

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR
Proceedings through Video Conferencing
CR.R. No. 177 of 2021

Reserved on 12-8-2021

Delivered on 23-8-2021

1. Dilip Pandey S/o Ambika Prasad Pandey Aged About 37 Years
2. Dinesh Kumar S/o Ambika Prasad Pandey Aged About 41 Years
3. Smt. Varsha Pandey W/o Dinesh Kumar Pandey Aged About 37 Years

All R/o Ward No. 68, New Changorabhatha, Raipur, Near Guman Sahu Aata Chakki, Raipur, P.S. D.D. Nagar, District Raipur CG

----Applicant

Versus

State of Chhattisgarh through S.H.O. Police Station Bemetara, District Bemetara CG

----Non-applicant

 For Applicant : Mr. Y.C. Sharma, Sr. Adv. with Shri Sachin Nidhi, Adv.
 For respondent : Mr. Devesh Chandra Verma, Govt. Adv.

Hon'ble Shri Justice N.K. Chandravanshi
CAV Order

1. This criminal revision has been preferred by the applicants against the order dated 22-1-2021 passed in S.T. 5/2021 by the Addl. Sessions Judge, Bemetara, Distt. Bemetara by which charges under Sections 498-A, 34, 376 and 377 of the Indian Penal Code (in short 'the I.P.C.') have been framed against the applicant No.1 and charge under Section 498-A of the IPC has been framed against applicants No. 2 and 3.

2. Brief facts of the case are that marriage of complainant was solemnized with the non-applicant No. 1 on 8-6-2017. Thereafter, they resided together. After few days of marriage, the applicants started harassing complainant on demand of dowry i.e. money and other articles. The applicants also used to abuse her and commit marpeet with her. The applicant No. 1/husband many times had made unnatural physical relation with her. He also inserted his fingers and radish in her vagina, despite her protest. Efforts were made to settle their dispute but it went in vein. Therefore,

complainant filed written complaint against the applicants at PS Bemetara. After investigation, charge sheet under Section 498-A, 377, 376, 34 of the I.P.C. was filed against the applicants. After affording opportunity of hearing to the counsel for both the parties, learned trial Court framed charges against the applicants as mentioned above. Hence, this revision.

3. Learned counsel for the applicants submits that the complainant and the applicant No. 1 are legally wedded wife and husband, therefore, none of the ingredients to constitute the offence punishable under Sections 376 and 377 of the I.P.C. are spelt out against applicant No. 1, because, in India, marital rape is not recognized and the same is not an offence in view of Exception II of Section 375 of the I.P.C. He further submits that carnal intercourse against the order of nature with any man, woman or animal voluntarily is necessary ingredient of Section 377 of the I.P.C. which is not present in this case. Therefore, the order of framing of charges against the applicant No. 1/ husband under Sections 376 and 377 of the I.P.C. is illegal and erroneous. He further submits that framing of charge of Section 498-A of the I.P.C. against the applicants is also not sustainable. Therefore, he prays that the impugned order be set aside and the applicants be discharged from aforesaid charges. To buttress his argument, he places reliance in the order of High Court of Gujarat at Ahmedabad in **Nimeshbhai Bharatbhai Desai -v- State of Gujarat** (2018 SCC Online Guj 732).

4. I have heard learned counsel for both the parties and perused the impugned order and material available on record as copy of complete charge sheet has been filed by the applicants.

5. From perusal of copy of the charge sheet, it is clear that the applicant No. 1 and complainant are legally wedded husband and wife and their marriage was solemnized in the month of June, 2017.

6. Section 375, I.P.C. defines “rape” as under :-

“375. Rape.—A man is said to commit “rape” if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

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.

Exception 1.—A medical procedure or intervention shall not constitute rape.

[*Exception 2.*—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]”

7. Exception II of Section 375 of the I.P.C. referred to above, makes it clear that sexual intercourse or sexual act by a man with his own wife, the wife not being under eighteen years of age, is not rape. In this case, complainant is legally wedded wife of applicant No. 1, therefore, sexual intercourse or any sexual act with her by the applicant No. 1/husband would not constitute an offence of rape, even if it was by force or against her wish. Therefore, charge under Section 376 of the I.P.C. framed against the applicant No. 1/husband is erroneous and illegal. Hence, he is entitled to be discharged from the charge under Section 376 of the I.P.C.

8. As regards Section 498-A of the I.P.C., written report and both the statements of the complainant show that after few days of marriage, she was subjected to cruelty by all the applicants by abusing and committing marpeet on demand of dowry, money and other articles from her parents. Father of complainant Durgashankar Chaturvedi and mother Kanti Chaturvedi have also supported her statement. Those facts have also been stated by their neighbouring witnesses in their police statements. Therefore, I do not find any

infirmity in framing charges under Section 498-A/34 of the I.P.C. against the applicants.

9. So far as charge framed under Section 377 of the I.P.C. is concerned, complainant/wife has categorically mentioned in her written report that after marriage, the applicant No. 1/husband so many times had made unnatural physical relation with her, but due to shame, she did not disclose about it to anyone. It has also been mentioned in her written report that the applicant/ husband inserted his fingers and radish also in her private part. In the statement of the complainant recorded under Section 164 of the Code of Criminal Procedure and in police statement also, she has narrated the above facts.

10. While considering the offence under Section 377 of the I.P.C., Gauhati High Court on the decision in case of **Momina Begum -v- Union of India and ors.** dated 4-3-2013 in Criminal Petition No. 98/2012 has held in para 18 and 19 as under :-

“18. As a matter of fact penetration of any object by the offender into the sex organ with an intention to derive sexual pleasure is sufficient to constitute the sexual connection against the order of nature necessary to constitute the offence under Section 377 of the I.P.C. Therefore, abusing sex organ with an intention to derive sexual pleasure apart from establishing sexual connection it would also be a carnal intercourse against the 'order of nature'. The carnal intercourse includes a set of sex acts that include sodomy and/or oral sex, or any such acts, which involves use of sex organ of the male, or female or animal, for deriving sexual pleasure in an unnatural manner, which also includes use of sex organ of the offender in an unnatural way on the victims i.e. man, woman or animal, for deriving sexual pleasure.

19. On careful evaluation of the entire aspect of the matter, upon going through the aforesaid decisions, it is apparent that carnal intercourse includes a set of sex acts which involves use of sex organ of the male or female or animal, for deriving sexual pleasure. Use of sex organ by the

offender is essential to commit an unnatural offence against the nature, in terms of Section 377 of the I.P.C. where dominant intention of the offender is to derive unnatural sexual satisfaction. If the offender with intention to derive sexual satisfaction repeatedly inserts any object in the sex organ of the victim and consequently derives sexual pleasure, such act would constitute as a carnal intercourse against the order of nature. Therefore, if dominant intention of the offender is to derive sexual satisfaction by unnatural way, such act of the offender would attract the ingredient of offence under Section 377 of the I.P.C.”

11. Even in the case of **Nimeshbhai Bharatbhai Desai** (supra), High Court of Gujarat at Ahmedabad in para 162 has held that “a wife can initiate proceedings against her husband for unnatural sex under Section 377 of the I.P.C. Section 377 of the I.P.C. does not criminalize a particular class of people or identity or orientation. It merely identifies certain acts, which if committed, would constitute an offence. Consent is not a determining criterion in the case of unnatural offences and rather any offence which is against the order of nature and can be described as carnal penetration would constitute an offence under Section 377 of the I.P.C.” Although in this case, the High Court of Gujarat has held that “except the sexual perversions of sodomy, buggery and bestiality, all other sexual perversions, would not fall within the sweep of Section 377, of the I.P.C.”

12. In the instant case, the complainant has reported that the applicant No. 1/ husband has many times, without her consent, made unnatural physical relation with her and even he inserted his finger and radish also in her private part. Although, except insertion of finger and radish in her private part, what other unnatural physical relation he made with the complainant, she has not stated, which is a matter of evidence, but, only on that ground, charge framed under Section 377 of the I.P.C. cannot be said to be erroneous at the stage of framing of charge, especially, in terms of Section 377 of the I.P.C. where dominant intention of the offender is to derive

unnatural sexual satisfaction, repeatedly insert any object in the sex organ of the victim and consequently derives sexual pleasure, such act would constitute as a carnal intercourse against the order of nature and such act would attract the ingredient of offence under Section 377 of the I.P.C. In view of above, judgment of **Nimeshbhai Bharatbhai Desai** (supra) is of no help to the applicant No. 1/husband with regard to charge under Section 377, of the I.P.C.

13. Therefore, I do not find any infirmity or illegality committed by learned trial Court in framing the charge under Section 377 of the I.P.C. against the applicant No. 1/husband.

14. Consequently, the instant revision is partly allowed. The applicant No. 1 is discharged from the charge framed against him under Section 376 of the I.P.C. This Court finds that trial Court has not committed any illegality in framing the charge under Section 377 of the I.P.C. against the applicant No. 1 and under Section 498-A/34 of the I.P.C. against all the applicants.

Sd/-
N.K. Chandravanshi
Judge