

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION

Before:

The Hon'ble Justice Ananda Kumar Mukherjee

C.R.R. No. 1650 of 2019
Golam Mohinuddin
Vs.
State of West Bengal & Anr.

For the Petitioners: Mr. Avik Ghatak, Adv.
Mr. Aniruddh Bhattacharya, Adv.
Mr. Fahad Imam, Adv.

For the O.P. No. 2: Md. Farhaduddin, Adv.
Mr. Siddhartha Ruj, Adv.

For the State: Mr. Bidyut Kumar Roy, Adv.
Ms. Manisha Sharma, Adv.

Heard on : 21.06.2022.

Judgment on: 22.07.2022.

Ananda Kumar Mukherjee, J. :-

1. This revisional application has been filed by the petitioner under section 482 of the Code of Criminal Procedure, 1973 praying for quashing of the proceeding in G.R Case No. 220 of 2019, arising out of Arambagh Women Police Station Case No. 10 of 2019 dated 26.2.2019 under section 376/417/506 of the Indian Penal Code, pending before Learned Additional Chief Judicial Magistrate, Arambagh, Hooghly and for quashing of charge sheet being no. 29 of 2019 dated 31.5.2019.

2. A brief profile of the prosecution case, which gives rise to this revisional application is that the de facto complainant (whose name is withheld and herein after referred to as the prosecutrix) lodged an FIR before Arambagh Police Station on 26.2.2019 disclosing that she is an helpless lady residing at her aunt's house at Kajipara, Arambagh with two minor children after dissolution of her marriage. She is a tailor and works in a shop to maintain her minor children. The prosecutrix met Golam Mohinuddin a resident at Miya Para, Arambagh at her tailoring shop and in course of time developed a love affair with him. The accused person was fully acquainted about the earlier marriage of the prosecutrix and her two minor children from her first marriage. The accused person on false promise to marry her and with an assurance to take care of her children developed a relationship with her for one and half years and cohabited with her at different places and also in her aunt's house at Kajipara. When the prosecutrix asked the accused to marry her, he avoided the marriage on various pretext. On 2.2.2019 the accused called the prosecutrix for her to sign on Kabilnama and when she reached the place the accused person along with five to six persons threatened her not to create pressure upon him to marry her otherwise they would commit gang rape on her and transport her to Uttar Pradesh. On such threat the accused person obtained her signature on a stamp paper on the pretext that she has taken money from him. Further case of the prosecutrix is that when she tried to contact the accused over telephone and asked him about her future, the accused person

finally refused to marry her on 24.2.2019 and also assaulted her physically. The prosecutrix then lodge an FIR giving rise to the present case.

3. The petitioner/accused has filed this application for quashing of the proceeding and the charge sheet in Arambagh Women Police Station Case No. 10 of 2019 on the grounds inter alia, that the petitioner is a day laborer and aged 32 years whereas the de facto complainant is a divorcee woman with two children, aged 34 years and an employee in a tailoring shop.

4. Mr. Avik Ghatak, learned advocate contended that both petitioner and the complainant are major and she has stated in her complaint and in her statement under section 164 of Cr. P.C that she consented to sexual intercourse with the petitioner on her own volition without fear or misconception. It is submitted that she knew very well the consequence thereof. It is urged that the complaint has been lodged under section 376 of the IPC with a oblique motive and with a view to harass the petitioner. Furthermore, it is contended that the written complaint has been lodged after expiry of two years of the alleged fast incident which is self explanatory of the fact that the prosecutrix was not under any misconception.

5. It is argued that prosecutrix consented to sexual intercourse with the petitioner, with whom she was deeply in love and on a promise that he would marry her on a later date. Therefore such consent was not an outcome of misconception of facts. According to the petitioner the complainant had sufficient intelligence to understand the significance and consequence of the act. Being aware of the consequence she had physical relation with the

petitioner, and that the allegation of rape levelled against the petitioner cannot be sustained due to such consensual relationship on alleged promise to marry. Furthermore, there may be various reasons for non-fulfillment of the promise and assurance of marriage. Referring to the contents of the statement of the prosecutrix recorded under section 164 of Cr. P.C., it is submitted that the prosecutrix started free mixing with the petitioner on his assurance that he would treat her children as his own children and would marry her. She accompanied him to various lodge at Kolkata and Tarakeswar and she also had physical relation with him on the consideration that he was in intense love with her. Learned advocate argued that all these circumstances would indicate that the prosecutrix not only on the alleged promise of marriage but on other considerations like having intense love and also the alleged promise of the petitioner to treat her children as his own had been the reasons for her to developed such relationship. With reference to the charge under section 506 of IPC it is urged that the FIR as well as the statement under section 164 of Cr. P.C does not satisfy the ingredients of the offence under section 506 of IPC. Referring to the decision of the Hon'ble Supreme Court in the case of **Uday Vs. State of Karnataka; 2003 SCC (Cri) 775**, it is contended on behalf of the petitioner that consensual relationship does not amount to an offence under section 376 of IPC.

6. To fortify his contention learned advocate for the petitioner has relied upon the decisions reported in **Pramod Suryabhan Pawar Vs. The State of**

Maharashtra and Anr; 2019 SCC Online SC 1073, in the aforesaid decision in paragraphs 14 and 15 it was laid down as follows:

“14. 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 in 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.”

7. To reinforce his argument that the complainant being a consensual partner cannot accuse the petitioner of committing rape on false promise of marriage, relied upon a decision in the case of **Shivasankar @ Shiva Vs. The State of Karnataka & Anr Criminal Appeal No. 504 of 2018 (arising out of SLP (Crl) No. 454 of 2017)**, in the said case the prayer for quashing was refused by the Hon’ble High Court of Karnataka. The petitioner filed an appeal before the Hon’ble Supreme Court. The charge against the appellant/accused was that he has raped the Respondent No.2-Complainant. Hon’ble Supreme Court observed :

“In the facts and circumstances of the present case, it is difficult to sustain the charges leveled against the appellant who may have possibly, made a false promise of marriage to the complainant.

It is, however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as ‘rape’ especially in the face of the complainant’s own allegation that they lived together as man and wife.”

8. Learned advocate for the petitioner further placed reliance upon another decision in the case of **Thesima Begum & Ors Vs. State of Tamil Nadu & Ors; (2020) 14 SCC 580** and **Anand Kumar Mohatta Vs. State (Govt. of NCT of Delhi); 2018 SCC Online SC 2447**, to indicate that proceeding could be quashed by exercise the inherent power of the High Court under section 482 of Cr. P.C even after charge sheet was submitted.

9. Reliance was also placed upon the ratio in the case of **Vikram Johar Vs. The State of UP & Anr; (2019) 14 SCC 207**, wherein it was laid down:

“24. Now, we revert back to the allegations in the complaint against the appellant. The allegation is that the appellant with two or three other unknown persons, one of whom was holding a revolver, came to the complainant’s house and abused him in filthy language and attempted to assault him and when some neighbours arrived there the appellant and the other persons accompanying him fled the spot. The above allegation taking on its face value does not satisfy the ingredients of Sections 504 and 506 as has been enumerated by this Court in the above two judgments. The intentional insult must be of such a degree that should provoke a person to break the public peace or to commit any other offence. The mere allegation that the appellant came and abused the complainant

does not satisfy the ingredients as laid down in para 13 of the judgment of this Court in Fiona Shrikhande.

25. *Now, reverting back to Section 506, which is offence of criminal intimidation, the principles laid down by Fiona Shrikhande has also to be applied when question of finding out as to whether the ingredients of offence are made or not. Here, the only allegation is that the appellant abused the complainant. For proving an offence under Section 506 IPC, what are the ingredients which have to be proved by the prosecution? Ratanlal & Dhirajlal on Law of Crimes, 27th Edn. with regard to proof of offence states the following:*

“...The prosecution must prove:

(i) That the accused threatened some person.

(ii) That such threat consisted of some injury to his persons, reputation or property; or to the person, reputation or property of someone 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.” (emphasis supplied)

A plain reading of the allegations in the complaint does not satisfy all the ingredients as noticed above.

10. It is argued that even uncontroverted allegation made in the FIR and material collected in course of investigation in support thereof do not disclose the commission of any offence against the accused person. Therefore, continuation of the proceeding would result in abuse of the process of court. The petitioner accordingly prayed for quashing of the case initiated at the instance of the de facto complainant/prosecutrix and the charge sheet submitted.

11. In reply, learned advocate for the opposite party no.2 submitted that the prosecutrix is a divorced lady with two minor children. She was residing in the house of her maternal aunt at Arambagh, where the petitioner developed acquaintance with her and taking advantage of her helpless condition promised to marry her and had physical relation with her on several occasions. The petitioner ultimately refused to marry the prosecutrix and when she insisted, the petitioner along with other persons threatened her of dire consequences and warned her not to contact him any further asking him to marry her.

12. It is argued that the opposite party no.2 lodged FIR on 26.02.2019 at Arambagh Police Station, which was registered under Section 376, 417 and 506 of the Indian Penal Code. After investigation, police submitted charge-sheet against the accused person. Learned advocate argued that a *prima facie* case under Section 376/417/506 of the Indian Penal Code has been well-established against the petitioner and he should face the trial. Learned advocate urged that there no material in the revisional application to preempt the prosecutrix's case, as such, the revisional application is liable to be dismissed.

13. Learned advocate for the State produced the Case Diary and submitted that there is material in the Case Diary to proceed with trial against the accused-petitioner.

14. I have carefully considered the contents of the Case Diary, the facts and circumstances of the case emerging out of the FIR and the submissions made by learned advocates for the parties.

15. It is undisputed and also evident from the statement of the prosecutrix under Section 164 of Cr.P.C. that she was 34 years of age at the time of occurrence. It appears that the accused/petitioner developed acquaintance with the prosecutrix at her tailoring shop and gradually developed an intimate relationship. He assured to marry the prosecutrix and also look after her minor son and daughter. It may be gathered from her own statement that she is a divorcee and on the basis of the assurance by the accused, she started mixing with him freely and visited different places and stayed with her at Kolkata and Tarakeshwar. According to the prosecutrix the accused also revealed that he had intense love for her and if she did not agree to accompany him and have relation with him, he would kill himself. On such consideration, the prosecutrix had physical relation with the accused-petitioner who also went to her aunt's house in the absence of other inmates. When the prosecutrix pressurized the petitioner to marry her, he started avoiding her and called her to a house where she found other people were present and they compelled her to put her signature on some stamp papers and the petitioner denied having any relationship with her.

16. From the facts and circumstances of the case, it appears that the prosecutrix had developed a love affair with the petitioner and had consensual relationship with him, knowing fully well that she was not the legally married wife of the accused. She does not have any case that she was raped perforce or the petitioner had sexual intercourse without her consent. Being an adult person she was fully conscious about the consequence of such relationship

before the marriage. There might be a promise of marriage, which may fail for various reasons but the some does not amount to any offence. When the relationship developed between the accused and the prosecutrix, the petitioner assured to take responsibility of the minor children of the prosecutrix and also marry her. Infatuation and love perished in course of time leaving the prosecutrix aggrieved. In my considered view, such mutual acts to which the prosecutrix was concomitant does not amount to any offence under Section 375 of IPC. The society needs to be alive of the fact that any consensual sexual act between two perceptive adult persons outside marriage would not amount to rape. I also find that there was no mistake of facts on the part of the prosecutrix and there was no reason to believe on her part that she was already married to the accused person. Therefore, the offence under Section 417 of IPC would not be attracted. In view of the facts involved, I find that the principles laid down in **Promod Suryabhan Pawar (Supra) and Shivasankar @ Shiva (Supra)** squarely apply to this case.

17. In the FIR, the prosecutrix has alleged that on 24.02.2019 she went to meet the petitioner in the evening when the accused refused to marry her and asked her to die by taking poison or hanging and assaulted her with fists and blows. However, in her statement under Section 164 of Cr.P.C., the prosecutrix did not mention about such alleged meeting with the opposite party on 24.02.2019 or being assaulted by him. In the FIR she has mentioned that on 02.02.2019 on the pretext of putting her signature on a Kabilnama, the prosecutrix was called to a place where she found five to six other persons who

took her to a house and told her not to create any pressure upon the petitioner to marry her, otherwise they would commit gang rape upon her and sent her to Uttar Pradesh and on that day they obtained her signature on a stamp paper of Rs.10/-, where it was written that she had received money from the accused-petitioner. In her statement under Section 164 of Cr.P.C., the prosecutrix did not disclosed the date and place of such meeting or being threatened by the accused person and his accomplice. The charge under Section 506 of I.P.C. is, therefore, relegated due to omissions made by the prosecutrix in her statement under Section 164 of Cr.P.C.

18. In the instant case, other witnesses examined under Section 161 of Cr.P.C. have not disclosed that the prosecutrix was subjected to criminal intimidation by the accused-petitioner on 02.02.2019 or 24.02.2019.

19. In such view of the matter, I am of the opinion that the charge under Section 506 of IPC levelled against the petitioner would not be attracted and the ingredients of the offence are lacking.

20. In the backdrop of the facts and circumstances of the case and the arguments advanced by learned advocates for the petitioner and the opposite parties, I hold that it would be an abuse of the process of the Court if on such material on record, the petitioner is required to undergo a trial. It is explicit from the fragile materials on record that the basic ingredients of the charge would not be attracted against the petitioner and it would be a futile exercise to proceed with this case any further.

21. In the light of my above discussion and the facts and circumstances involved in this case the entire proceedings in GR Case No.220 of 2019, arising out of, Arambagh Women Police Station Case No.10 of 2019 dated 26.02.2019 under Section 376, 417, 506 of Indian Penal Code pending before Learned Additional Chief Judicial Magistrate, Arambagh, including the charge-sheet submitted in this case are quashed. The revisional application is allowed on contest.

22. Interim order, if any, stands vacated. Let a copy of this order be communicated to the Learned Additional Chief Judicial Magistrate, Arambagh, Hooghly, for information.

23. All parties to act on the basis of a server copy of the Judgment and Order placed on the official website of the Court.

24. Urgent Photostat certified copies of this order may be supplied to the parties expeditiously if applied for, maintaining all formalities.

(Ananda Kumar Mukherjee, J.)