

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.R. 1887 of 2011

Dilip Paul

-Vs-

The State of West Bengal & Anr.

For the Petitioner	: Mr. Mohan Kumar Mullick Mr. Debanjan Chatterjee
For the State	: Mr. Avishek Sinha
Heard on	: 26.09.2023, 30.11.2023, 08.02.2024, 25.04.2024
Judgment on	: 22.05.2024

Ananya Bandyopadhyay, J.:-

1. The instant revisional application has been filed by the petitioner for quashing of Sessions Case No. 03(10) 10 arising out of G.R. No. 2159/09 vide Barasat Police Station F.I.R. No. 630 dated 19.08.2009 under Section 376 of the Indian Penal Code pending before the Learned Additional Sessions Judge, 5th Court, Barasat and order dated 06.04.2011 passed by the Learned Additional Sessions Judge, 5th Court, Barasat rejecting the prayer for discharge of the accused person under Section 227 of the Code of Criminal Procedure.

2. The opposite party no. 2 was a labour contractor appointed by the petitioner in terms of agreement cum appointment letter dated 01.09.2008 for his project site namely "Sonar Tari" at Jhargram, Paschim Medinipur, which she has admitted in her complaint under Section 138 of the Negotiable Instrument Act against the petitioner, being Case No. C/9451/10, pending before the Learned Metropolitan Magistrate, 8th Court, Calcutta. At that time the opposite party no. 2 was residing at Kalachand Para, P.O. – Duttapukur, P.S. – Barasat, North 24 Parganas.
3. Barasat Police Station Case No. 630 dated 19.08.2009 was registered on receiving a complaint under Section 156 (3) of Cr.P.C. along with a direction from the Learned Chief Judicial Magistrate, Barasat to investigate the case treating the said complaint lodged by the opposite party no. 2 as First Information Report.
4. It was inter alia alleged in the complaint that the petitioner was introduced with the complainant by her sister and since then the petitioner started visiting the house of the complainant and one day in absence of her mother and children, the petitioner had sexual intercourse with her against her will. Thereafter the petitioner appointed complainant's husband in a work at Jhargram in his project and started paying Rs. 4000/- monthly to the complainant for maintaining her family and Rs. 1200/- monthly to her husband for his maintenance. It was further alleged that the petitioner used to visit the house of the complainant with the plea of giving money and spent

right there and in very right had sexual intercourse with her but subsequently stopped visiting the house of the complainant and paying money.

5. On 25.08.2009 the Learned Judicial Magistrate, 1st Court, Barasat recorded the statement of the complainant under Section 164 of the Code of Criminal Procedure when she stated that after introduction with the petitioner through her sister, suddenly one day the petitioner came, when her mother and children's were not at home and grasp her, torn her Saree, slapped her and had a sexual intercourse with her and threatened her not to disclose to anybody. Thereafter another day the petitioner came and talked to the husband of the complainant and sent him to a project at Jhargram and promised to pay Rs. 1200/- to husband and Rs. 4000/- to the complainant monthly. It was stated that on that plea the petitioner used to visit the house of the complainant frequently and spent night with the complainant and give money to her and used to tell her that the petitioner will make her life-partner and will build a house for her etc., but suddenly the petitioner stopped visiting the house of the complainant and paying money. The complainant further stated that she along with her sister visited the house of the petitioner at Baguihati for bringing money from him but he insulted and drove them from his house when after few days the complainant lodged a complainant. It was further stated that the petitioner along with 7/8 others visited the house of the complainant and threatened her for withdrawing the complainant.

6. After completion of investigation the Investigating Officer submitted Charge-Sheet against the petitioner on 29.12.2009 under Section 376 of the Indian Penal Code.
7. Petitioner filed a petition for discharge under Section 227 of the Cr.P.C. on 10.02.2011 before the Learned Additional Sessions Judge, 5th Court, Barasat on the ground that there was no sufficient material to frame charge against him.
8. On 06.04.2011 the Learned Sessions Judge, Barasat heard the petitioner under Section 227 of Cr.P.C. for discharge of the accused and came to conclusion that there was no reason to discharge the accused at this stage and rejected the aforesaid petition.
9. Petitioner submitted that the complaint lodged by the complainant was false, frivolous and concocted and filed with an oblique motive to harass and blackmailing the petitioner and to avoid repayment of loan.
10. Petitioner submitted that neither in the complaint/First Information Report nor in her statement under Section 164 of Cr.P.C., the complainant mentioned the date and time of alleged offence under Section 376 of the Indian Penal Code, which established the allegation against the petitioner was false, frivolous and concocted.
11. Petitioner submitted that the allegations made in the First Information Report even if given its face value and accepted to be correct in its entirety do not constitute any offence under Section 376 of the Indian Penal Code.

12. It was apparent on the face of the record that no prima facie case was made out against the petitioner since the essential ingredients of the offence were missing. The Learned Judge misconceived the scope, effect and ambit of the application under Section 376 of the Indian Penal Code and upon such misconception he erred in law in rejecting the prayer of the petitioner for discharge vide his order dated 06.04.2011.
13. Petitioner submitted that the alleged co-habitation on number of occasions, though not admitted, even if taken to be correct in its entirety do not constitute any offence under Section 376 of the Indian Penal Code as it was a consensual act appears from the First Information Report, the statement of the complainant under Section 164 of the Code of Criminal Procedure and from the medical report.
14. Petitioner submitted that the Learned Sessions Judge failed to consider that it was apparent on the face of the record that the alleged co-habitations were consensual act and fell into an error in holding. But, prima facie, it appears that there was some materials to constitute offence as the question of consent was really a matter of defence by the accused and it was for him to place materials from which the court can come to the conclusion that the prosecutrix was a consenting party and one of the essential ingredients of commission of offence under Section 376 of the Indian Penal Code is that the offence must be committed against her will or without her consent.

15. Petitioner submitted that the complaint against him has been lodged maliciously with an ulterior motive for wreaking vengeance on him and with a view to spite him due to private and personal grudge.
16. Petitioner submitted that the complaint against him are so absurd and inherently improbably on the basis of which no prudent person can ever reach a just conclusion that there was sufficient ground for proceeding against the petitioner.
17. While taking cognizance of the alleged offence, the Learned Magistrate is required to apply his judicial mind to the facts and circumstances of the case for coming to the conclusion as to whether the allegations of fact constitute the offence alleged. The cognizance of offence should not be taken mechanically only because the prosecuting agency has filed the complaint against the accused concerned. The petitioner submitted that the order taking cognizance of the alleged offence in the instant case was not a proper order, which ex-facie shows non application of mind by the Learned Magistrate.
18. Petitioner submitted that the Learned Magistrate failed to appreciate that the essential ingredients of the aforesaid offence were not disclosed in the charge sheet and documents filed in support the complaint against the petitioner. The criminal law cannot set into motion as a matter of course. The order of the Learned Magistrate issuing process against the accused for facing trial must reflect that he has applied his mind to the facts of the case and law applicable thereto. The Learned Magistrate was required to apply his judicial

mind to the facts and circumstances of the case and materials on record in order to come to the conclusion as to whether process should be issued against the accused person. In the instant case it was apparent on the face of the record i.e. from the allegations and the documents that no prima face case made out against the petitioner since the essential ingredients of offence were missing and inspite of that the Learned Magistrate issued process against the petitioner mechanically without any application of mind.

19. Learned Advocate for the petitioner submitted that –

- i. The complaint lodged by the complainant was false, frivolous and concocted and filed with an oblique motive to harass and blackmailing the petitioner and to avoid repayment of loan.
- ii. Neither in the complaint/First Information Report nor in her statement under Section 164 of Cr.P.C., the complainant mentioned the date and time of alleged offence under Section 376 of the Indian Penal Code, which established the allegation against the petitioner was false, frivolous and concocted.
- iii. The allegations made in the First Information Report even if given its face value and accepted to be correct in its entirety do not constitute any offence under Section 376 of the Indian Penal Code.
- iv. It was apparent on the face of the record that no prima facie case was made out against the petitioner since the essential ingredients of the offence were missing. The Learned Judge misconceived the scope, effect and ambit of the application under Section 376 of the Indian Penal

Code and upon such misconception he erred in law in rejecting the prayer of the petitioner for discharge vide his order dated 06.04.2011.

- v. The alleged co-habitation on number of occasions, though not admitted, even if taken to be correct in its entirety do not constitute any offence under Section 376 of the Indian Penal code as it was a consensual act appears from the First Information Report, the statement of the complainant under Section 164 of the Code of Criminal Procedure and medical report.
- vi. The Learned Sessions Judge failed to consider that it was apparent on the face of the record that the alleged co-habitations were consensual act and fell into an error in holding "But, prima facie, it appears that there was some materials to constitute offence as the question of consent was really a matter of defence by the accused and it was for him to place materials from which the court can come to the conclusion that the prosecutrix was a consenting party and one of the essential ingredients of commission of offence under Section 376 of the Indian Penal Code was that the offence must be committed against her will or without her consent.
- vii. The complaint against him has been lodged maliciously with an ulterior motive for wreaking vengeance on him and with a view to spite him due to private and personal grudge.

- viii. The complaint against him are so absurd and inherently improbable on the basis of which no prudent person can even reach a just conclusion that there was sufficient ground for proceeding against the petitioner.
- ix. While taking cognizance of the alleged offence, the Learned Chief Judicial Magistrate ought to have applied his judicial mind to the facts and circumstances of the case made out in the complaint, in order to arrive at a conclusion as to whether the allegations of facts constitute the offence alleged and he should not have taken cognizance of the alleged offence mechanically, only because the prosecuting agency has filed the charge sheet against the accused petitioner.
- x. While taking cognizance of the alleged offence of the Indian Penal code and issued process the Learned Chief Judicial Magistrate failed to appreciate that the essential ingredients of the aforesaid offences were not disclosed in the charge sheet and documents filed in support of the complaint against the petitioner. The criminal case cannot set into motion as a matter of course. The order of the Learned Magistrate issuing process against the accused for facing trial must reflect that he has applied his mind to the facts of the case and law applicable thereto. The Learned Magistrate was required to apply his judicial mind to the facts and circumstances of the case and materials on record in order to come to the conclusion as to whether process should be issued against the accused persons. In the instant case, it was apparent on the face of the record i.e. from the allegations and the documents that no prima

facie case was made out against the petitioner since the essential ingredients of offences were missing and in spite of that the Learned Magistrate issued process against the petitioner mechanically without any application of mind.

xi. In order to prevent the abuse of the process of the Court and to secure the ends of justice the instant proceeding pending against the petitioner should be quashed.

20. The opposite party no.2 being a married lady had filed an application under Section 156(3) of the Cr.P.C. before the Court of Learned C.J.M. at Barasat, inter alia, stating to have been acquainted with the petitioner through his sister. The complainant being financially constrained resides in her house along with her two children and her aged mother. On the relevant date she was alone in the house as her mother had been to the market and the children had gone to the school. The petitioner entered the house of the complainant and enriched her in solitary condition. The complainant tried to rescue herself from the grasp and implored the petitioner to leave her but in vein. The petitioner committed rape upon her against her will. Being ashamed the complainant did not disclose the incident to anybody. The petitioner after conversing with the husband of the victim sent him to Jhargram for a project work and assured to pay him a sum of Rs. 1,200/- towards his food expenditure and a sum of Rs. 4,000/- to be paid to the complainant to meet the domestic expenses. The petitioner on the pretext of providing the aforesaid money would visit the house of the complainant in

the night and coercively cohabited with her. The complainant refrained to protest at the threat of removal of her husband from job allotted by the petitioner. The petitioner used to further assure the complainant to desist herself from being intimidated alluring to depute her as a partner in the business and to purchase a plot of land for the purpose of construction of a house. Subsequently, the petitioner gradually declined to visit the house of the complainant and discontinued the payment of money as aforesaid both to her and her husband. Her husband did not have money to return home.

21. Perused the materials of the certified copy of the case diary produced by the Learned Advocate for the State.
22. The Investigating Officer on completion of the investigation submitted charge-sheet under Section 376 of the Indian Penal Code on 29.12.2009.
23. The statements recorded under Section 161 of Cr.P.C conformed to the version of the complainant in her complaint. The victim lady should have resisted the act of the petitioner without indulging him to continue cohabitation as referred to by her against her will. The victim lady has offered herself to be wrongfully ravished at the cost of her poverty. She has knowingly taken advantage from such deprecating and condemning act if at all she termed the same to be against her desire as long as the petitioner provided money to the victim and her family. She did not raise any protest or object to the same. The moment the petitioner discontinued himself from the visiting the house of petitioner and paying money to the same, the complainant lodged the aforesaid complaint.

24. The neighbouring witnesses were aware of the relationship between the complainant and the petitioner which the petitioner unabashedly continued against provision of money at the cost of her dignity and modesty. Such as brazen act on the part of the victim lady cannot be without consent. The victim cannot take the plea of poverty to disguise an immoral act and thereafter attribute the same with criminality. The alleged offence under Section 376 of the Indian Penal Code appears to be consensual.
25. In view of the above discussions, the proceedings being Sessions Case No. 03(10) 10 arising out of G.R. No. 2159/09 vide Barasat Police Station F.I.R. No. 630 dated 19.08.2009 under Section 376 of the Indian Penal Code pending before the Learned Additional Sessions Judge, 5th Court, Barasat and order dated 06.04.2011 passed by the Learned Additional Sessions Judge, 5th Court, Barasat rejecting the prayer for discharge of the accused person under Section 227 of the Code of Criminal Procedure is quashed.
26. Accordingly, the revisional application is allowed.
27. The instant criminal revisional application is disposed of.
28. There is no order to costs.
29. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
30. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)