

(2016) 05 AHC CK 0312

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 10625 of 2014

Arvind Kumar Pathak

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 30-05-2016

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 323, 376, 498A, 504

Citation : (2016) 96 ACrC 33

Hon'ble Judges : Suneet Kumar, J.

Bench : Single Bench

Advocate : Ajatshatru Pandey and Gopal S. Chaturvedi, Advocates, for the Petitioner; Govt. Advocate, Anup Kumar Upadhyay and Dharendra Kumar Dwivedi, Advocates, for the Respondents

Final Decision : Dismissed

Judgement

Suneet Kumar, J.—The writ petition is directed against the order dated 2 July 2014 passed by the revisional court/Additional District and Sessions Judge, Court No.5, Allahabad in Revision No.106 of 2014 (Arvind Kumar Pathak v. State of U.P. and another) affirming the summoning order dated 3 March 2014 passed by the Special Chief Judicial Magistrate, Allahabad, further, seeking quashing of the entire proceeding of Case No.523 of 2013 (Suman Gupta v. Arvind Kumar Pathak) arising out of Case Crime No.94 of 2013, under Sections 323, 504, 376 IPC, P.S. Colonelganj, District Allahabad.

2. The facts briefly for the purposes of decision is that the informant-opposite party no. 2 lodged an F.I.R. against the petitioner for the offences under Sections 498A, 323, 504, 376 IPC. The Investigating Officer upon investigation submitted closure report contending therein that from the evidences, statement of the witnesses and other material, offence is not made out against the petitioner. The informant filed a protest petition, the learned Magistrate rejected the closure

report and was of the opinion that the material and evidence available on record disclose the commission of offence under Section 376, 323, 504 IPC, therefore, under Section 190 (1) (b) Cr.P.C., summoned the petitioner to face trial. The summoning order was assailed in revision, the revisional court by the impugned order rejected the revision affirming the order passed by the learned Magistrate.

3. Sri Gopal S. Chaturvedi, learned Senior Advocate would submit that on perusal of the evidence collected during investigation would not disclose the ingredients of the offence, hence, would submit that the entire proceeding be quashed against the petitioner/accused.

4. Per contra, Sri Shashaank Mishra, learned counsel appearing for the opposite party No. 2 and the learned Additional Government Advocate would submit that the summoning order is lawful and legal, there is sufficient material and evidence available on record to put the petitioner to trial, as such, petition is liable to be dismissed.

5. The scope of interference in criminal proceeding at the stage of summoning is limited. In the facts of the present case, criminal process was set in motion on filing a police case. The allegation made in the complaint was that the informant met the petitioner for the first time in 2007 in a coaching institute, both were students preparing for competitive exams. The petitioner since inception tried making advances towards informant, which she resisted, however, upon assurance given by the petitioner that he would marry her, and to substantiate his promise and commitment petitioner took the informant on 30 May 2009 to a temple, and in presence of the deity accepted her as his woman by putting vermilion on her forehead. Thereafter, the petitioner took her to his rented room and since thereon they continued to have regular physical relationship. The petitioner assured the informant that he would, upon being employed, perform ceremony of marriage for social acceptance. Petitioner subsequently qualified the competitive examination in 2012, however, during training got entangled with a colleague, and thereafter started avoiding the informant. On 31 January 2013 at 3:00 P.M. informant visited the room of the petitioner on his invitation, where, she is alleged to have been criminally assaulted and raped. On the following day, medical examination was conducted and first information report was lodged. Statement of informant was recorded under Section 161 and under Section 164 Cr.P.C. reiterating the facts narrated in the first information report. Learned Magistrate recorded in the summoning order that the informant in her protest petition would allege that the petitioner upon being selected in the Provincial Civil Services and on having been appointed Trade Tax Officer exercised his influence, thereupon, persuading the Investigating Officer to close the case, however, the evidence available on record would clearly make out the ingredients of the offence under Sections 376, 323 & 504 IPC. The revisional court recorded that perusal of the statement under Section 161/164 Cr.P.C., medical report, forensic lab report, letters exchanged by the petitioner, mobile data record and compact disc (C.D.) containing voice recording which are part of investigation and case

diary would, prima facie, make out the offence against the petitioner.

6. Learned Senior Counsel with aid of his oratory and advocacy made best effort to impress upon the Court that taking all material and evidence on face value would not make out an offence under Section 376 IPC against the petitioner. It is sought to be urged that it is admitted by the informant that petitioner was known to her since 2007 and as per her own version since 2009 they are having regular physical relationship which being voluntary and having consent of the informant. To establish his bona fide intention and commitment, petitioner assured the victim by taking her to a temple, where he accepted the victim as his woman before the deity. At the best, it is urged, to be a case of failed promise of marriage which would, therefore, not constitute an offence under Section 376 IPC, there being no fraud or misconception in obtaining the consent of the victim.

7. Per contra, learned counsel appearing for the opposite party would submit that the summoning order is lawful and legal, there is sufficient evidence and material on record that would justify the summoning order. The consent of the victim was obtained by fraud and misconception by assuring her of marriage which the petitioner never intended to fulfil.

8. This Court at this stage need not critically dwell upon the material and evidence brought on record. I have though gone through the entire evidence and material. It would suffice to note that the revisional court has taken notice of all the material and evidence that was collected during investigation. Statement of the victim under Section 164 Cr.P.C. ultimately would indicate commission of the offence. Her statement recorded under Section 161 Cr.P.C., correspondence between the petitioner and victim, forensic lab report, the record of mobile messages and conversation of the petitioner and victim recorded on compact disc (C.D.) is available on record. The plea as to whether the consent was voluntary or obtained by misconception or fraud is a question of fact which cannot be gone into in writ jurisdiction under Article 226/227 of Constitution of India or under Section 482 Cr.P.C..

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

10. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the

mind weighing, as in a balance, the good and evil on each side. There is a difference between consent and submission and every consent involves submission but the converse does not follow and a mere act of submission does not involve consent. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had malafide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was malafide, and that he had clandestine motives. [Refer: Deelip Singh @ Dilip Kumar v. State of Bihar, (2005) 1 SCC 88; Uday v. State of Karnataka, (2003) 4 SCC 46; Karthi @ Karthick v. State Rep. By Inspector of Police, Tamil Nadu, 2013 (3) JIC 228 (SC).]

11. Section 114-A of the Indian Evidence Act, 1872 (hereinafter referred to as the "Act 1872") provides, that if the prosecutrix deposes that she did not give her consent, then the Court shall presume that she did not in fact, give such consent.

12. The facts of the instant case whether would warrant that the provisions of Section 114-A of the Act 1872 be pressed into service. The Court at this stage declines to comment lest it may have bearing upon the merits of trial. Whether her consent had been obtained on the false promise of marriage, the provisions of Section 417, 375 and 376 IPC have to be taken into consideration, along with the provisions of Section 90 of the Act 1872. Section 90 of the Act 1872 provides, that any consent given under a misconception of fact, would not be considered as valid consent, so far as the provisions of Section 375 IPC are concerned, and thus, such a physical relationship would tantamount to committing rape.

13. In Deelip Singh v. State of Bihar, (2005) 1 SCC 88 : 2005 SCC (Cri) 253, it has been observed:

"20. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays

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

14. There must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance. Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her. [Ref: Deepak Gulati v. State of Haryana (2013) 7 SCC 675, and Tilak Raj v. State of H.P., 2016 (93) ACC 454.]

15. Whether the material and evidence is believable or reliable to sustain the allegations against the petitioner or whether there was fraudulent or dishonest inducement of the prosecutrix by the petitioner are questions to be gone into in trial.

16. The overwhelming material and evidence brought on record do create, prima facie, a strong suspicion regarding commission of the offence, therefore, it would be in the interest of justice that the petitioner be put to trial and to hold otherwise, as vehemently persuaded by the learned Senior Counsel, would not be in the interest of the society or the victim. This Court at this stage declines to interfere with the impugned summoning order.

17. For the reasons indicated herein above, I am of the view that the writ petition would have to be dismissed. The writ petition is, accordingly, dismissed.

18. It is made clear that the observations made herein above is confined to the rival contentions made by the parties and not on merit of the case. The trial court shall proceed with the trial without being influenced by the observations made in the order.

19. However, it is provided that the petitioner shall surrender before the concerned court within four weeks from today and apply for bail, his prayer for bail shall be considered and decided in view of the settled law laid by this Court in the case of Amrawati and another v. State of U.P. reported in 2004 (57) ALR 290, as well as, judgement passed by Hon"ble Apex Court reported in Lal Kamendra Pratap Singh v. State of U.P. 2009 (3) ADJ 322 (SC).

20. For a period of 30 days from today or till the disposal of the application for grant of bail whichever is earlier, no coercive action shall be taken against the

petitioner.

21. However, in case, the petitioner does not appear before the Court below within the aforesaid period, coercive action shall be taken against him as per law.