her, the second respondent herein had considered for physical contact. Therefore, to resolve the issue, what has to be decided is as to whether the consent obtained by the petitioner is voluntary or under misconception of facts. That has to be decided only during the time of trial, particularly, during the time of giving evidence before the Trial Court. Further as per the allegations levelled by the second respondent that she has lodged a complaint immediately after breaking the promise to marry her by the petitioner. So it cannot be said that the second respondent lodged a complaint belatedly.

11. At this juncture, both the counsel appearing for the respondents as well as the petitioner had not stated anything about the recovery of nude photographs as alleged to be taken by the



investigation the same has to be done by the investigation.

12. In the judgment of our Hon'ble Apex Court in *State of Orissa and another Vs. Saroj Kumar Sahoo*, reported in 2005(13) SCC 540, has held as follows :

When exercising jurisdiction under Section 482 of the Cr.P.C., the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly

So applying the principle said out by our Hon'ble Apex Court, in this case, since in the application filed under Section 482 of Cr.P.C., it is not the duty of this Court to made enquiry about the reliability of evidence which concluded during the time of investigation. Here is a case, where the investigation is at the threshold stage. Further the allegations levelled by the second respondent is nothing but a very serious one.

13. In the case of **Ajaykumar Das Vs. State of Jharkhand and others** in **Criminal Appeal No.1735 of 2011**, our Hon'ble Apex Court has held as follows :

"Ration Decidendi : *Genuineness of the allegations / charge is an issue to be tried and the Court in exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure cannot delve into such factual controversy so as to quash the proceedings."*

Applying the principles set out in the above referred judgment, herein also the allegations levelled by the second respondent is so serious one. Invoking Section 482 of Cr.P.C to find out the truthfulness of the allegations, trial is necessary.

14. Further the judgment of our Hon'ble Apex Court in **Central bureau of Investigation Vs. A.Ravishankar Prasad and others** reported in **(2009) 2 Supreme Court Cases (Cri) 1063**, has held as follows :

"Inherent powers of High Court under Section 482 of Cr.P.C are meant to act ex debito



18.In the result, this Criminal Original Petition is dismissed. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (AD-II)

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// True Copy //

/ /2020

Sub Assistant Registrar(CS)

RM

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate / litigant concerned.

To

1.The Inspector of Police,
All Women Police Station,
Thiruchendur,
Thoothukudi District.

2.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.M. THIRUNAVUKKARASU, Advocate (SR-14577[F] dated 21/08/2020)

Order in
Crl.O.P.(MD)No.6574 of 2020
21.08.2020

AP(01/09/2020) 10P 4C