

16.11.2021

Item No.5
Ct.No.34
dc.

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION**

C.R.R. 286 of 2021
(Via Video Conference)

Riya Sarkar
versus
The State of West Bengal & Anr.

In Re: An Application under Sections 397/401 read with Section 482 read with Section 401 of the Code of Criminal Procedure, 1973.

Mr. Bikash Ranjan Bhattacharya,
Mr. Uday Sankar Chattopadhyay,
Mr. Santanu Maji,
Ms. Snigdha Saha,
Mr. Pronoy Basak ... For the Petitioner.

Ms. Sukanya Bhattacharyya,
Mr. Mirza Firoj Ahmed Begg ... For the State.

The present revisional application has been preferred against the order dated 06.03.2020 passed by the learned Additional Chief Judicial Magistrate, Alipore in connection with ACGR Case No. 3079 of 2017 arising out of Purba Jadavpur Police Station Case No. 69 of 2017 dated 22.06.2017 under Sections 417/376/313/506 of the Indian Penal Code wherein the learned court was pleased to reject the prayer for further investigation.

Mr. Bhattacharya, learned senior advocate appearing for the petitioner is aggrieved by the manner in which the investigating authority has come to a conclusion.

Ms. Sukanya Bhattacharyya, learned advocate appearing for the State supports the findings of the investigating officer.

I have perused the case diary and the statement of the victim under Section 164 of the Code of Criminal Procedure which was recorded before a learned Magistrate. On perusal of the same, I am of the opinion that the court while considering a case under Section 376 of the Indian Penal Code is supposed to take into account two basic issues which have been reiterated by the Hon'ble Apex Court. Firstly, the victim in a case under Section 376 of the Code of Criminal Procedure is an injured witness and secondly, the sole testimony of the prosecutrix is enough to come to a conclusion.

Further Section 90 of the Indian Penal Code reads as follow :

“90. Consent known to be given under fear or misconception.—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, 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

Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.”

Having regard to the manner in which the opinion was drafted by the investigating officer of the case to give discharge to the accused, who happens to be a sergeant of Kolkata Police, I am of the view that with same pain other cases under Sections 417 and 376 of the Indian Penal Code are not dealt with. Factual appreciation of a case is to be done by a court of law. The duty of the investigating officer

while expressing his opinion should be on the basis of the materials appearing. Detailed analysis of the facts as done in this case by the investigating officer without allowing prosecutrix/prosecution to examine or cross-examine would in fact lead to presumption in such type of cases of certain incidents and events which are not approved by law. The issue of consenting party and being major does not absolve the liability and the test of consent in this case cannot be inferred from the statement under Section 164 of the Code of Criminal Procedure.

In this case, I find that the investigating officer has assessed the truth and falsity of the statement of the prosecutrix itself. When a statement under Section 164 of the Code of Criminal Procedure was recorded, the same is a premature one. Without going into further details and/or dealing with the factual interpretation as made by the investigating officer of the case, I am of the view that this case should go for trial. Accordingly, the prayer for further investigation is refused.

However, the learned Additional Chief Judicial Magistrate, Alipore is directed to take cognizance on the materials already available on record and proceed with the case. It would be in the fitness of circumstances, for the learned Magistrate to decide the witnesses and the materials copies of which should be supplied to the accused and then commit the case to the appropriate forum to proceed in accordance with law.

With the aforesaid observations, the revisional application being CRR 286 of 2021 is disposed of.

All pending connected applications, if any, are consequently disposed of.

All parties shall act on the server copy of this order duly downloaded from the official *website* of this Court.

(Tirthankar Ghosh, J.)