

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 3578 of 2019

Biplab Biswas

Vs

The State of West Bengal & Anr.

For the Petitioner : Mr. Kallol Mondal,
Mr. krishan Ray,
Mr. Souvik Das,
Mr. Ayan Mondal.

For the State : Mr. Swapan Banerjee,
Mr. Suman De.

For the Added Party : Mr. Uttam Basak.

Heard on : 09.02.2023

Judgment on : 03.03.2023

Shampa Dutt (Paul), J.:

The present revision has been preferred praying for quashing of the proceeding being G.R. Case No. 1578 of 2018 arising out of Hanskhali Police Station Case No. 307 of 2018 dated 02.09.2018 under Section 417/376 of the Indian Penal Code, 1860 pending before the learned Court of Additional Chief Judicial Magistrate at Ranaghat, Nadia.

The petitioner's case is that the petitioner is a government service personnel employed with the Border Security Force.

The instant case has been initiated on the basis of a written complaint lodged by one Mampi Sarkar (herein referred to as the de facto complainant) with the officer in charge of Hanskhali Police Station and the same has been registered as Hanskhali Police Station Case No. 307 of 2018 dated 02.09.2018 for investigation into offences punishable under Sections 417/376 of the Indian Penal Code, 1860 corresponding to G.R. Case No. 1578 of 2018.

Petitioner states that the averments made in the written complaint is to the effect that the de facto complainant is mother of one child and a divorcee who resides at her retired father's house. The de facto complainant and the petitioner herein came to know each other when the petitioner herein used to visit the father of the de facto

complainant as both of them used to work at the same place. The petitioner promised marriage to the de facto complainant and subsequently on 24.08.2018 the petitioner borrowed a sum of Rs. 71,000/-from the de facto complainant. On 25.08.2018 at about 3 p.m. when there was no one in the house of the de facto complainant the petitioner on the lieu of marrying the de facto complainant ravished her. Afterwards the petitioner promised the de facto complainant of registry marriage on 26.08.2018 or on 27.08.2018. On 26.08.2018 when the de facto complainant rang the petitioner the petitioner did not respond to her mobile calls and later on when the de facto complainant visited the residence of the petitioner, the petitioner denied the fact that he ever made such a promise to the de facto complainant.

After conclusion of the purported investigation, the investigating agency has submitted charge sheet vide charge sheet no. 336 of 2018 dated 30.09.2018 under Sections 376/417 of the Indian Penal Code.

The petitioner states that the petitioner was taken into custody on 05.09.2018 and subsequently on 18.09.2018 he was enlarged on bail vide order dated 18.09.2018 passed by the learned Additional District and Sessions Judge, Ranaghat, Nadia in Misc. Case No. 458 of 2018 wherein the learned Additional District and Sessions Judge, Ranaghat, Nadia was pleased to observe that in the statement made under Section 164 of the Code of Criminal Procedure, 1973 the de facto

complainant had stated that the relation with the petitioner herein was an amorous one and was consensual in nature.

After submission of the charge sheet the learned Additional Chief Judicial Magistrate, Ranaghat, Nadia was pleased to take cognizance on 14.11.2018.

The petitioner states and submits that the allegation which has been drawn up against the petitioner herein is entirely vindictive in nature which has been carefully drawn up against the petitioner herein with the sole intent to malign the reputation of the petitioner with ulterior and malicious intention. It is apposite to mention that on a bare reading of the First Information Report drawn up against the petitioner it can be found that the de facto complainant has allegedly lent a sum of Rs.71,000/- to the petitioner. Whereas the same will itself reveal that the de facto complainant is herself a helpless woman living at her father's place having no income and the petitioner is a BSF personnel drawing a good salary. From the above it can be deduced that the First Information Report has been drawn up with careful manipulation and deliberation and the allegations leveled against the petitioner are false.

The allegations made by the de facto complainant in this instant criminal case fails to convene or satisfy any of the criterion envisaged in Section 375 of the Indian Penal Code, 1860. The First Information Report of the instant criminal matter reveals that the de facto

complainant was neither put under any sort of coercion nor any misrepresentation was made by the petitioner. Thus from the above it can be assumed that the learned Magistrate would have traversed a different path if proviso Section 375 of the Indian Penal Code, 1860 would have been considered at the time of taking cognizance.

It is not a case where the de facto complainant had any misconception about the nature of the act which she consented. In the instant case, the de facto complainant fully knew that what they were going to commit was an act of sexual intercourse. That being so, it does not become a case of rape when the consent to the act of sexual intercourse fully knowing the nature and implication of such act and when she was fully aware that the person concerned was not yet her husband, even if he had proposed to marry her. As such the learned Magistrate had made a gross mistake in neglecting the well laid out law in this instant criminal case.

In the statement made under Section 164 of the Code of Criminal Procedure, 1973 the de facto complainant had stated that the relation with the petitioner herein was an amorous one and was consensual in nature. Thus it can be deduced from the above that the instant criminal case is misconceived and vindictive in nature which has been instituted after careful deliberation and manipulation with the

sole intent to malign the petitioner and to compel the petitioner to marry her in the lieu of this instant criminal case.

Mr. Kallol Mondal, learned counsel for the petitioner has submitted that in the prevalent facts and circumstances of the present case, the entire proceedings is liable to be quashed against the petitioner and the impugned order dated 14.11.2018 is required to be set aside.

That an order of quashing of the instant case and setting aside the impugned order shall serve the ends of justice.

While taking cognizance the learned Magistrate has failed to apply its judicial mind and made no endeavour to prima facie look into the prosecution case.

Mr. Uttam Basak, learned counsel for the opposite party has submitted that there is sufficient materials on record and case diary to make out a prima facie case of cognizable offence against the petitioner and as such the revision is liable to be dismissed.

Mr. Swapan Banerjee, learned counsel for the State has placed the case diary and submitted that there is sufficient materials against the petitioner for proceeding towards trial and as such the revision should be dismissed.

Mr. Mondal has relied upon the following judgments:-

- (1) **Hemant Choubey vs State of MP, 2014 SCC Online MP 8193, on December 11, 2014.**
- (2) **Puran Giri vs State of West Bengal & Anr., 2016 SCC Online Cal 120, on January 14, 2016.**
- (3) **Partho Pratim Phukan @ Meja vs State of West Bengal and Anr., 2008 SCC Online Cal 199, on March 14, 2008.**
- (4) **Sudhamay Nath @ Bachhu vs State of West Bengal, 1999 SCC Online Cal 305, on July 15, 1999.**
- (5) **Shyamapada Tiwari vs State of West Bengal and Anr., 2009 CCrLR (Cal) 266, on June 29, 2007.**
- (6) **Uday vs State of Karnataka, (2003) 4 SCC 46, on February 19, 2003.**
- (7) **Kaini Rajan vs State of Kerela, (2013) 9 SCC 113, on September 19, 2013.**

Mr. Basak has relied upon the following judgments in support of the opposite party's case:-

- (1) **State of U.P. vs. Naushad, Criminal Appeal No. 1949 of 2013, 2013 0 Supreme (SC) 1043, on 19.11.2013.**
- (2) **Yedla Srinivasa Rao vs State of A.P., (2006) 11 SCC 615, Criminal Appeal No. 1369 of 2004, on September 29, 2006.**

Heard the learned counsels for both sides and the learned counsel for the State. Perused the materials on record. Considered.

In the ruling relied upon by the petitioner, the Supreme Court in **Uday vs State of Karnataka, Appeal (Crl.) 336 of 1996, on 19 February, 2003**, also held:-

“.....It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.....”

The Supreme Court in **Deepak Gulati vs State of Haryana, Criminal Appeal No. 2322 of 2010, on 20 May, 2013**, held:-

“15. *Section 114-A of the Indian Evidence Act, 1872 (hereinafter referred to as the ‘Act 1872’) provides, that if the prosecutrix deposes that she did not give her*

consent, then the Court shall presume that she did not in fact, give such consent. The facts of the instant case do not warrant that the provisions of Section 114-A of the Act 1872 be pressed into service. Hence, the sole question involved herein is whether her consent had been obtained on the false promise of marriage. Thus, the provisions of Sections 417, 375 and 376 IPC have to be taken into consideration, alongwith the provisions of Section 90 of the Act 1872. Section 90 of the Act 1872 provides, that any consent given under a misconception of fact, would not be considered as valid consent, so far as the provisions of Section 375 IPC are concerned, and thus, such a physical relationship would tantamount to committing rape.

16. This Court considered the issue involved herein at length in the case of *Uday v. State of Karnataka*, AIR 2003 SC 1639; *Deelip Singh @ Dilip Kumar v. State of Bihar*, AIR 2005 SC 203; *Yedla Srinivasa Rao v. State of A.P.*, (2006) 11 SCC 615; and *Pradeep Kumar Verma v. State of Bihar & Anr.*, AIR 2007 SC 3059, and came to the conclusion that in the event that the accused's promise is not false and has not been made with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act(s) would not amount to rape. Thus, the same would only hold that where the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned.

17. Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamounts to a serious blow to the supreme honour of a woman, and

offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks.

18. *Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused 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 a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. 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 mis-representation made to her by the 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 so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.*

19. *In Deelip Singh (supra), it has been observed as under:*

“20. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the

victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology.”

20. *This Court, while deciding Pradeep Kumar Verma (Supra), placed reliance upon the judgment of the Madras High Court delivered in N. Jaladu, Re ILR (1913) 36 Mad 453, wherein it has been observed:*

“We are of opinion that the expression “under a misconception of fact” is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) states that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married..... “thus ... if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person”. ...

Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of Section 90 IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence.”

21. *Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. 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 IPC 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.”*

The Supreme Court in **Naim Ahamed vs State(NCT of Delhi)**,

Criminal Appeal no. 257 of 2023, on 30.01.2023, held:-

“20. *The bone of contention raised on behalf of the respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause – Secondly of Section 375 IPC. In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of promise by the accused. In case of false promise, the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceived the prosecutrix by giving a false*

*promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376. **As stated earlier, each case would depend upon its proved facts before the court.***

Thus in the present case only cognizance has been taken. Trial is yet to begin. Only after evidence has been adduced that the court will be in a position to consider the case on the total materials/evidence before it, in accordance with the relevant provisions of law and lead the case to its logical conclusion.

As such in the interest of justice, the present case needs to be decided by a trial.

The materials in this case and the stage of the proceeding do not call for interference by this Court as the materials on record make out a prima facie case of a cognizable offence against the petitioner.

In Ramesh Chandra Gupta vs. State of Uttar Pradesh and Ors., 2022 LiveLaw (SC) 993, Criminal Appeal No(s). 2060 of 2022 (Arising out of SLP (Crl.) No(s). 39 of 2022), the Supreme Court held:-

“15. This Court has an occasion to consider the ambit and scope of the power of the High Court

under Section 482 CrPC for quashing of criminal proceedings in **Vineet Kumar and Others vs. State of Uttar Pradesh and Another, (2017) 13 SCC 369** decided on 31st March, 2017. It may be useful to refer to paras 22, 23 and 41 of the above judgment where the following was stated:

“22. Before we enter into the facts of the present case it is necessary to consider the ambit and scope of jurisdiction under Section 482 CrPC vested in the High Court. Section 482 CrPC saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice.

23. This Court time and again has examined the scope of jurisdiction of the High Court under Section 482 CrPC and laid down several principles which govern the exercise of jurisdiction of the High Court under Section 482 CrPC. A three-Judge Bench of this Court in *State of Karnataka v. L. Muniswamy* (1977) 2 SCC 699 held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. In para 7 of the judgment, the following has been stated :

‘7. ... In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher

than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction.'

41. Inherent power given to the High Court under Section 482 CrPC is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. The Court cannot permit a prosecution to go on if the case falls in one of the categories as illustratively enumerated by this Court in State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335. Judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of operation or harassment. When there are materials to indicate that a criminal proceeding is manifestly attended with mala fides and proceeding is maliciously instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 CrPC to quash the proceeding under Category 7 as enumerated in State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335 which is to the following effect :

'102. (7) Where a criminal proceeding is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.' Above Category 7 is clearly attracted in the facts of the present case. Although, the High Court has noted the judgment of State of Haryana v. Bhajan Lal 1992 Supp (1) SCC 335 but did not advert to the relevant facts of the present case, materials on which final report was submitted by the IO. We, thus, are fully satisfied that the present is a fit case where the High Court ought to have exercised its jurisdiction under Section 482 CrPC and quashed the criminal proceedings."

16. *The exposition of law on the subject relating to the exercise of the extra-ordinary power under Article 226 of the Constitution or the inherent power under Section 482 CrPC are well settled and to the possible extent, this Court has defined sufficiently channelized guidelines, to give an exhaustive list of myriad kinds of cases wherein such power should be exercised. This Court has held in para 102 in **State of Haryana and Others v. Bhajan Lal and Others, 1992 Supp. (1) 335** as under :*

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

17. *The principles culled out by this Court have consistently been followed in the recent judgment of this Court in **Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra and Others, 2021 SCC Online SC 315.***

In the present case, the facts/circumstances and the materials on record do not fall under any of the said categories.

CRR 3578 of 2019 is thus dismissed.

There will be no order as to costs.

All connected Application stand disposed of.

Interim order if any stands vacated.

Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)