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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 17.02.2023
Pronounced on: 20.03.2023

+ **CRL.REV.P. 772/2018**

STATE

..... Petitioner

Through: Mr. Naresh Chahar, APP for
State with SI Veena, P.S. Sarai
Rohilla.

versus

SUDERSHAN KUMAR

..... Respondent

Through: Mr. Yogesh Swaroop,
Advocate

+ **CRL.REV.P. 565/2019 & CRL.M.A. 10128/2019**

X

..... Petitioner

Through: Mr. Sujeet Kumar Mishra,
Advocate

versus

THE STATE (NCT OF DELHI) & ANR. Respondents

Through: Mr. Naresh Chahar, APP for
State with SI Veena, P.S. Sarai
Rohilla.
Mr. Sanser Pal Singh,
Advocate for R-2.

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

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SWARANA KANTA SHARMA, J.

1. This judgment shall govern the disposal of Crl.Rev.P. 772/2018 and Crl.Rev.P. 565/2019, along with pending applications. Since both the petitions arise out of same set of facts and contentions and the issue before this Court in both the petitions is also common, the same are being decided through this common judgment. The petitioner in Crl.Rev.P. 772/2018 is the 'State' whereas petitioner in Crl.Rev.P. 565/2019 is the 'prosecutrix/complainant'.

2. The aforesaid revision petitions filed under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (*hereinafter referred to as 'Cr.P.C'*) assail the order dated 14.06.2018 passed by learned Additional Sessions Judge/SFTC-2(Central), Tis Hazari Courts, Delhi (*hereinafter referred to as 'Trial Court'*) in case FIR bearing no. 475/2017, registered at Police Station Sarai Rohilla, Delhi for the offences punishable under Sections 376/506 of the Indian Penal Code, 1860 (*hereinafter referred to as 'IPC'*), whereby the accused, i.e. respondent in Crl.Rev.P. 772/2018 and respondent no. 2 in Crl.Rev.P. 565/2019 (*hereinafter referred to as 'accused'*) has been discharged of offences punishable under Section 376/506 of IPC.

FACTUAL BACKGROUND

3. To encapsulate briefly, the present FIR was lodged on the complaint of prosecutrix who had alleged that she had got married to one 'Mr. Y' in the year 2003. While travelling by a train in 2005, she had come in contact with the accused and both of them had become friends. He had started visiting her house and also meeting her family members including her husband. It was alleged that in November, 2005, the accused had come to factory at Dayabasti where the prosecutrix used to work. He had called her out, and thereafter, had offered her a glass of juice, after consuming which, she had become unconscious and the accused had taken her to a room in a rickshaw. Upon gaining consciousness, prosecutrix had realised that the accused had established physical relations with her. It was alleged

that the accused had also threatened to defame the prosecutrix. It was alleged that after about 10-15 days, the accused had shown some obscene photographs in a mobile phone to the prosecutrix and under threat, he had taken her to a railway quarter at Panchkuian Road, New Delhi. He had threatened to show photographs to her family members. Thereafter, the accused had compelled her to establish physical relationship with him several times till the year 2017. In July, 2017, the accused had visited the house of prosecutrix at Palam Colony, Delhi and had established physical relations with her. He had also asked her to establish physical relations with his friends. Thereafter, the prosecutrix had narrated the incident to her husband and a complaint was filed with the police, leading to registration of the present FIR.

4. During investigation, statement of prosecutrix under Section 164 of Cr.P.C. was recorded wherein she also stated that her son and daughter were born from the physical relationship between her and the accused. DNA test was conducted and the report revealed that the DNA profile of the children matched with the DNA profile of the accused and prosecutrix.

5. The learned Trial Court, *vide* order dated 14.06.2018, discharged the accused. The operative portion of the said order reads as under:

“...It is further revealed that prosecutrix is a married lady and despite that she entered into relationship with the accused. Therefore, she cannot claimed that on the pretext of promise of marriage, accused had misused her. The facts and circumstances of the present case are very unique. The

prosecutrix had remained silent since 2005 when accused allegedly established physical relationship with her. It was very abnormal on the part of prosecutrix not to make a complaint against accused or not to disclose about the incident to her husband or to any of her relative. It is also admitted case of prosecution that physical relationship between accused and prosecutrix continued till December 2017 when she lodged complaint with the police. The statement of the prosecutrix recorded before the magistrate u/s 164 Cr.P.C. is also to the effect that accused threatened her to establish physical relationship with her. There is no mobile phone recovered in the case to corroborate the version of prosecutrix that her obscene photographs and videos were prepared by accused. If the entire prosecution case as it is to be accepted even then position remains that the prosecutrix established physical relationship with the accused and born two children despite she being married having a husband which goes to show that she has established relationship with accused with her free will. The question of life and liberty of accused is also of paramount consideration. An accused cannot be compelled to face trial in a case where the result of the case is apparent and as such that it would go in favour of accused. In these circumstances, the prosecutrix even if called by her deposition in court cannot depose anything beyond her statement given to police and before the Ld. MM. In these circumstances, I do not find any merit in the arguments of Ld. Addl. PP for the State. There is hardly any material against accused to show that he has threatened the prosecutrix to establish physical relationship with her. Accordingly, accused Sudershan is discharged from section 376/506 IPC...”

SUBMISSIONS AT BAR

6. Learned counsel for prosecutrix/complainant states that learned Trial Court committed grave error by discharging the

accused of the charges levelled against him. He also states that though it is true that allegations in this case were levelled by the prosecutrix after 12 years of the alleged incident when she was sexually assaulted by the accused for the first time, the learned Trial Court could not have gone beyond the statements of the prosecutrix recorded under Section 161 and 164 of Cr.P.C. Learned counsel also states that irrespective of the fact that the prosecutrix has two children from the accused, the same will not come in the way of framing charge, since at the time of framing of charge, the Court has to look into the statements of prosecutrix under Sections 161 and 164 of Cr.P.C and not beyond.

7. Learned APP for the State also argues that considering the allegations levelled by the prosecutrix in her complaint and statement under Section 164 Cr.P.C., charges should have been framed against the accused and the genuineness of the allegations can be tested at the stage of trial.

8. Learned counsel for the accused, on the other hand, states that the prosecutrix in her statements recorded under Sections 161 and 164 Cr.P.C., has admitted that she had given birth to two children from the accused which shows that she had been in a consensual relationship with him. It is vehemently argued that the prosecutrix remained silent since the year 2005, when the accused allegedly established physical relationship with her without her consent, and complained only in the year 2017 thereby leveling false and frivolous allegations. It is stated that there is no illegality or infirmity in the impugned order passed by learned Trial Court.

9. This Court has heard arguments addressed by both the sides and have perused the material on record.

10. In the present case, the issue which has to be decided by this Court is that whether, considering all the allegations in the FIR and charge-sheet as they stand, offences punishable under Sections 376/506 IPC are made out or not for the purpose of framing charge.

LAW ON FRAMING OF CHARGE

11. Before considering the rival contentions of the parties and the merits of the case, it will be apposite to briefly discuss the law with respect to framing of charge and discharge as provided under Sections 227 and 228 of Cr.P.C. The same has been reproduced as under for reference:

“227. Discharge.

If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf. the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

228. Framing of charge.

(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure

for the trial of warrant- cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub- section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

i. Judicial Precedents

12. In *Union of India v. Prafulla Kumar Samal* (1979) 3 SCC 4, the Hon’ble Supreme Court had laid down the following principles to be considered at the stage of framing of charge/discharge:

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

1. That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out **whether or not a prima facie case against the accused has been made out.**

2. Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

3. The **test to determine a prima facie case would naturally depend upon the facts of each case** and it is difficult to lay down a rule of universal application. **By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.**

4. That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court **cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on.** This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

(Emphasis supplied)

13. The Hon’ble Supreme Court in case of *Sajjan Kumar v. CBI* (2010) 9 SCC 368, has considered the powers of Courts in respect of the framing of charge and discharge and the fact that a prima facie case would depend on the facts and circumstances of each case. The relevant principles as enunciated in the said decision read as under:

“21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 Cr.P.C. **has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie cases would depend upon the facts of each case.**

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.”

(Emphasis supplied)

ii. Prima Facie View

14. The very foundation of formation of opinion regarding framing of charge is as to whether “there is sufficient material on record to prima facie make out a case of commission of an offence”. Therefore, a duty has been cast on the Trial Court judges to apply their mind carefully to the material before them to form such opinion.

15. The edifice of an order on charge is appreciation of prima facie view of the matter. Therefore, it becomes important to address the pertinent question as to what constitutes a ‘prima facie’ view qua the stage of framing charges.

16. Prima facie refers to something that can be determined at first glance, at first impression, on the surface, or inasmuch as it can be inferred from the initial disclosure. Black’s Law Dictionary, 5th Ed. suggests that the prima facie case would mean that the evidence brought on record would reasonably allow the conclusion that the plaintiff seeks. Therefore, ‘prima facie’ would mean the suggestion that comes from having the first glance of anything.

17. According to the Oxford Dictionary of Modern Greek, the literal meaning of prima facie is ‘on/at first viewing’. It will necessarily mean that looking at something at its face value and not going into any intricate or detailed analysis, therefore, the word prima facie when used in terms of prima facie view as far as consideration of charge is concerned would mean there being enough material of substance which will give rise to strong suspicion against

the accused and holding of a view in favour of prosecution.

LAW OF SECTION 375 AND 90 OF INDIAN PENAL CODE, 1860

18. An offence is punishable under Section 376 of the IPC if the offence of rape is established in terms of Section 375 which sets out the ingredients of the offence. In the present case, Section 375 along with Section 90 of the IPC is relevant which is set out below:

“375. Rape – A man is said to commit “rape” if he – under the circumstances falling under any of the following seven descriptions

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

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

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

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

First. -Against her will.

Secondly - Without her consent.

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

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

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

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

Seventhly - When she is unable to communicate consent.

Explanation 1. - For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2. - Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

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

Exception 2 - Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

"90. Consent known to be given under fear or misconception - A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception

of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or...”.

i. Judicial Precedents

19. In *Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra* (2019) 18 SCC 191, the Hon’ble Apex Court had discussed the scheme of aforesaid provisions as under:

“15. Section 375 defines the offence of rape and enumerates six descriptions of the offence. The first clause operates where the woman is in possession of her senses and, therefore, capable of consenting but the act is done against her will and the second where it is done without her consent; the third, fourth and fifth when there is consent but it is not such a consent as excuses the offender, because it is obtained by putting her, or any person in whom she is interested, in fear of death or of hurt. The expression “against her will” means that the act must have been done in spite of the opposition of the woman. 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.

16. Section 90 of the IPC defines “consent” known to be given under fear or misconception:-

“Section 90: Consent known to be given under fear or misconception.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception

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”.

20. In the case of *Kaini Rajan v. State of Kerala* (2013) 9 SCC 113, the Hon’ble Supreme Court, while explaining the essentials and parameters of the offence of rape, had observed as under:

“12. Section 375 IPC defines the expression “rape”, which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression “against her will” means that the act must have been done in spite of the opposition of the woman. 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 the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression “consent”. Section 90, though, does not define “consent”, but describes what is not consent. “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 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 relied upon *State of H.P. v. Mango Ram*, (2000) 7 SCC 224.”

ANALYSIS AND FINDINGS

21. Coming back to the case at hand, the arguments of the petitioners rest primarily on the ground that the prosecutrix was administered some kind of intoxicating substance in the year 2005 at a public place i.e. a juice shop near her work place and later on, she had found herself in the house of the accused which was a government quarter and she had realized upon gaining consciousness that she had been raped by the accused. Later on, she was also told by accused that he had made a video clip of her and had taken several inappropriate photographs, and he had thereafter made physical relations with the prosecutrix for many years on the basis of such threats. Since the year 2005, till filing of the complaint in the year 2017, the prosecutrix did not lodge complaint either with police or inform the same to any of her family members.

22. Thus, this Court has to decide, in light of the settled law and precedents, as to whether the facts of the case make out a ‘prima facie’ case of rape against the accused or not.

23. Perusal of the statement of the prosecutrix and the other material on record reveals unusual facts and raises certain important issues, which this Court now proceeds to discuss and deal with in the succeeding paragraphs.

i. Peculiar Facts and Circumstances

24. The present case comprise of peculiar facts and circumstances. The first alleged incident in year 2005 had taken place in broad day light when prosecutrix was allegedly administered intoxicating substance at a juice shop. Immediately thereafter, the incident of rape allegedly takes place in a congested, highly populated Government quarters which have a common passage and common entry gate.

25. Essentially after 12 years, the juice shop owner may not have been found by the police and thereafter neither there is any pointing out of the shop, the exact place or location of the shop or a person who must have been the best witness to have seen the kidnapping. The prosecutrix herself says that in November, 2005, the glass of juice was offered to her on the main road and she was made to sit in the rickshaw in the broad day light, where she became unconscious in the rickshaw and when she had regained consciousness, she had realized that physical relations had been made by the accused with her. Prima facie, on the face of it, the very statement itself would indicate that it is difficult to believe her assertions since during day time on the main road, that too at one of the busiest places in Delhi, she was administered some intoxicating substance in a glass of juice at the juice shop itself and was thereafter taken in a rickshaw where she became unconscious. Someone taking a fully grown woman in unconscious condition in a rickshaw in broad day light to another busiest place of Delhi i.e. railway quarters, Daya basti, rather raises questions against her story.

26. Thereafter, the prosecutrix was allegedly shown her

inappropriate pictures and videos recorded by the accused in his mobile phone, which were never recovered by the investigating agency. It remains noteworthy that the mobile number or the mobile phone in which the alleged video and photographs were shown to prosecutrix are neither a part of the charge-sheet, nor could be recovered. It is not clear as to why the same were not recovered. The prosecutrix herself states in her statement that she was shown the photographs and videos in a white oval mobile phone which she had not seen in the year 2005 and that neither she had seen it before the day she was shown the mobile phone, nor she has seen the phone thereafter in possession of the accused. It is thus unclear as to how the consent of prosecutrix was obtained under fear of such pictures or videos.

27. The complainant as well as the accused, at the time of alleged first incident till the last incident, had been married to different partners. Both of them have been in sexual association since the year 2005, which took place frequently at the house of the accused where she was taken by the accused through various means on regular basis where the sexual activity took place *allegedly* against her consent. More noteworthy than this, is the fact that while both of them were living with their living and legally married partners, they not only were in relationship which now the complainant alleges to be against her will, it further seems falsified or suspicious for the reason that she delivered two children who have been fathered by the accused. The facts do not reveal as to how the family of the prosecutrix was not even aware about the parenting of the children till the DNA test

report was received in the Court. It is also not clear as to why she did not inform the family or any other authority that she was being sexually exploited, or 'raped' for 12 long years against her consent and she also chose to deliver children fathered by the accused herein. It is not a case of a teen-aged girl, an illiterate woman or a person confined after every sexual assault for 12 years. It is rather a case where for every sexual encounter, she had travelled to the house of accused and had thereafter gone back home and had borne two children by such sexual union.

ii. Jurisprudence of consent

28. The laws in this country, including the fundamental rights of women, affirm woman's right to sexual autonomy, sexual self-determination and equality which are individual human rights. For many years, the sexual assault was identified with sexual activities with use of violence and absence of the same was considered her agreement to the sexual activity in question. However, with development of sexual assault and sexual consent jurisprudence in India and many other countries, right to bodily integrity is protected by law and absence of violence is not indicative of rape in all cases. Recent years have seen widespread reforms in rape and sexual assault laws and development of jurisprudence in this regard in India. It is to be noted that sexual activity against will of the victim is the main and essential ingredient of sexual assault. It is based on the principle that violation of the sexual autonomy of the victim is a crime.

29. Learned counsel for the prosecutrix wants this Court to hold that the first sexual encounter between the accused and prosecutrix was against her consent and even if it is presumed that for the intervening period of 12 years, there was consensual relationship between two majors, the last sexual encounter was against her will and, therefore, trial has to commence on basis of these two sexual encounters against her will.

30. However, in given set of facts and circumstances, this contention of the learned counsel for the petitioner does not find favour with this Court. In the present case, neither there is any mobile phone, or photographs, or video of the prosecutrix, nor there is any evidence that it was ever in possession of the accused. Further, the last incident has allegedly taken place at the own house of the prosecutrix. The prosecutrix and the accused have a long history of sexual association of 12 years with two children born from the sexual association and therefore, to allege or hold that their last association was without consent and terming it as rape would be against the judicial precedents in this regard. As it has been observed earlier, the rape in this case has not taken place on any false pretext of marriage, but only on the basis of some photographs and a video which was allegedly in the possession of the accused, which is not relied upon or recovered by the prosecution to even prime facie produce something incriminating against the present accused. The conduct of the prosecutrix of not reporting the matter to anyone, and both accused and prosecutrix producing two children from their union, and their conduct of staying with their own spouses in the meantime

when adultery was still a criminal offence, raises question about their own conduct to an extent.

31. In such circumstances, this Court is only left with the statements of the prosecutrix to decide as to whether, even prima facie, a case will be made out under Section 375 of IPC against the accused or not.

32. In this regard, a reference can be made to the decision of Hon'ble Apex Court in *Sonu @ Subhash Kumar vs. State of Uttar Pradesh* 2021 SCC OnLine SC 181, whereby following observations were made by the Apex Court while relying upon its earlier decision in *Pramod Suryabhan Pawar v. State of Maharashtra* (2019) 9 SCC 608:

“10. Further, the Court has observed:

“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...”

33. As held by the Hon'ble Apex Court in *Deepak Gulati v. State of Haryana* 2013 7 SCC 675, “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.”

34. The legal position, thus, emerging from the various precedents is that the consent of a woman with respect to Section 375 of IPC has to be active and reasoned deliberation towards sexual intercourse.

35. In the present case, to establish whether the consent was obtained by fear of defamation which primarily arose due to the alleged photographs and video being in the possession of the accused, this Court takes note of the following crucial facts:

- i. There was **continuous sexual relationship** between the prosecutrix and accused **for 12 long years**, while both of them were married to different partners.
- ii. The **relationship between the parties continued during subsistence of their respective marriages**. Both the parties are adults and both were working i.e. the prosecutrix was working in a factory and the accused was employed in a government service.
- iii. There being **no evidence of existence of any inappropriate photograph, video or threat apparent from the record** or any mobile phone in which such photographs or videos could have been recorded.
- iv. There being **no evidence to support any allegation of administration of intoxicating substance** in broad day light in a heavily populated area, after a lapse of 12 years.
- v. It is **not the case of the prosecutrix that she lacked capacity to inform the authorities** or even her family about alleged sexual exploitation by the accused

- vi. The choice and **consent of the prosecutrix herself to give birth to the children fathered by the accused**, without a whisper of complaint to anyone
- vii. The prosecutrix was not confined and had remained free throughout to live with her family including her husband, visiting any place, attending to her work, and even visiting the doctor for the purpose of giving birth to the children without there being any threat or fear from the accused.

36. In aforesaid circumstances, it will be against the jurisprudence of sexual consent to hold that only on the basis of one single sentence, charge ought to be framed while ignoring the consent for 12 long years between the same parties and also considering the facts, circumstances and conduct of the parties in question. This Court also observes there are no questions of facts which are disputed and the facts as on record indicate that the ingredients of offences under Section 375/506 of IPC are not established.

37. The bone of contention primarily in the present case is as to whether the consent of the prosecutrix for sexual relationship was under fear and therefore, no consent in the eyes of law or whether it was a conscious consent. In the facts of the present case, even prima facie, it is difficult to construe the allegations levelled by the prosecutrix to be covered under definition of 'rape' the prosecutrix being a legally wedded wife of another partner, had sufficient maturity and intelligence to understand the significance, outcome and significance of the acts she was indulging in and was consenting to

including the moral aspect of the same. The facts as revealed clearly portrayed that while on the one hand, she had committed betrayal of faith and sanctity of marriage qua her husband by begetting two children from another man who was legally wedded to another partner, the accused himself was also betraying his own legally wedded partner. Even while she was impregnated twice she did not disclose to her husband that she was pregnant from the accused and she had gone ahead to give birth to his children which was surprisingly not a secret for her as she was still living with her legally wedded husband as she has stated in her statement that she knew that both the children have been fathered by the accused, therefore, she clearly knew that she was conceiving from the accused and not from her legally wedded husband.

38. The material on record also does not point out that consent was based on use of force and rather points out towards an agreement between the parties, especially in view of the fact that she has given statement herself to the police that the alleged white color oval mobile phone was once shown to her momentarily and she had never seen it again. Thus, it points out that there was no continuous threat as such of the photographs and videos being shown to her family, since the mobile phone itself was never recovered as the description and details of the phone were never given by the prosecutrix. The mobile number of the said phone is also not available.

39. The fact that complainant in this case herself had gone to the police and had requested for DNA test of the two children alleging that they were fathered by him point out to the fact that though she

was living with her husband in a conjugal relationship, she knew that the children were fathered by this person. Therefore, it belies her contention that every act committed with her for 12 years was non-consensual. The children were, therefore, born with consent of the complainant herself.

40. This Court also notes that this is a case of non-stranger sexual relationship of long duration of 12 years. Since the proof of sexual consent place pivotal role in determining whether the offence of sexual assault took place in the factual circumstances of the case, the facts of the present case become very material. In the facts of the case, communication of consent may consist of either words or conduct which should be unambiguous. The explanation to Section 375 of Cr.P.C also points out to the same. Necessarily therefore, the communication of consent has to be gathered from the facts and conduct of the person concerned. There is no denying that law must provide protection to those who may even be prima facie vulnerable to sexual exploitation/assault on the basis of blackmailing or threats. However, that type of protection cannot be available in the social context in which acquaintances or friends have been in, as long sexual relationship as 12 years as in the present case with two children born from such sexual union.

41. Thus, in the present case, it clearly seems that the consent of the prosecutrix was implied as well as expressed which had not been coerced or misguided or obtained through deceit since the prosecutrix for 12 long years maintains sexual relationship with him. While she gave birth to two children fathered by the accused while

still living with her legally wedded husband continuously her consent must have been based on reason, after deliberation and weighing the good and evil on each side.

42. A Court has to, in such circumstances, also examine the **dynamics of interpersonal relationship** of the accused and the complainant and as to whether the complainant had been pressurized to give up her right of refusal due to a threat. The facts of the present case, however, point out to specific interpersonal relationship where both the parties exercised their right of sexual self-determination and while living with their own legally wedded spouses had maintained physical relationship and had given birth to two children while the sexual relationship took place at the house of the accused in a Government provided accommodation in a busy locality of Delhi.

43. It is not a case where accused exploited or abused any disability or lack of power of the complainant or abused power or had put her under any fear of injury due to which she carried on with the relationship for 12 years and after 12 years had reported the matter to the police and also had voluntarily disclosed herself that the two children were fathered by the accused. Interestingly, this fact was not even known to her own family and her husband that the children were fathered by the accused.

44. This Court has practiced **judicial caution** while legally analyzing the prima facie evidence in this case so that it is not based on common assumption. The conduct of the parties and the circumstances have been examined for the purpose of making inferences about the state of mind and the conduct of keeping quiet

and thereafter suddenly disclosing the incident after 12 years and also disclosing the paternity of the children to the world. The decision of this case focuses objectively on the observable conduct of the complainant including her contention that she was under fear for all these 12 years about few photographs which she did not see for all these 12 years neither they were recovered by the police.

45. The conclusion of this case is, therefore, based on fact that her submission regarding her non-consent was not found credible on basis of inferences from facts of her conduct. The complainant's actual communicative behavior in this case has been her **undeniable silence**, non reporting the case to anyone though she had every opportunity, lack of fear of injury at every step for 12 years and the specific evidence regarding the complainant giving birth to children fathered by accused on some interval of time without any complaint, fact of absence of any inappropriate photographs or video made at any point of time, makes it a case of **no evidentiary foundation** whatsoever for believing absence of consent even prima facie at the stage of charge.

iii. Consensual Sex vs. Sexual Assault

46. To conclude in cases as the present one, the critical issue of consent which is the dividing line between consensual sex or sexual assault had to be examined in light of the facts of the case. Thus, the story of the petitioner and the respondent's relationship of 12 years and two children being born from this sexual union on some interval of time without any whisper of complaint to anyone points out

implied and behavioural consent inferred from the long years of their sexual relationship and behavior which is based on assumption of continuous consent in light of the evidence available on record.

47. The pattern of repeatedly consenting to sex with accused for 12 years is noteworthy. The assumption is based on the complainant's behaviour which is based on her own statement before the police. The behaviour of no attempt to ever report the matter and repeatedly going with him to his house answers the central legal issue of the case regarding the consent being voluntary.

iv. Unexplained delay of 12 years

48. The silence of the prosecutrix for 12 years remains unexplained.

49. There is no gain saying that each case has to be judged on the peculiar facts it reveals. In the present case, this Court is of the view that the prosecutrix was a grown up, matured married woman who was married for about 2 years. She did not state that she was unhappily married. She was a working woman and she also has not stated anywhere that she did not know that the accused was married or he had misrepresented the same to her. She was, therefore, aware of the fact that both of them were legally wedded to different partners. She also had sufficient maturity and intelligence to understand the significance and morality of the acts both of them were indulging in, and were consenting to. To say after such a long period of relationship, after 12 years, she has mustered courage to resist the overtures of the accused, when she already had two

children from him, points out contrary to her claim. Rather it points out that she knew that both of them were in a relationship which had to be kept a secret due to the morality involved in the same as while living with legally wedded husband she had given birth to two children from the accused. It is not her case that she did not know that she was giving birth to children begotten by the accused and not by her husband though she was living with both of them. Therefore, it will point out that she was well aware that it was the accused only who had fathered her children and not her husband. She had chosen to keep quiet for 12 long years as she knew that such acts had to be kept secret as long as they could.

50. Despite being free from any incident of fear from the side of the accused, only upon a few photographs and video which have not seen the light of the day, she had not resisted the overtures of the accused and in fact had not only continued her sexual relationship with him but has also gone ahead to give birth to the two children fathered by him. She must have been fully conscious of the consequences of her decisions and actions and therefore, there are no two views possible in this case even at the stage of charge, but to hold that she had consciously consented to having sexual intercourse with the accused with her consent and was not due to any kind of fear of injury or misconception of fact.

51. Perusal of the statement of husband of prosecutrix also reveals that he admitted therein that the accused in the meanwhile for all these years i.e. 12-13 years has been visiting them regularly even at their home. However, till September, 2017, even the husband of the

prosecutrix did not know about their relationship and the fact that two children were born from the sexual union of prosecutrix and the accused.

52. It is also noted that the accused is having five children from his wife. Though an argument was raised that complainant was a married woman and therefore there was reluctance to go to the police due to society's attitude towards such woman. However, the conduct of the prosecutrix in the present case at the cost of repetition is that in totality of the circumstances of her continuous relationship for 12 years where she had maintained sexual relationship with him at the official accommodation of the accused and has given birth to two children by him, while he already had fathered five children from his legally wedded wife and the fact that it was accused who was also continuously visiting them frequently at the matrimonial home of the prosecutrix on the pretext that he was like a brother to prosecutrix and there is no complaint of any kind by the prosecutrix to her husband and she had gone ahead to give birth to the children without any resistance, will rather force the Court to note that such consideration of reluctance was missing in the present case.

CONCLUSION

53. In cases of rape, sexual violence and effective enforcement of sexual assault laws, conceptualization of definition of sexual consent is of utmost importance so that the delicate balance between rape and consensual sexual sex is fairly arrived at in such complaints and cases. The issue of consent, thus, merits close scrutiny for analysis of

sexual assault offences.

54. No doubt, in cases of rape depending on facts from case to case, consent cannot be said to be inferred or proved by passivity or silence alone from the complainant. However, continuous consent, as in the present, without any whisper of complaint assists the Court in consent analysis. The prosecutrix admittedly, as per her own admission used to herself go to the official accommodation of the accused at his asking continuously for 12 years. Therefore, the sexual element of the relationship and the assumption of ongoing consent to that sexual element are very material to have come to the conclusion regarding her conscious consent in the present case. In the present case, the petitioner was capable of consciously evaluating the outcome of her consent and the act she was indulging in making her a conscious consenting partner to the sexual relationship.

55. It is not disputed that the prosecutrix and the accused are married to their respective partners and despite being married, the relationship with the accused continued for 12 years. The relationship between the parties have taken place admittedly at railway quarters of Daya Basti and railway quarters of Panchkuian Road, which are one of the busiest and most congested places of Delhi, and the quarters are constructed in a manner that it has common passage and are in close vicinity to each other. Moreover, the accused also continuously kept on visiting the house of the prosecutrix and she kept on visiting him at his official accommodation which cannot but point out to the express as well as implied consent to the sexual relationship. Neither did the

prosecutrix lodge any complaint with police for 12 years nor did she tell the same to her husband or other family members. Two children were born from the relationship of the prosecutrix and the accused and even during that period, she lodged no complaint with any authority. The story of the prosecutrix of last 12 years of sexual relations against her will, repeatedly at a thickly populated place in Delhi and regarding giving birth to the children of accused and her inaction for 12 long years is unexplained. Though, she states that for 12 years she was being blackmailed as the accused had taken some photographs in his mobile phone, no such photographs or mobile phone had been recovered by the prosecution.

56. Though, this court remains conscious of the fact that at the stage of charge, a mini trial cannot be conducted, however, there is no dearth of judgments on the point of charge which also impose a duty on the Courts to not act as a postman of prosecution. And if it can be put in other words, the allegations whether a rape or any other offence levelled after 12 years of the incident and the silence exercised by the complainant in the facts and circumstances of the case, the Courts have to exercise their judicial discretion to note as to whether a strong suspicion against the accused arises or not.

57. The facts of the present case raise serious questions against the story of the prosecutrix even for the purpose of framing of charge against the accused.

58. In the changing **social context and contemporary society**, rigorous thinking was required while passing this judgment to strike a balance between the configuration of the rights of the accused

against false implication due to their long consensual relationship which continued for 12 years and right of the complainant to fair trial. While there can be no denying that the complainants in sexual assault cases are entitled to fair trial, the responsibility of the criminal justice system towards protecting rights of the accused also cannot be ignored. In the circumstances and the facts of the present case, it may pose as a daunting task for a Judge. However, the duty of the Court in such circumstances still has to ensure that a balance is maintained between the settled law of sexual assault while keeping in mind the equality standards of the complainant and the accused. The Courts have to ensure that the right of fair trial to the complainant and rights of the accused of being protected from mala fide trial are taken care of in the Court's crucial endeavor to ensure equality before law.

59. In the facts and circumstances of the case, therefore, it cannot be said even prima facie, by any stretch of imagination, that the prosecutrix had given her consent for sexual relationship with the accused under any misconception of fact or any fear of injury, to even hold that a prima facie case is made out within the meaning of Section 375 of IPC for framing charge against the accused.

60. In this backdrop and taking the allegations in the complaint as they stand, it is impossible to find in the FIR or in the charge-sheet, the essential or crucial ingredients of an offence under Section 376/506 IPC. In view of the foregoing discussion, this Court finds that the impugned order dated 14.06.2018 passed by learned Additional Sessions Judge/SFTC-2(Central), Tis Hazari Courts Delhi

in FIR bearing No. 475/2017, suffers from no irregularity, illegality, impropriety or perversity.

61. It is, however, **clarified** that since this Court is dealing with a case based on peculiar facts, that involves question as to whether there was a voluntary agreement and affirmative 'Yes' to engage in sexual activities or not, this Court is testing the applicability of laws in the context of this particular case in its peculiar circumstances, and is not laying down any law regarding consent for every rape case.

62. Accordingly, the present petitions stand dismissed. Pending applications, if any, also stand dismissed.

63. Considering the allegations and the nature of the offence complained of, the Registry is directed to mask name of the prosecutrix in Crl.Rev.P. 565/2019 as 'X'. Further, as directed by the Hon'ble Apex Court in "*Ms. X v. The State of Maharashtra and Another*" *Criminal Appeals No.822-823 of 2023*, the Registry shall ensure that in such matters, if the name of prosecutrix is revealed in the petition, the same shall be returned by the Registry to the concerned counsel for removing the name before the matter is cleared for being placed before the Court.

64. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

MARCH 20, 2023/zp