

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

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRR 2495 of 2021

Sukanta Roy Chowdhury

-vs.-

State of West Bengal & Anr.

Mr. Somopriyo Chowdhury,
Mr. Dipayan Dan.

...For the Petitioner

Mr. S.G. Mukherjee, Ld. P.P.,
Mr. Sandip Chakraborty.

...For the State

Ms. Nandita Bakshi

...For the Opposite Party no.2

Reserved on : 06.02.2023

Judgment on : 14.02.2023

Tirthankar Ghosh, J:-

The present revisional application has been preferred challenging the continuance of the proceedings in S.C. case No. 48 of 2020 pending before the learned Additional Sessions Judge, Fast Track, 2nd Court, Hooghly, under Sections 417/376/406 of the Indian Penal Code arising out of Chinsurah Police Station Case No. 115 of 2019 dated 04.06.2019 including the order dated 25.03.2021 passed by the learned Sessions Court.

The order dated 25.03.2021 relate to the order of framing of charges against the present petitioner under Section 417/376/406 of the Indian Penal Code wherein the learned Trial Court read over the charges and the accused/petitioner in response pleaded not guilty and claimed to be tried.

Mr. Somopriyo Chowdhury, learned Advocate appearing for the accused/petitioner drew the attention of the Court to the First Information Report (along with the letter of complaint), charge-sheet and the statement of the victim under Section 164 of the Code of Criminal Procedure. It was submitted that the petitioner is aged about 46 years, divorced with a girl child aged about 12 years and the de facto complainant/lady is aged about 37 years with also a girl child of 12 years and her divorce case is pending before the jurisdictional Court. According to the learned Advocate even if the allegations made in the FIR, charge-sheet and all the documents relied upon by the prosecution as a whole are accepted in its entirety the same fails to make out any case and the learned Trial Court erroneously framed charges against the petitioner under Section 417/376/406 of the Indian Penal Code. In order to substantiate his argument learned Advocate relied upon *Prasanta Bharti –Vs. – State (NCT of Delhi)* reported in (2013) 9 SCC 293; *Pramod Suryabhan Pawar – Vs. – State of Maharashtra* reported in (2019) 9 SCC 608 and *Dr. Dhruvaram Murlidhar Sonar –Vs. – State of Maharashtra* reported in (2019) 18 SCC 191.

On the other hand Ms. Nandita Baksi learned Advocate appearing for the de facto complainant/opposite party submitted that the victim was allured by

the accused with a proposal to marry, to that effect the relevant part of the FIR was emphasized and the accused by his conduct made arrangements thereby developing confidence which prompted the victim to leave her service and shift her residence from her parental home to the house of the accused. Learned Advocate drew the attention of the Court to the contents of the FIR and the statement under Section 164 of the Code of Criminal Procedure wherein it has been contended that the accused at Kalighat Temple married the complainant by applying vermilion on her forehead. It was submitted that accused by his act tempted the de facto complainant to perform all the duties of a wife as such the charges under Section 417/376 of the Indian Penal Code are made out. Thus, according to the learned Advocate the accused after enjoying the lady threw her away and as such he must be asked to face the trial and prosecution be allowed to adduce its evidence as there are allegations also of criminal breach of trust.

Mr. Sandip Chakraborty learned Advocate appearing for the State produced the Case Diary and drew the attention of the Court to the FIR, statement of witnesses, medical evidences, an agreement made between the accused and the complainant, seizure lists as also the statement of the victim under Section 164 of the Code of Criminal Procedure. It was submitted on behalf of the State that as charge has already been framed the trial of the case should be taken to its logical conclusion.

In view of the contentions advanced by the learned Advocates appearing for the accused/petitioner, complainant/opposite party and the State, the FIR

and the Statement of the victim under Section 164 of the Code of Criminal Procedure should be analysed to arrive at a finding regarding the legality of the charges so framed which is subject matter of the present revisional application.

The allegations in the FIR (which is the letter of complaint addressed to the Inspector-in-charge, Chinsurah Police Station) were to the effect that the complainant namely Manjima Singh Sanger (Basu) was married to one Jagjit Singh Sanger on or about 25.01.2002 and out of the said wedlock a girl child was born who is aged about 12 years. However, for the last few years said Jagjit Singh Sanger was untraceable and after sometime complainant came to know that her husband was staying with another lady. Complainant states that she earns her livelihood by teaching in a local English medium school and by working as a private tutor. She also filed a divorce suit against her husband being case no. 325 of 2018. In the meantime she stated that the accused through her friend send proposal to her father for marrying her. The accused committed that till they are legally married he would take the responsibility of maintaining the complainant and her daughter. It has been contended that the accused was also divorced and having a girl child of 12 years. Being impressed by the behaviour and representation of the accused, complainant and her parents agreed and to that effect on December 16, 2018 an agreement was prepared and signed. On the said date accused wanted to take her to his residence and thereafter also applied vermilion on her forehead and represented that since he was spending/maintaining her, he is entitled to do the same even though the legal marriage may take place afterwards. The

accused took her to Kalighat Temple, married her and also cohabitated with her. Accused also asked her to leave her service and shift along with her daughter to Kolkata and promised to get her daughter admitted in a school at Kolkata. After 1/2 months accused told her that it was not possible for him to marry her and she should return to her parents. Compelled by such circumstances, complainant returned to her parents and presently she is without any means of livelihood. It has been alleged that the accused acted in a designed manner as he had earlier done with his wife and she apprehends that the accused would similarly harm other ladies. She further alleged that accused was in the habit of promising to marry and ravishing women and as such steps should be taken against him.

In her statement under Section 164 of Cr.P.C. before the learned Judicial Magistrate complainant narrated that she was married on 25.01.2002 and the marital tie continued for a considerable period of time, however, all on a sudden her husband left her and she received information that he married another lady. After frantic attempt she could establish contact with her husband, when he represented that he was having a relationship with a lady who is pregnant so she should either accept her or lead life on her own terms. The complainant thereafter filed divorce suit which is still pending. In the meantime through her friend she came to know that accused informed her father regarding him. Her father asked her to inform the accused to meet him when the accused met her father. She has a daughter and the accused is also divorced having a daughter of the same age. Accused after meeting her father

expressed his willingness and promised to marry her and an agreement was prepared on 16.12.2018. On the same date accused took her to Kalighat temple and married her, the same was done in spite of her resistance and on an allurement by the accused that belief and faith are paramount in marriage. On 21.03.2019 she shifted to Kolkata and her daughter was admitted in a school. Disputes and differences cropped up as the daughter of the accused was a special child (which the accused suppressed). She was abused by the accused, his mother and a neighbour who charged her for assaulting the special child. She was also sexually tortured by the accused and not allowed to go out of the house or meet with her acquaintances. Accused closed her facebook account and checked her phone. Her daughter was also tortured and was not admitted in a good school, further the accused unnecessarily reprimanded her daughter. Her parents being informed tried to mediate but the accused was adamant, as such she was compelled to leave the home on 26.05.2019. She informed the incident to local police station, as such she was not allowed any further entry and subsequently accused refused to keep any contact with her. Presently she is without any job and her daughter is also not getting admission in any school. Accused according to the complainant used and left her, in fact, she was compelled to clean the genitals of his special child daughter also.

I have considered the charge-sheet and its accompaniments which included the statement of the complainant, Manjima Singh Sanger (Basu); Ajit Basu, father of complainant; Manjushree Basu, mother of complainant; Arjika

Ghosh, sister of complainant; Kumkum Kar, seizure list witness; Amit Roy, neighbour of the complainant and Babu Saha, neighbour of the complainant.

Before proceeding to consider the subject matter of the case as a whole the principles set out by the Hon'ble Supreme Court in some of the judgments are required to be considered. In *Prasanta Bharti –Vs. – State (NCT of Delhi)* reported in (2013) 9 SCC 293 the following paragraphs are relevant:

“23.6. *Sixthly, even though the complainant/prosecutrix was married to one Manoj Kumar Soni, s/o Seeta Ram Soni (as indicated in an affidavit appended to the Delhi Police format for information of tenants and duly verified by the investigating officer, wherein she had described herself as married), in the complaint made to the police (on 16-2-2007 and 21-2-2007), she had suggested that she was unmarried.*

23.7. *Seventhly, as per the judgment and decree of the Civil Judge (Senior Division), Kanpur (Rural) dated 23-9-2008, the complainant was married to Lalji Porwal on 14-6-2003. The aforesaid marriage subsisted till 23-9-2008. The allegations made by the complainant dated 16-2-2007 and 21-2-2007 pertain to occurrences of 23-12-2006, 25-12-2006, 1-1-2007 and 15-2-2007 i.e. positively during the subsistence of her marriage with Lalji Porwal. Thereafter, the complainant Priya married another man Manoj on 30-9-2008. This is evidenced by a “certificate of marriage” dated 30-9-2008. In view of the aforesaid, it is apparent that the complainant could not have been induced into a physical relationship based on an assurance of marriage.*

23.8. *Eighthly, the physical relationship between the complainant and the accused was admittedly consensual. In her complaints*

Priya had however asserted, that her consent was based on a false assurance of marriage by the accused. Since the aspect of assurance stands falsified, the acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC. Especially because the complainant was a major on the date of occurrences, which fact emerges from the “certificate of marriage” dated 30-9-2008, indicating her date of birth as 17-7-1986.

24. *Most importantly, as against the aforesaid allegations, no pleadings whatsoever have been filed by the complainant. Even during the course of hearing, the material relied upon by the accused was not refuted. As a matter of fact, the complainant/prosecutrix had herself approached the High Court, with the prayer that the first information lodged by her, be quashed. It would therefore be legitimate to conclude, in the facts and circumstances of this case, that the material relied upon by the accused has not been refuted by the complainant/prosecutrix. Even in the charge-sheet dated 28-6-2007, (extracted above) the investigating officer has acknowledged, that he could not find any proof to substantiate the charges. The charge-sheet had been filed only on the basis of the statement of the complainant/prosecutrix under Section 164 CrPC. ”*

In *Pramod Suryabhan Pawar –Vs. – State of Maharashtra* reported in (2019) 9 SCC 608 the following paragraphs are relevant for the purpose of the present case:

11. *The primary contention advanced by the complainant is that the appellant engaged in sexual relations with her on the false promise 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 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* [*Dhruvaram Murlidhar Sonar v. State of Maharashtra*, (2019) 18 SCC 191 : 2018 SCC OnLine SC 3100] which was a case involving the invoking of the jurisdiction under Section 482, this Court observed : (SCC para 15)

“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* [*Kaini Rajan v. State of Kerala*, (2013) 9 SCC 113 : (2013) 3 SCC (Cri) 858] : (SCC p. 118, para 12)

“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 consent or not, is to be ascertained only on a careful study of all relevant circumstances.”

17. In *Uday v. State of Karnataka* [*Uday v. State of Karnataka*, (2003) 4 SCC 46 : 2003 SCC (Cri) 775] the complainant was a college-going student when the accused promised to marry her. In the complainant's statement, she admitted that she was aware that there would be significant opposition from both the complainant's and accused's families to the proposed marriage. She engaged in

sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The Court observed that in these circumstances the accused's promise to marry the complainant was not of immediate relevance to the complainant's decision to engage in sexual intercourse with the accused, which was motivated by other factors : (SCC p. 58, para 25)

“25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties

which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. 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."

(emphasis supplied)

19. *The allegations in the FIR indicate that in November 2009 the complainant initially refused to engage in sexual relations with the accused, but on the promise of marriage, he established sexual relations. However, the FIR includes a reference to several other allegations that are relevant for the present purpose. They are as follows:*

19.1. *The complainant and the appellant knew each other since 1998 and were intimate since 2004.*

19.2. *The complainant and the appellant met regularly, travelled great distances to meet each other, resided in each other's houses on multiple occasions, engaged in sexual intercourse regularly over a course of five years and on multiple occasions visited the hospital jointly to check whether the complainant was pregnant.*

19.3. *The appellant expressed his reservations about marrying the complainant on 31-1-2014. This led to arguments between them. Despite this, the appellant and the complainant continued to engage in sexual intercourse until March 2015.*

20. *The appellant is a Deputy Commandant in the CRPF while the complainant is an Assistant Commissioner of Sales Tax.*

21. *The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the*

complainant, it was done in bad faith or with the intention to deceive her. The appellant's failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellant's promise of marriage. Therefore, even if the facts set out in the complainant's statements are accepted in totality, no offence under Section 375 IPC has occurred.”

In Dr. Dhruvaram Murlidhar Sonar -Vs. - State of Maharashtra reported in (2019) 18 SCC 191 the following paragraphs are relevant for the purpose of the present case:

“17. *Thus, Section 90 though does not define “consent”, but describes what is not “consent”. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances.*

23. *Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether*

the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC.

24. *In the instant case, it is an admitted position that the appellant was serving as a Medical Officer in the Primary Health Centre and the complainant was working as an Assistant Nurse in the same health centre and that she is a widow. It was alleged by her that the appellant informed her that he is a married man and that he has differences with his wife. Admittedly, they belong to different communities. It is also alleged that the accused/appellant needed a month's time to get their marriage registered. The complainant further states that she had fallen in love with the appellant and that she needed a companion as she was a widow. She has specifically stated that "as I was also a widow and I was also in need of a companion, I agreed to his proposal and since then we were having love affair and accordingly we started residing together. We used to*

reside sometimes at my home whereas sometimes at his home". Thus, they were living together, sometimes at her house and sometimes at the residence of the appellant. They were in a relationship with each other for quite some time and enjoyed each other's company. It is also clear that they had been living as such for quite some time together. When she came to know that the appellant had married some other woman, she lodged the complaint. It is not her case that the complainant has forcibly raped her. She had taken a conscious decision after active application of mind to the things that had happened. It is not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit consent and the tacit consent given by her was not the result of a misconception created in her mind. We are of the view that, even if the allegations made in the complaint are taken at their face value and accepted in their entirety, they do not make out a case against the appellant. We are also of the view that since the complainant has failed to prima facie show the commission of rape, the complaint registered under Section 376(2)(b) cannot be sustained."

It would not be out of place to state that the Hon'ble Supreme Court relying upon the aforesaid three judgments also reiterated the principles in Sonu –Vs. – State of U.P. reported in 2021 SCC OnLine SC 181 and Shambhu Kharwar –Vs. – State of U.P. reported in 2022 SCC OnLine SC 1032.

The following factual circumstances surface in the present case:

- (i) The petitioner is aged about 46 years, divorced, having a girl child and the complainant is aged about 37 years, having a girl child of 12 years and her divorce case against her husband was pending.

- (ii) The complainant had an active understanding of the circumstances, actions and consequences of the act of settling with another person during pendency of her divorce proceedings. In fact she had taken a conscious decision after active application of mind to the things that happened.
- (iii) It was a choice of the complainant to enter into the agreement dated 16.12.2018, there was no complaint that there was any coercion while entering into such agreement. Although the validity of such agreement is debatable but considering the maturity of the complainant, the terms set out therein expresses the consent in respect of the acts proposed to be consensual done by both the parties.
- (iv) Act of entering into the agreement also expresses an active will of doing of an act which was later on made the subject matter of the complaint. In fact there was a voluntary participation not only after exercising her intelligence based on the knowledge of the moral quality of the act but after fully exercising her choice.
- (v) Further even if the facts are taken to be true the lady was not legally entitled to marry in view of the fact that her divorce proceeding were pending. Her entering into the agreement itself will reflect her inclination for attaching herself with the accused.

Having assessed the allegations in the FIR which was made by the complainant and her statement under Section 164 of the Code of Criminal

procedure there is nothing to show that there was a false promise to marry the complainant, repetition of the phrase do not alter the tenor or spirit of the allegations. So far as the allegations relating to Section 406 of the Indian Penal Code is concerned there are no materials either in the letter of complaint treated to be the First Information Report or in the statement under Section 164 of the Code of Criminal Procedure, in respect of entrustment of any valuables, however, there is a seizure list which reflects that there were certain jewellerys which were produced by the accused to the Investigating Officer of the case and were seized which included gold ornaments, wrist watch, utensils, study materials, cosmetic items and some garments.

Having regard to the nature of the case which has been complained of which was mainly for the purpose of foisting the petitioner with a criminal liability under Section 417 and 376 of the Indian Penal Code rather than a case of retention of stridhan articles (which cannot be in the present case as the parties are not married to each other), I am of the opinion that further continuance of the proceedings on the basis of the principles set out by the Hon'ble Supreme Court in the background of the facts of the present case would be an abuse of the process of law and the continuance of the same is bound to cause miscarriage of justice.

Thus, all further proceedings arising out of Chinsurah police station case no. 115 of 2019 presently pending before the learned Additional Sessions Judge, Fast Track, 2nd Court, Hooghly being S.C. Case No. 48 of 2020 (S.T. No.

07 of 2021) including the order dated 25.03.2021 framing charges against the present accused/petitioner is hereby quashed.

Accordingly, CRR 2495 of 2021 is allowed.

Pending applications, if any, are consequently disposed of.

Case Diary be returned to the learned Advocate appearing for the State.

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

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)