



**207 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRR-1735-2019

Date of decision: 17.09.2024

Soni

....Petitioner

Versus

State of Haryana and others

...Respondents

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Rakesh Nehra, Advocate with
Mr. Vikalp Hooda, Advocate
For the petitioner.

HARPREET SINGH BRAR, J.

1. The present revision petition has been preferred against the impugned order dated 21.01.2019 passed by learned Additional Sessions Judge, Rohtak, whereby, respondent no.2 was discharged as well as the application (Annexure P-3) moved by prosecution for summoning respondent no.3 under Section 193 Cr.P.C. as an accused was dismissed, in the case emanating from FIR No.96 dated 17.07.2018 registered under Sections 328, 365, 376(2)(n), 506 of IPC at Police Station Women, Rohtak.

2. Succinctly, the facts are that the petitioner/prosecutrix moved a complaint to the concerned police on 13.07.2018 wherein it was alleged that respondent no.3/accused gave water to the petitioner/prosecutrix which was laced with some intoxicant, due to which she fell unconscious and was raped by him. Respondent no.2/accused was also called at the spot and he also committed rape upon the prosecutrix and even prepared a video film. Thereafter, both the accused began to blackmail the prosecutrix and continued to rape her. The prosecutrix was also forced into filing a petition for divorce against her estranged husband and was further told by the accused that she



would be married to respondent no.2 while being kept as a mistress by respondent no.3. Following this, the accused persons, in order to save themselves from the clutches of law, forcibly took the prosecutrix to a temple in Delhi and then to Tis Hazari Court where respondent no.2 performed marriage with her on 14.06.2018. She tried to resist but was silenced by the accused on threats of selling her into prostitution. While under threat, the prosecutrix was also made to sign the marriage documents along with some blank papers by the accused despite knowing that she was already married to someone and even had child from that marriage. Thereafter, respondent no.2 also filed a petition for divorce against the prosecutrix.

3. The aforesaid complaint moved by the petitioner culminated into the FIR (supra). Investigation ensued and after following due procedure, final police report was submitted against respondent no.2 whereas, respondent no.3 was found innocent and kept in column no.2. At the stage of consideration on charge against respondent no.2, the counsel representing him pressed for his discharge whereas learned Public Prosecutor assisted by learned counsel of the petitioner moved an application for summoning respondent no.3 after taking cognizance under Section 193 Cr.P.C. However, the learned Court below declined to summon respondent no.3 and also discharged respondent no.2 in the present case vide the impugned order. Aggrieved by the same, the petitioner/prosecutrix has approached this Court by way of the present petition.

4. Learned counsel for the petitioner vociferously contends that the learned Court below erred in ignoring the fact that consent of the petitioner was obtained by the accused, i.e., respondents no.2 and 3 under threat and in no way could it be held that she performed marriage or withdrew her previous complaint dated 06.06.2018 out of her free will. He further argues that malafide



intent of the accused becomes quite apparent from the fact that respondent no.2 filed a petition under Section 11 of Hindu Marriage Act (Annexure P-4) for annulment of his marriage with the petitioner immediately after the aforesaid complaint was withdrawn. Further, the compromise between respondent no.2 and the petitioner cannot be considered to have been made voluntarily since her statement was not recorded before a Magistrate as required in a case pertaining to Section 376 IPC. It is also contended that in light of Section 114-A of Indian Evidence Act, once the sexual intercourse between the petitioner and the accused was proved, they should have been summoned and put to trial where the question of consent could be decided since the presumption of law was raised in her favour.

5. I have heard learned counsel for the petitioner and carefully perused the paper-book with his able assistance. It has come to the fore that the petitioner had herself made a written submission on 14.06.2018 before the concerned police official wherein it was stated that she had married accused Amit out of her own will and did not want any action taken against him in the complaint moved by her before Superintendent of Police, Jhajjar on 06.06.2018. ASI of the Police Station Women, Jhajjar recorded that an inquiry was made in this matter and it was found that the petitioner/prosecutrix wanted to talk with respondent no.2 before moving forward with her complaint. After discussing the matter with respondent no.2, the petitioner performed marriage with him and made a statement in writing before the police stating that her date of birth is 15.07.1995 and she performed marriage with respondent no.2 without any fear or pressure and therefore, did not want any action taken against him. Furthermore, the written statement of the petitioner as well as the marriage certificate was appended with the inquiry report. Furthermore,



respondent no.3 was nowhere named by the petitioner in her complaints previously moved despite such serious allegations against him and was only embroiled in the subsequent complaint made by her before SI Bimla for the first time. Consequently, respondent no.3 was found innocent by the investigating agency and kept in column no.2 accordingly.

6. Moreover, in the investigation conducted apropos to the FIR (supra) certain documents, including photocopy of the marriage register, photocopy of marriage certificate, affidavits of respondent no.2 and the petitioner, Aadhar card of the petitioner and the statement of the petitioner dated 14.06.2018, were taken into possession by the Investigating Officer SI Bimla. In spite of dearth of any material to point towards the guilt of respondent no.2 and 3, police report was filed against respondent no.2 and only respondent no.3 was exonerated. The facts of the case, when viewed in entirety, do not provide succour to the case of the petitioner.

7. Before delving further into the facts and circumstances, it is pertinent to discuss the statutory provisions and the parameters for adjudication of a rape case where issue of consent is majorly involved.

Section 90 of Indian Penal Code, 1860 reads as under:-

"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 misconception; or

Consent of insane person. - if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child. - unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."



Section 114A of Indian Evidence Act, 1872 reads as under:-

"114-A. Presumption as to absence of consent in certain prosecution for rape.--- In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of Sub-Section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

Explanation- In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of Section 375 of the Indian Penal Code (45 of 1860)."

In the case of **Uday vs. State of Karnataka, 2003(2) RCR(Criminal) 99**, the Hon'ble Supreme Court has made the following observations qua the notion of consent which are quite pertinent to the case at hand: -

*"11. Some of the decisions referred to in Words and Phrases - Permanent Edition Volume 8A at page 205 have held 'that adult female's understanding of nature and consequence of sexual act must be intelligent understanding to constitute 'consent'. Consent within penal law, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. Legal consent, which will be held sufficient in prosecution for rape, assumes a capacity to the person consenting to understand and appreciate the nature of the act committed, its immoral character, and the probable or natural consequence which may attend it." (See : **People v. Perry, 26 Cal. App. 143**).*

*12. The Courts in India have by and large adopted these tests to discover whether the consent was voluntary or whether it was vitiated so as not to be legal consent. In **Rao Harnarain Singh v. State: AIR 1958 Punjab 123** it was observed:*

"A mere act of helpless resignation in the face of inevitable compulsion, acquiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law. Consent, on the part of a woman as a defence to an allegation of a



rape, 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 freely exercised a choice between resistance and assent.

Submission of her body under the influence of fear or terror is not consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure."

13. The same view was expressed by the High Court of Kerala in **Vijayan Pillai @ Babu v. State of Kerala: 1989(2) K.L.J. 234. Balakrishnan, J.** as he then was, observed: -

"10. The vital question to be decided is whether the above circumstances are sufficient to spell out consent on the part of PW.1. In order to prove that there was consent on the part of the prosecutrix it must be established that she freely submitted herself while in free and unconstrained position of her physical and mental power to act in a manner she wanted. Consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in the face of inevitable compulsion, non-resistance and passive giving in cannot be deemed to be "consent". Consent means active will in the mind of a person to permit the doing of the act of and knowledge of what is to be done, or of the nature of the act that is being done is essential to a consent to an act. Consent supposes a physical power to act, a moral power of acting and a serious and determined and free use of these powers. Every consent to act involves submission, but it by no means follows that a mere submission involves consent. In Jowitt's Dictionary of English Law II Edn. Vol. 1 explain consent as follows :

"An act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. Consent supposes three things - a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, mediated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind".

8. Taking into account the abovesaid observations and the fact that it came forward in the inquiry conducted subsequent to the complaint dated 06.06.2018 that the petitioner had a discussion with respondent no.2 after filing the aforesaid complaint and then proceeded to marry him. Furthermore, the

petitioner stated before the concerned police that she was major and had



performed her marriage with respondent no.2 without an element of coercion. Therefore, it is a considered opinion of this Court that there was active will showcased by her which was further put into action by solemnizing her marriage with respondent no.2 in presence of witnesses, in pursuance of which she withdrew her previous complaint.

9. As far as the question regarding framing of charges is concerned, it is necessary to discuss the relevant statutory provisions of the Code of Criminal Procedure, 1973.

Section 228 reads as under:-

"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, [or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such 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 subsection (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.

Section 239 reads as under:-

"239. When accused shall be discharged- If, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be



groundless, he shall discharge the accused, and record his reasons for so doing."

Section 240 reads as under:-

"240. Framing of charge- (1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.

Section 245 reads as under: -

"245. When accused shall be discharged- (1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

Pertinently, a two-judge Bench of the Hon'ble Supreme Court in case of **Sajjan Kumar v. CBI: (2010) 9 SCC 368**, while speaking through Justice P. Sathasivam, has held as under: -

"16. It is clear that at the initial stage, if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the prosecution proposes to adduce prove the guilt of the accused even if



fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. A Magistrate enquiring into a case under Section 209 of the Criminal Procedure Code is not to act as a mere Post Office and has to come to a conclusion whether the case before him is fit for commitment of the accused to the Court of Session. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is the duty of the Magistrate to discharge the accused, on the other hand, if there is some evidence on which the conviction may reasonably be based, he must commit the case. It is also clear that in exercising jurisdiction under Section 227 of Criminal Procedure Code, the Magistrate should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

17. Exercise of jurisdiction under Sections 227 & 228 of Criminal Procedure Code

On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge: -

(i) The Judge while considering the question of framing the charges under Section 227 of the Criminal Procedure 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. The test to determine prima facie case 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 discloses 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.

10. Therefore, it is incumbent upon the trial Court to apply its mind at the time of framing of charge. It should not act as a mere post office on the charge sheet presented by the police without applying its mind. However, the material which is required to be evaluated by the Court at the time of framing charge should be the material which is produced and relied upon by the prosecution. In the present case, no material has come to the fore to establish a



prima facie case against respondent no.2. Rather, it transpires that the petitioner willfully solemnized marriage with respondent no.2 at Arya Samaj Mandir in Delhi and then got it registered at Tis Hazari Court, Delhi in presence of witnesses. Their Marriage Certificate and affidavits were also taken into possession by the Investigating Officer. It was categorically stated by the petitioner that she married respondent no.2 out of her free will and she even got her previous complaint dated 06.06.2018 cancelled by making a written statement, which was also taken into possession by the Investigating Officer, before the concerned police. In the light of the aforesaid discussion, this Court is of the considered opinion that respondent no.2 was rightly discharged by the learned Court below since no prima facie case was made out against him from the material present on record.

11. The contention raised by the learned counsel for the petitioner that the learned trial Court erred by not summoning respondent no.3 in the present case is also insupportable in view of the settled law. The debate pertaining to power of Sessions Court to take cognizance under Section 193 Cr.P.C. was laid to rest by the Hon'ble Supreme Court through its judgement rendered in the case of **Rafiusshan v. State of U.P & Ors., 2021(11) ADJ 210**, wherein, following observations were made: -

“The Sessions Judge is entitled to issue summons under Section 193 CrPC upon the case being committed to him by the Magistrate. Section 193 CrPC speaks of cognizance of offences by the Court of Session. The key words in the section are that "no Court of Session shall take cognizance of any offence as a court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code".

The provision of Section 193 CrPC entails that a case must, first of all, be committed to the Court of Session by the Magistrate. The Second condition is that only after the case had been committed to it, could the



Court of Session take cognizance of the offence exercising original jurisdiction. The submission that the cognizance indicated in Section 193 CrPC deals not with cognizance of an offence, but of the commitment order passed by the Magistrate, was specifically rejected in view of the clear wordings of Section 193 that the Court of Session may take cognizance of the offences under the said section.

Cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceeding to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 of the Code will, therefore, have to be understood as the Magistrate playing a passive role in committing the case to the Court of Session on findings from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the Sessions Judge.

*In the process of coming to the aforesaid conclusions, this Court in **Dharam Pal v. State of Haryana (supra)** accepted the view expressed in the case of **Kishun Singh v. State of Bihar, reported in (1993) 2 SCC 16 (SCC p.320, para 40)** the Sessions Court has jurisdiction in committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. It specifically held that upon committal under Section 209 of the Code, the Sessions Judge may summon those persons shown in Column 2 of the police report to stand trial along with those already named therein.*

*Interestingly, at the same time, the Court in the case of **Dharam Pal v. State of Haryana (supra)** also held that it would not be correct to hold that on receipt of a police report and seeing that the case is triable by a Court of Session, the Magistrate has no other function but to commit the*

case for trial to the Court of Session and the Sessions Judge has to wait till the stage under Section 319 of the Code is reached before proceeding against the persons against whom a prima facie case is made out from the material contained in the case papers sent by the Magistrate while committing the case to the Court of Session."

8. However, the High Court made following observations regarding the present matter:

"In the present matter as the cognizance has already been taken by the learned Sessions Judge and charges were framed against the accused after considering the police papers annexed with the charge-sheet and the trial had started, it would not be proper for the trial court to take further cognizance of the case and to summon the three accused by the impugned order. The summoning of the three accused by the impugned order is not in consonance with the legal provisions of law. The cognizance taken by the trial Sessions Court under Section 193 Cr.P.C. for the second time is not perfectly valid and permissible by law. The impugned order is not legally proper and the impugned order transpires that the trial sessions court has abused the process of law. The impugned order is liable to be quashed."

xxxx.....xxxx.....xxxx.....xxxx.....

11. The instant matter is completely covered by the question posed in paragraph 7.4 of the decision in Dharam Pal. As stated by this Court, once the case is committed to the Court of Sessions, the Court of Sessions assumes original jurisdiction and that it would be within its power to pass appropriate directions under Section 193 of the Code. The decision of the High Court in the instant case, is not consistent with the law laid down by this Court."

12. Undoubtedly, it is within the ambit of the Magistrate under Section 190 Cr.P.C. or the Court of Sessions under Section 193 Cr.P.C. to take cognizance against an accused without waiting till the stage of Section 319 Cr.P.C. However, it *sine qua non* that a person not arrayed as an accused in the



police report must only be summoned by the Magistrate or Sessions Court, upon taking cognizance, if the perusal of material available on record establishes a prima facie case and there are cogent reasons for issuing the process. Reverting to the facts of the case at hand, the petitioner failed to name respondent no.3 in her previous complaint made to SHO, Police Station Jhajjar and suddenly made such grave allegations against him in the FIR (supra). After thorough inquiry, respondent no.3 was found innocent and kept in column no.2 of the police report. Resultantly, the learned Court of Sessions, Rohtak rightly refrained from summoning respondent no.3 to face trial and discharged the accused i.e. respondent No.2.

12. As an upshot of the above discussion, this Court finds that learned counsel for the petitioner has failed to point out any perversity or illegality in findings recorded by the learned Court below in its order dated 21.01.2019 which warrants interference by this Court. As such, there is no merit in the present petition and the same stands dismissed.

13. Pending miscellaneous application(s), if any, shall also stand disposed of accordingly.

(HARPREET SINGH BRAR)
JUDGE

17.09.2024
Neha

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No