

(2023) 08 JH CK 0066
In the Jharkhand High Court
Case No : Criminal Revision No.313 Of 2022

Abhishek Kumar Paul @ Abhishek Kumar Pal

APPELLANT

Vs

State Of Jharkhand And Others

RESPONDENT

Date of Decision : 30-08-2023

Acts Referred:

Indian Penal Code, 1860 — Section 90, 375, 376, 420, 506

Code Of Criminal Procedure, 1973 — Section 164, 239, 397, 397(2), 482

Citation : (2023) 08 JH CK 0066

Hon'ble Judges : Subhash Chand, J

Bench : Single Bench

Advocate : Rajeeva Sharma, Abhay Kumar Tiwari, Sunil Kumar

Final Decision : Allowed

Judgement

Subhash Chand, J

1. This Criminal Revision is preferred against the order dated 05.03.2022 passed by the learned Principal Sessions Judge, Pakur in Miscellaneous Criminal Application No.82 of 2022, whereby the application for discharge of the petitioner had been rejected.

2. The learned senior counsel for the petitioner has submitted that the impugned order passed by the learned Court below is illegal as no offence is made out against the petitioner under Section 376 of the Indian Penal Code reason being that the victim was major and married lady. Without having taken divorce from her former husband, she had consented for cohabitation with the petitioner, as such, the consent of victim cannot be said to have obtained under misconception as defined under Section 90 of the Indian Penal Code. It is further submitted that a Hindu married lady during the lifetime of her husband without obtaining the divorce, cannot marry with another person. The learned Court below while declining in allowing the discharge application of the petitioner has committed illegality. It is also further submitted that though after the rejection of the

discharge application, the trial has commenced and some of the witnesses have been examined and on the same ground this Criminal Revision against the impugned order, whereby the discharge application was rejected, does not become infructuous. In support of his contention, learned senior counsel for the petitioner has relied upon the judgment passed by the Hon'ble Supreme Court in the case of Sanjay Kumar Rai Vs. State of Uttar Pradesh & Anr., passed in Criminal Appeal No.472 of 2021 arising out of Special Leave Petition (Crl.) No.10157 of 2019.

3. Learned counsel for the State and learned counsel for the opposite party No.2 vehemently opposed the contentions made by the learned senior counsel for the petitioner and contended that while framing the charge, the learned Court below has to look into the allegations made in the FIR and also the evidence collected by the Investigating Officer. If there is sufficient ground to proceed against the accused, the discharge application is to be rejected. The learned Court below has made no illegality in rejecting the discharge application. In support of his contention, the learned counsel for the opposite party No.2 has relied upon the following judgments:

1.Chandi Puliya Vs. the State of West Bengal (SLP Criminal No.9897 of 2022 decided on 12.12.2022.

2. K. Sadanandam Vs. State of Tamil Nadu rep Inspector of Police [2010 (15) SCC 396].

3. Central Bureau of Investigation Vs. Mukesh Pravinchandra Sharof [2009 (16) SCC 429].

4. State of U. P. Vs. Uday Narayan & Anr. [2000 (9) SCC Cri. 74].

5. State of Tamil Nadu Vs. Bashir [1996 (2) LW (Cri) 727].

4. It is the settled propositions of law that while framing the charge, the learned Court has to go through the allegations made in the FIR and the evidence collected by the Investigating Officer during investigation and if there was sufficient ground to proceed with the trial, the learned Court should decline to discharge the accused. The appreciation of evidence or marshalling of evidence is not permissible. Court cannot conduct the mini trial at the stage of framing charge.

5. The prosecution case is that the informant gave the written information to the police station concerned with these allegations that the informant-victim and the accused Abhishek Kumar Pal both were familiar to each other for more than three and half years back and used to love each other. In the meantime, Abhishek Kumar Pal having allured her to marry and also established physical relations with her several times and he also compelled her not to tell the parents in regard their physical relation. Thereafter, Abhishek Kumar Pal went out to complete his education. In the meantime, the informant-victim was married with another person. Still after solemnization of marriage of the informant, the

petitioner Abhishek Kumar Pal remained in contact with the informant. He also emotionally blackmailed her and the relation of the informant-victim and Abhishek Kumar Pal were known to the in-laws of the informant, therefore, they decided to desert the informant. Abhishek Kumar Pal still assured him to marry with her and he also asked her to get divorce from her former husband. In the year 2019, she also got divorce from her former husband. Since Abhishek Kumar Pal was not of the marriageable age, so on 17.03.2020 the informant and Abhishek Kumar Pal both have filled the form before the Registrar of Marriage. On account of COVID-19 lockdown, the marriage could not be registered, in the meantime, the petitioner also established physical relation with her. On 26.12.2020, the petitioner called the informant-victim at 09:00 O'clock at night to Middle School, Ganpura and established physical relation with her. Thereafter, the informant informed her parents about love affairs with Abhishek Kumar Pal, but due to pressure of his parents, Abhishek Kumar Pal flatly refused to marry with her and she was also criminally intimidated by the parents of the accused Abhishek Kumar Pal. On this written information, Pakuria P.S. Case No.05 of 2021 was registered in the District of Pakur under Sections 376 and 506 of the Indian Penal Code against the Accused Abhishek Kumar Pal, Arun Pal and the mother of the Abhishek Kumar Pal.

6. In paragraph No.2 of the case diary, the restatement of the victim-informant was recorded, in which, she reiterated the prosecution story as shown in the FIR. In paragraph No.10 of the case diary, the statement of father of the victim, namely, Sudhir Pal was recorded, in which, he stated that on 26.12.2020, his daughter told him in regard to the love affairs with Abhishek Kumar Pal for last three and half years. It was also told by his daughter that on having allured her for marriage, the petitioner Abhishek Kumar Pal also established physical relation with her. On 26.12.2020, he also established physical relation with his daughter having called her to the Middle School, Ganpura. Her daughter also got divorce from her former husband in spite of that Abhishek Kumar Pal refused to marry with her. In paragraph No.11 of the case diary, the statement of the mother of the victim-informant, namely, Tula Devi was also recorded, she also corroborated the statement of her husband Sudhir Pal. In paragraph No.29 of the case diary, there is medical examination of the victim, in which, it is opined that it was a case of habitual sexual intercourse.

7. In paragraph No.34 of the case diary, the statement of victim under Section 164 of the Code of Criminal Procedure was recorded, in which, she stated that she was having love affairs with Abhishek Kumar Pal for last three and half years, since college time and he allured her for marriage and established physical relation with her. He went out for education, in the meanwhile, she got married with another person. Abhishek Kumar Pal used to talk with her on mobile phone, this fact came to know her in-laws and at the behest of Abhishek Kumar Pal, she got divorce from her former husband. They also applied for registration of marriage, but the same could not be registered on account of lockdown. On 26.12.2020, she was again called in Middle School, Gaupna, where physical

relation was also established and ultimately he refused to marry with her.

8. At page No.29 of the case diary, the divorce on the basis of agreement made between two parties on Rs.20/- stamp. This agreement is between Purnima Kumari and her former husband, namely, Vikram Chandra Pal. There is also the signature of seven witnesses on this agreement.

9. In the FIR itself, the date of birth of the victim-informant is shown as 12.08.1997 and the date of occurrence is shown as 26.12.2020, therefore, in view of the date of birth i.e., 12.08.1997, the victim was aged about 23 years old on 26.12.2020. The allegations made in the FIR itself are that the victim was in love affairs with the accused Abhishek Kumar Pal for three and half years ago on the date of lodging FIR. This FIR was lodged on 14.03.2021, therefore, in view of the allegations made in the FIR, three and half years ago from 14.03.2021, the victim was major being 20 years old three and half years ago, during the period of love affairs with the accused since college time.

10. The allegations, which are made against the accused Abhishek Kumar Pal are that she being in love affairs for three and half years ago since college time, the accused had established physical relation with her and allured her to marry. At that time, victim was quite major and admittedly as per the allegations made in the FIR, the accused Abhishek Kumar Pal was younger to the victim as the date of birth of Abhishek Kumar Pal is shown as 28.02.1999 in the certificate issued by the Secondary School Examination Certificate, which annexed is as Annexure-3 to this Criminal Revision, as such, the victim was two years elder than the accused Abhishek Kumar Pal. During the college time, the accused Abhishek Kumar Pal has not attained the age of marriage as per the allegations made in the FIR itself. When the accused went to obtain his education, victim got married with another person, but after solemnization of marriage, she still remained in contact with accused as per the allegations made in the FIR. It is also alleged that on allurements of the accused, the victim also got divorce from her former husband and established physical relation with the accused Abhishek Kumar Pal on his false promise to marriage with her.

11. Indeed, no judicial divorce was taken by the informant-victim from her former husband. The divorce agreement, which is on record between the informant-victim and her former husband Vikram Chandra Pal, in which, by way of mutual agreement reduced in writing on Rs.20/- stamp the marriage dated 26.04.2018 between the victim-informant and Vikram Chandra Pal was dissolved, therefore, this marriage was not judicially dissolved by the competent court. This agreement in regard to the dissolution of marriage is nothing but a waste paper which has no evidential value in the eye of law. Since marriage of the victim was solemnized with Vikram Chandra Pal on 26.04.2018; but still after solemnization of marriage, the victim continued in contact and established relation with the accused.

12. Herein, it is pertinent to mention here that the victim was major since the

very time when she came in contact with the accused and while during the love affairs of the victim with the accused Abhishek Kumar Pal at college time, the victim was major, while the accused was minor at that time being 2 years younger to the victim. Victim married with Vikram Chandra Pal in the year 2018 as she was major; still without getting the marriage dissolved by the competent court of law, she established physical relation with the accused Abhishek Kumar Pal though on allurements to marry with her. The victim being the major and married lady she was very well aware in regard to the consequence of the physical relation with another person, more so she had married in the year 2018. Therefore, the consent herein cannot be said to be obtained by the accused under misconception. Therefore, the allegations made in the FIR are believed that she was deceived by accused.

13. The Hon'ble Supreme Court in the case of Pramod Suryabhan Pawar Vs. State of Maharashtra and Anr., reported in 2019 (9) SCC 608 has held at paragraph No.21 as under:

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

13.1. The Hon'ble Supreme Court in the case of Mandar Deepak Pawar Vs. the State of Maharashtra & Anr. reported in 2022 Live Law (SC) 649 has held as under:

"The appellant and respondent No.2 were undisputedly in a consensual relationship from 2009 to 2011 (or 2013 as stated by the respondent No.2). It is the say of the respondent No.2 that the consensual physical relationship was on an assurance of marriage by the appellant. The complaint has been filed only in 2016 after three years, pursuant where to FIR dated 16.12.2016 was registered under Section 376 and 420, IPC.

On hearing learned counsel for parties, we find *ex facie* the registration of FIR in the present case is abuse of the criminal process.

The parties chose to have physical relationship without marriage for a

considerable period of time. For some reason, the parties fell apart. It can happen both before or after marriage. Thereafter also three years passed when respondent No.2 decided to register a FIR.

The facts are so glaring as set out aforesaid by us that we have no hesitation in quashing the FIR dated 16.12.2016 and bringing the proceedings to a close. Permitting further proceedings under the FIR would amount to harassment to the appellant through the criminal process itself.

We are fortified to adopt this course of action by the judicial view in (2019) 9 SCC 608 titled "Pramod Suryabhan Pawar Vs. State of Maharashtra & Anr." where in the factual scenario where complainant was aware that there existed obstacles in marrying the accused and still continued to engage in sexual relations, the Supreme Court quashed the FIR. A distinction was made between a false promise to marriage which is given on understanding by the maker that it will be broken and a breach of promise which is made in good faith but subsequently not fulfilled. This was in the context of Section 375 Explanation 2 and Section 90 of the IPC, 1860."

14. The Hon'ble Supreme Court in the case of State Through Deputy Superintendent of Police Vs. R. Soundirarasu Etc. reported in 2022 Live Law (SC) 741 has also held at paragraph Nos. 69, 73 and 74 as under:

"69. The real test for determining whether the charge should be considered groundless under Section 239 of the CrPC is that whether the materials are such that even if unrebutted make out no case whatsoever, the accused should be discharged under Section 239 of the CrPC. The trial court will have to consider, whether the materials relied upon by the prosecution against the applicant herein for the purpose of framing of the charge, if unrebutted, make out any case at all.

73. This would not be the stage for weighing the pros and cons of all the implications of the materials, nor for sifting the materials placed by the prosecution- the exercise at this stage is to be confined to considering the police report and the documents to decide whether the allegations against the accused can be said to be "groundless".

74. The word "ground" according to the Black's Law Dictionary connotes foundation or basis, and in the context of prosecution in a criminal case, it would be held to mean the basis for charging the accused or foundation for the admissibility of evidence. Seen in the context, the word "groundless" would connote no basis or foundation in evidence. The test which may, therefore, be applied for determining whether the charge should be considered groundless is that where the materials are such that even if unrebutted, would make out no case whatsoever."

15. The learned counsel for the informant and learned APP have contended that during the pendency of this Criminal Revision, the charge was framed and trial was commenced and witnesses have also been examined, therefore, this

Criminal Revision has become infructuous.

16. This contention made by the learned counsel for the informant and the learned counsel for the State is tenable reason being that framing of charge is not the interlocutory order. Even if the charge has been framed during pendency of this Criminal Revision for the very reason this Criminal Revision cannot be said to be infructuous.

17. The Hon'ble Supreme Court in the case of *Madhu Limaye Vs. State of Maharashtra*, reported in 1977 (4) SCC 551 at paragraph No.21 held as under:

21. It may be somewhat necessary to have a comparative examination of the powers exercisable by the court under these two provisions. There may be some overlapping between these two powers because both are aimed at securing the ends of justice and both have an element of discretion. But, at the same time, inherent power under Section 482 of the Code being an extraordinary and residuary power, it is inapplicable in regard to matters which are specifically provided for under other provisions of the Code. To put it simply, normally the court may not invoke its power under Section 482 of the Code where a party could have availed of the remedy available under Section 397 of the Code itself. The inherent powers under Section 482 of the Code are of a wide magnitude and are not as limited as the power under Section 397. Section 482 can be invoked where the order in question is neither an interlocutory order within the meaning of Section 397(2) nor a final order in the strict sense. Reference in this regard can be made to *Raj Kapoor v. State*⁷. In that very case, this Court has observed that inherent power under Section 482 may not be exercised if the bar under Sections 397(2) and 397(3) applies, except in extraordinary situations, to prevent abuse of the process of the Court. This itself shows the fine distinction between the powers exercisable by the Court under these two provisions. In that very case, the Court also considered as to whether the inherent powers of the High Court under Section 482 stand repelled when the revisional power under Section 397 overlaps. Rejecting the argument, the Court said that the opening words of Section 482 contradict this contention because nothing in the Code, not even Section 397, can affect the amplitude of the inherent powers preserved in so many terms by the language of Section 482. There is no total ban on the exercise of inherent powers where abuse of the process of the court or any other extraordinary situation invites the court's jurisdiction. The limitation is self-restraint, nothing more. The distinction between a final and interlocutory order is well known in law. The orders which will be free from the bar of Section 397(2) would be the orders which are not purely interlocutory but, at the same time, are less than a final disposal. They should be the orders which do determine some right and still are not finally rendering the court functus officio of the lis. The provisions of Section 482 are pervasive. It should not subvert legal interdicts written into the same Code but, however, inherent powers of the Court unquestionably have to be read and construed as free of restriction.

18. The Hon'ble Supreme Court in the case of *Sanjay Kumar Rai Vs. State of*

Uttar Pradesh & Anr. passed in Criminal Appeal No.472 of 2021 arising out of Special Leave Petition (Crl.) No.10157 of 2019 decided on 17.05.2021 at paragraph Nos.15 held as under:

"15. The correct position of law as laid down in Madhu Limaye (supra), thus, is that orders framing charges or refusing discharge are neither interlocutory nor final in nature and are therefore not affected by the bar of Section 397 (2) of CrPC. That apart, this Court in the above-cited cases has unequivocally acknowledged that the High Court is imbued with inherent jurisdiction to prevent abuse of process or to secure ends of justice having regard to the facts and circumstances of individual cases. As a caveat it may be stated that the High Court, while exercising its afore-stated jurisdiction ought to be circumspect. The discretion vested in the High Court is to be invoked carefully and judiciously for effective and timely administration of criminal justice system. This court, nonetheless, does not recommend a complete hands off approach. Albeit, there should be interference, may be, in exceptional cases, failing which there is likelihood of serious prejudice to the rights of a citizen. For example, when the contents of a complaint or the other purported material on record is a brazen attempt to persecute an innocent person, it becomes imperative upon the Court to prevent the abuse of process of law."

19. Therefore, in view of the allegations made in the FIR itself and the evidence collected by the Investigating Officer, there is no sufficient ground to make out the offence under Section 376 of the Indian Penal Code against the accused, as such, the impugned order passed by the learned Court below in rejecting the discharge application of the petitioner bears illegality and the same needs interference. Accordingly, the order passed by the learned Court below is set-aside.

20. In consequence thereof, this Criminal Revision is hereby allowed. The petitioner is discharged from the charge framed under Section 376 of the Indian Penal Code.

21. Let a copy of this judgment be communicated to the learned Court below.