

IN THE HIGH COURT OF ORISSA, CUTTACK

CRLREV No. 307 of 2022

From the order dated 04.06.2022 passed by the Additional Sessions Judge, Anandapur in S.T. Case No.29 of 2022.

Anil Kumar Jena

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Petitioner

-Versus-

State of Odisha

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Opposite Party

For Petitioner:

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Mr. Devashis Panda
Advocate

For Opposite Party:

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Mr. Rajesh Tripathy
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing: 13.09.2022

Date of Order: 19.09.2022

S.K. SAHOO, J.

“Broken vows are like broken mirrors. They leave those who held to them bleeding and staring at fractured images of themselves”

- Richard Paul Evans

The petitioner Anil Kumar Jena has filed this criminal revision petition under section 401 read with section 397 of the

Code of Criminal Procedure, 1973 (hereafter 'Cr.P.C.') to set aside the impugned order dated 04.06.2022 passed by the learned Additional Sessions Judge, Anandapur in S.T. Case No.29 of 2022 in framing charges under sections 376(2)(n)/417 of Indian Penal Code against him with a further prayer for discharge him from the case. The said case arises out of Nandipada P.S. Case No.73 of 2022.

2. The prosecution case, as per the first information report lodged by the victim 'RJ' on 10.04.2022 before the Inspector in-charge of Nandipada police station is that prior to eight years of lodging of the first information report, while she was prosecuting her studies in the college, the petitioner used to come near her college and after they met several times, love affair was developed between them and the petitioner assured the victim to marry her. The father of the petitioner brought marriage proposal to the house of the victim, which was also duly accepted by her father. On the assurance of marriage, the petitioner used to visit the house of the victim regularly and forcibly keeping physical relationship with her on many a times against her will. The petitioner took a sum of Rs.30,000/- (rupees thirty thousand) from the father of the victim and being asked to return the same, the petitioner told openly that neither

he would return the money nor would he marry the victim as his marriage was fixed with another girl by his family members. The petitioner was working as Assistant Officer in the L.I.C. office at Nimapada. Near about one year, the petitioner kept no relation with the victim and he even blocked her mobile number and rejected her marriage proposal. The petitioner's three sisters and two brother-in-laws threatened the victim with dire consequences and stated that they would settle the marriage of the petitioner at another place.

On the basis of such first information report, Nandipada P.S. Case No.73 of 2022 was registered under sections 376(1)/493/417/506/34 of the Indian Penal Code.

On completion of investigation, charge sheet was submitted on 27.05.2022 under sections 376(2)(n)/417 of the Indian Penal Code only against the petitioner.

3. Mr. Devashis Panda, learned counsel for the petitioner contended that the medical examination report of the victim-informant indicated that there was no sign of any forcible sexual intercourse. He further contended that the petitioner had filed a complaint case i.e. 1.C.C. Case No.11 of 2022 before the learned S.D.J.M., Anandapur against the victim and her father alleging therein that the victim having become acquainted with

the petitioner maintained friendship through phone calls and messages, however after sometime when she began to call him during his working hours, he had to block her mobile number and being annoyed, she and her father used to threaten the petitioner and also demanded a sum of Rs.5,00,000/- (rupees five lakh) from him saying that non-payment would put him into problems with threat to diminish his social standing and accordingly, the victim filed a false case against the petitioner. It is further contended that the victim was major when she kept physical relationship with the petitioner and she was a consenting party. It is argued that even though there are no materials to constitute the ingredients of offences under sections 376(2)(n)/417 of the Indian Penal Code, charge has been framed in a mechanical manner without application of mind and therefore, the impugned order so far as framing of charge under sections 376(2)(n)/417 of the Indian Penal Code should be set aside. Learned counsel has relied upon the decisions of the Hon'ble Supreme Court in cases of **Pramod Suryabhan Pawar -Vrs.- State of Maharashtra and another reported in (2019) 9 Supreme Court Cases 608** and **Maheshwar Tigga -Vrs.- State of Jharkhand reported in (2020) 10 Supreme Court Cases 108**.

Mr. Rajesh Tripathy, learned Addl. Standing Counsel on the other hand supported the impugned order and contended that at the stage of framing charge, the trial Court is not required to enter into meticulous consideration of evidence and material placed before it at that stage. The defence plea is not required to be considered. He argued that much prior to the medical examination of the victim, the petitioner had stopped keeping physical relationship with her and therefore, the finding in the medical examination report of the victim that there was no sign of any forcible sexual intercourse on her cannot be a ground to discharge the petitioner. He placed reliance on the decision of the Hon'ble Supreme Court in the case of **Yedla Srinivasa Rao -Vrs.- State of A.P. reported in (2006) 11 Supreme Court Cases 615** and submitted that the revision petition should be dismissed.

4. Adverting to the contentions raised by the leaned counsel for the respective parties, let me first discuss the scope of sections 227 and 228 of Cr.P.C. as held by the Hon'ble Supreme Court in the following decisions.

In the case of **Om Wati -Vrs.- State reported in (2001) 4 Supreme Court Cases 333**, the Hon'ble Supreme Court held as follows:-

"7. Section 227 of the Code provides that if upon consideration of record of the case and the documents submitted therewith, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused for which he is required to record his reasons for so doing. No reasons are required to be recorded when the charges are framed against the accused persons.

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8. At the stage of passing the order in terms of Section 227 of the Code, the Court has merely to peruse the evidence in order to find out whether or not there is a sufficient ground for proceeding against the accused. If upon consideration, the court is satisfied that a prima facie case is made out against the accused, the Judge must proceed to frame charge in terms of Section 228 of the Code. Only in a case where it is shown that the evidence which the prosecution proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by defence evidence cannot show that the accused committed the crime, then and then alone the court can discharge the accused. The court is not required to enter into meticulous consideration of evidence and material placed before it at this stage."

In case of **Amit Kapoor -Vrs.- Ramesh Chander** reported in (2012) 9 Supreme Court Cases 460, it is held as follows:-

"17. Framing of a charge is an exercise of jurisdiction by the trial Court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the Court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the Court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the Court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while

Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

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19. At the initial stage of framing of a charge, the Court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the Court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage....."

In case of **State of Madhya Pradesh -Vrs.- Mohanlal Soni reported in A.I.R. 2000 S.C. 2583**, it is held that at the stage of framing charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence to conclude whether the materials produced are sufficient or not for convicting the accused. If the evidence which the prosecution proposes to produce to prove the guilt of the accused, even if fully accepted before it is challenged by the cross-examination or rebutted by the defence evidence, if any,

cannot show that accused committed the particular offence then the charge can be quashed.

In case of **State of M.P. -Vrs.- Awadh Kishore Gupta reported in (2004) 1 Supreme Court Cases 691**, it is held that when charge is framed, at that stage, the Court has to only prima facie be satisfied about existence of sufficient ground for proceeding against the accused. For that limited purpose, the Court can evaluate materials and documents on records but it cannot appreciate evidence.

In case of **State of Orissa -Vrs.- Debendra Nath Padhi reported in (2005) 30 Orissa Criminal Reports (SC) 177**, it is held as follows:-

"18.....The scheme of the Code and object with which Section 227 was incorporated and Sections 207 and 207(A) omitted have already been noticed. Further, at the stage of framing of charge, roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge, the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to

adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police."

5. The contention of the learned counsel for the petitioner that the medical examination report of the victim indicated that there was no sign of any forcible sexual intercourse, cannot be a ground to disbelieve the prosecution case at this stage. As rightly pointed out by the learned counsel for the State that much prior to the medical examination of the victim, the petitioner had stopped keeping physical relationship with her. It is the settled law that the victim of rape is not to be treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case, even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix if it inspires confidence and it is clear, cogent, reliable and trustworthy. Thus, the contention of the learned counsel for the petitioner on this score is not acceptable.

6. The contention of the learned counsel for the petitioner that the petitioner had filed a complaint case i.e. 1.C.C. Case No.11 of 2022 before the learned S.D.J.M., Anandapur against the victim and her father for which the rape case has been foisted, is very difficult to be accepted. Neither any discharge petition was filed by the petitioner nor was any

such contention regarding his false implication on account of filing of complaint petition raised in the trial Court at the time of hearing on the point of charge. Such contentions were raised for the first time in this Court. Moreover, the defence plea regarding the false implication is not to be considered at this stage. If oral as well as documentary evidence is adduced by the petitioner in the trial Court in support of his defence plea, it will be considered in accordance with law.

When the learned counsel for the petitioner contended that the learned S.D.J.M. after taking cognizance of offences has issued process against the victim and her father in the complaint case, this Court asked the learned counsel for the petitioner to produce the certified copy of the order taking cognizance of offences in the complaint petition. The learned counsel for the petitioner produced the certified copy of the order sheet of the complaint case from which it appears that even initial statement of the complainant has not been recorded. Therefore, there was no scope for the victim to know that a complaint petition has been filed against her by the petitioner. Thus the submission made by the learned counsel for the petitioner on this score is palpably wrong.

7. Coming to the submission made the learned counsel for the petitioner that there are absence of materials to constitute the ingredients of offences, reliance was placed by the learned counsel for the petitioner in the case of **Pramod Suryabhan Pawar** (supra), wherein the Hon'ble Supreme Court held as follows:-

"16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act.

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18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation

towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

Reliance was further placed by the learned counsel for the petitioner in case of **Maheswar Tigga** (supra), wherein the Hon'ble Supreme Court held as follows:-

"13. The question for our consideration is whether the prosecutrix consented to the physical relationship under any misconception of fact with regard to the promise of marriage by the appellant or was her consent based on a fraudulent misrepresentation of marriage which the appellant never intended to keep since the very inception of the relationship. If we reach the conclusion that he intentionally made a fraudulent misrepresentation from the very inception and the prosecutrix gave her consent on a misconception of fact, the offence of rape under Section 375 I.P.C. is clearly made out. It is not possible to hold in the nature of evidence on record that the appellant obtained her

consent at the inception by putting her under any fear. Under Section 90 I.P.C. a consent given under fear of injury is not a consent in the eyes of law. In the facts of the present case, we are not persuaded to accept the solitary statement of the prosecutrix that at the time of the first alleged offence, her consent was obtained under fear of injury.

14. Under Section 90 I.P.C., a consent given under a misconception of fact is no consent in the eyes of law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four years. It hardly needs any elaboration that the consent by the appellant was a conscious and informed choice made by her after due deliberation, it being spread over a long period of time coupled with a conscious positive action not to protest. The prosecutrix in her letters to the appellant also mentions that there would often be quarrels at her home with her family members with regard to the relationship, and beatings given to her.

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20. We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary action or denial and which

opportunity was available to her, because of her deep-seated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations in this regard in **Uday -Vrs.- State of Karnataka : (2003) 4 Supreme Court Cases 46** are considered relevant:

"25...It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances, the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it.

In these circumstances, it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."

Reliance was placed by the learned counsel for the State in case of In **Yedla Srinivasa Rao** (supra), where the accused forcibly established sexual relations with the prosecutrix. When she asked the accused why he had spoiled her life, he promised to marry her. On this premise, the accused repeatedly had sexual intercourse with the prosecutrix. When the prosecutrix became pregnant, the accused refused to marry her. When the matter was brought to the Panchayat, the accused admitted to having had sexual intercourse with the prosecutrix but subsequently absconded. Given this factual background, the Court observed:

"10. It appears that the intention of the accused as per the testimony of P.W.1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became

pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of P.Ws.1, 2 and 3 and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused, completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent....It is always matter of evidence whether the consent was obtained willingly or consent has been obtained by holding a false promise which the accused never intended to fulfil. If the court of facts come to the conclusion that the consent has been obtained under misconception and the accused persuaded a girl of tender age that the he would marry her then

in that case it can always be said that such consent was not obtained voluntarily but under a misconception of fact and the accused right from the beginning never intended to fulfil the promise. Such consent cannot condone the offence.”

8. On perusal of the first information report and the statement of the victim, it clearly indicates that the victim was major and aged about twenty seven years when she lodged the F.I.R. and love affair between the petitioner and the victim blossomed since eight years prior to the lodging of F.I.R. and assurance of marriage was given by the petitioner and even the father of the petitioner brought marriage proposal to which the victim's father agreed. The victim specifically stated that the petitioner kept physical relationship on many a time against her will. He not only took money from the father of the victim and did not return it, but when he was asked for the money, he refused to pay back and did not show any interest to marry the victim rather his family members settled his marriage at another place. Whether the intention of the petitioner right from the beginning when he gave assurance of marriage to the victim was bonafide and honest or it was a false promise of marriage given by the petitioner to keep physical relationship with the victim

with no intention of being adhered to at the time it was given, is to be adjudicated at the stage of trial after assessing the evidence on record. The Court may find basing on evidence that at initial stage itself, the petitioner had no intention whatsoever, of keeping his promise to marry the victim. In the case of **Deepak Gulati -Vrs.- State of Haryana reported in (2013) 7 Supreme Court Cases 675**, the Hon'ble Supreme Court held that there may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to 'misconception of fact'. In order to come within the meaning of the term 'misconception of fact', the fact must have an immediate relevance. Section 90 Indian Penal Code cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the Court is assured of the fact that from the very beginning, the accused had never really intended to marry her.

In the case in hand, the victim has specifically stated that the petitioner kept physical relationship with her against her will on many a time giving assurance of marriage. Merely

because a boy and a girl were having love affairs for a long term, it does not mean that the girl would be willing or be a consenting party to have sexual intercourse with the boy and that to before their marriage. It would depend on the factual scenario. A famous quote states, "Touch her heart, not her body. Steal her attention, not her virginity. Make her smile, don't waste her tears." Whether the victim willingly consented to have sexual intercourse with the petitioner or the petitioner had sexual intercourse with the victim against her will as per the first clause of section 375 of the Indian Penal Code is no doubt to be adjudicated by the learned trial Court at the appropriate stage. The expression 'against the will' seems to connote that the offending act was done despite resistance and opposition of the woman. It would not be proper to give any finding in that respect at this stage.

9. In the case of **Amit Kapoor** (supra), while discussing the scope of revisional jurisdiction, the Hon'ble Supreme Court held as follows:-

"12. Section 397 of the Code vests the Court with the power to call for and examine the records of an inferior Court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The

object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the Court to scrutinize the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

13. Another well-accepted norm is that the revisional jurisdiction of the higher Court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex-facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its

revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the Cr.P.C.

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20. The jurisdiction of the Court under Section 397 can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial Court or the inferior Court, as the case may be. Though the section does not specifically use the expression 'prevent abuse of process of any Court or otherwise to secure the ends of justice', the jurisdiction under Section 397 is a very limited one. The legality, propriety or correctness of an order passed by a Court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily."

10. Without entering into a detailed analysis of the materials in the case records, it cannot be said at this stage that there are no prima facie case against the petitioner to frame the charges. In view of the foregoing discussions, on a careful

scrutiny of the case records produced by the learned counsel for the State, I do not find any illegality or perversity in the impugned order. Accordingly, the CRLREV petition being devoid of merits, stands dismissed.

Before parting, I would like to place it on record by way of abundant caution that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer made by the petitioner to set aside the order of framing of charge. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done by the trial Court at the appropriate stage of the trial on the basis of evidence to be adduced by the parties.

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S.K. Sahoo, J.

Orissa High Court, Cuttack
The 19th September 2022/RKMishra