

(2023) 09 GAU CK 0037

In the Gauhati High Court

Case No : Criminal Petition No. 64 Of 2023

Bajrul Akram Mirdha

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 20-09-2023

Acts Referred:

Indian Penal Code, 1860 — Section 90, 375, 376, 406
Code Of Criminal Procedure, 1973 — Section 161, 164, 482

Citation : (2023) 09 GAU CK 0037

Hon'ble Judges : Arun Dev Choudhury, J

Bench : Division Bench

Advocate : S Borthakur, M Ahmed, Sh Bora

Final Decision : Allowed

Judgement

1. Heard Mr. S Borthakur, learned counsel for the petitioner. Also heard Mr. M Ahmed, learned counsel for the respondent victim and Ms. SH, learned Additional PP, Assam.

2. The present application is filed under Section 482 of the Cr.P.C. praying for quashing and setting aside the proceeding initiated on the basis of Dalgaoon Police Station Charge-sheet No. 227/2022 dated 31.08.2022 and the corresponding proceeding of Sessions case No. 238 (DM) /2022 under Section 376/406 IPC.

3. Perused the material available on record including the FIR and the statement of the victim girl recorded under Section 164 Cr.P.C. as well as her testimony before the learned court below.

4. From the FIR, the following averments are discernible:

I.The present petitioner and the victim had love affair since their childhood and with promise to marry, the accused had sexual intercourse with her.

II. Though the accused promised to marry her, however, he went to Saudi Arabia in connection with his job and continued to maintain his relation through phone

and promised that he will marry her after returning from Saudi Arabia.

III. After returning from Saudi Arabia, on 13.07.2022, the accused persons including the present petitioner kidnapped her from Besimari market and the present petitioner raped the victim and the other accused severely beaten her up to kill her.

IV. On the basis of the aforesaid FIR, the case was registered as discussed hereinabove.

5. In her 164 Cr.P.C. statement, the victim deposed that after coming from Saudi Arabia the present petitioner called her on 08.07.2022 and asked her to meet him but the victim did not meet him and therefore, he kidnapped her from Besimari at around 2.30 p.m. on 13.07.2022.

6. She further stated that there are 3 /4 persons not known to her. She further deposed that she was raped by the accused. Thereafter, neighbours came upon and after sometime police personal rescued her.

7. In her 161 statement, she deposed that she was kidnapped and the accused committed rape on her. She also deposed that she is 21 years of age and the accused loved her when she was a minor and towards the end of 2018 he went to Saudi Arabia for work and promised her verbally that he would marry her after returning.

8. The case diary reveals that the investigating officer has recorded the statement of witnesses.

9. From the 161 statement of the aforesaid witnesses more particularly, one fruits owner of Besimari, two sweet shops owner and one Home Guard, who were present on the date of alleged occurrence of kidnapping on 13.07.2022 at Besimari at the relevant point of time as alleged have deposed that they have not seen any incident of any kidnapping or any such action. The Home Guard specifically stated that the police personal from the police station always remains present in the Besimari and nobody has seen any incident of kidnapping occurred on that date as alleged by the victim.

10. Another person, whose statement was recorded under Section 161 Cr.P.C. relating to the offence allegedly committed in the house of the accused, has stated before police that he was present in his house on the alleged date around 2.30 p.m. police searched the house of the accused and on that time no one was present in the house other than the mother of the accused.

11. Statement of another witness, which is witness to the allege incident and witness to the search of the house of the accused also stated before police that when the police searched the house at 2.30 p.m. no one was available in the house and accused was not there. He further stated before the police that he had seen the informant coming in an E-Rickshaw to the house of the accused at around 3 / 4 p.m. on 13.07.2022.

12. Another statement of a witness recorded by the police reveals that he saw the victim girl coming in an e-rickshaw to the house of the accused and after de-boarding from the e-rickshaw he saw her entering into the house of the accused. Later on he came to learn that the said girl loved the accused person and had come to marry him. At that time, the accused was not at his home.

13. Another witness, whose statement was recorded also stated before the police that he saw the girl on 13.07.2022 at around 3/ 4 p.m. in an e-rickshaw and she got down in front of the house of the accused and went inside the house. Thereafter they heard arguments and learnt that the said victim loved the accused and came to marry him. According to him at that time accused was not in his residence. Though the mother of the accused asked the girl to leave their house, the girl forcefully remained there.

14. From the aforesaid materials, this court is of the view that no case of Section 376 or any case of kidnapping is made out even if this court believes and takes all the statements of all the aforesaid persons to be correct. Admittedly, there had been love relation between the petitioner and the accused and they had sexual intercourse.

15. The Hon'ble Apex Court in the case of Pramod Suryabhan Pawar Vs. State of Maharashtra and Anr. reported in (2019) 9 SCC 608 considered the concept of rape and consent in the context of promise to marry and having sexual relation and laid down the following propositions of law:

I. Though Section 90 IPC does not define the term 'consent', consent based on a misconception of fact is not a consent in the eye of law.

II. Thus, in case of a woman engaging in sexual relation on false promise to marry her consent is based on misconception of fact and such sexual act will amount to rape.

III. Where promise to marry is false and the intention of maker at the time of making promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relation, there is a misconception of fact that vitiate the consent of the woman.

IV. A breach of promise cannot be said to be a false promise specially in the concept of promise to marry and there is distinction between false promise given on the understanding by the maker that it will be broken and the breach of promise which is made in good faith but subsequently not fulfilled.

V. To establish false promise, the maker of promise should have no intention of upholding his word at the time of giving it.

16. In the aforesaid judgment, the Hon'ble Apex court also dealt with the power of Section 482 Cr.P.C. in dealing with quashing of such kind of allegation of rape on the basis of promise to marry. Such determination is reflected at paragraph 6, which is quoted herein below:

" 6. Section 482 is an overriding section which saves the inherent powers of the court to advance the cause of justice. Under Section 482 the inherent jurisdiction of the court can be exercised (i) to give effect to an order under the CrPC; (ii) to prevent the abuse of the process of the court; and (iii) to otherwise secure the ends of justice. The powers of the court under Section 482 are wide and the court is vested with a significant amount of discretion to decide whether or not to exercise them. The court should be guarded in the use of its extraordinary jurisdiction to quash an FIR or criminal proceeding as it denies the prosecution the opportunity to establish its case through investigation and evidence. These principles have been consistently followed and reiterated by this court. In *Inder Mohan Goswami v State of Uttaranchal*, this Court observed.

23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent powers to act *ex debito justitiae* to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 CrPC can be exercised:

(i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of the court, and (iii) to otherwise secure the ends of justice."

17. It is also equally well settled that in deciding or in exercising power under Section 482 Cr.P.C., the court does not adjudicate upon the veracity of facts alleged or enters into appreciation of competing evidence presented. The limited question is whether on the basis of the FIR or the material collected or the statement of the accused, the allegation constitutes a cognizable offence.

18. The consent in such kind of relation to a sexual intercourse shall not be a consent if the same is based on misconception of fact.

19. The Hon'ble Apex Court in the case of *Pramod Suryabhan Pawar* (supra) relying on certain earlier decisions of the Hon'ble Apex court came to a conclusion that when consent with respect to Section 375 IPC involves an active understanding of circumstances actions and consequences of the proposed act and when an individual makes a reasoned choice to act after evaluating various alternative actions or inactions as well as various possible consequences flowing from such action or inaction, consent to such action is to be treated as a consent on its own volition.

20. In the present case The allegation from the FIR, the statement of the victim recorded under 164 Cr.P.C. and 161 Cr.P.C., it is revealed that the case of the victim is that the petitioner engaged in sexual relation with her on false promise of marrying her and therefore, such consent is misconception of fact and therefore, shall amount to a rape. But her statement itself shows that till the accused was in Saudi Arabia, he maintained contact with her and the promise to marry continues and after coming back from Saudi Arabia he wanted to meet

her, which she refused. If we accept such statement to be true, even then it is not the case of breaching the promise to marry is made out. So far relating to rape, no dates, even period is mentioned when such act was done. Regarding the kidnapping even the entire statement of the victim as discussed hereinabove, no case of kidnapping is made out rather it is seen that the victim went to the house of the accused at the alleged time of kidnapping in an e-rickshaw.

21. So far relating to the commission of offence under POCSO Act, the only statement is that she was in love with the accused since her minor age, however, it is not discernible either from the FIR or from the statement recorded under Section 164 or under Section 161 that she had sexual relation during her minority.

22. The learned Additional PP has seriously objected to the quashing of the FIR in the proceeding inasmuch as it is submitted that the case involves the POCSO Act and the girl herself has stated that she had love affair with the accused since her childhood and consent is no consent to sexual intercourse by her in the eye of law.

23. While dealing with the argument of the learned Addl. PP. it is seen that though the girl has stated that since her minority she has been in love, it is nowhere stated that the alleged sexual intercourse was consented or committed during her minority. In view of in absence of such statement in any of the statements recorded, this court cannot presume that the offence was committed during her minority and therefore, the consent is not a consent and the case dairy reveals that the victim also refused to get her medically examined. Accordingly, such argument raised by the learned Addl. PP is rejected.

24. In view of the aforesaid, this court is of the unhesitant view that reading as a whole of her statement clearly reveals that she had an active understanding of the circumstances and consequences of such sexual relation. In view of the aforesaid, this court is of the unhesitant view that no case under Section 376 or 406 IPC is made out.

25. Accordingly, the present petition stands allowed by setting aside the proceeding initiated on the basis of Dalgaon Police Station Charge-sheet No. 227/2022 dated 31.08.2022 and the corresponding proceeding of Sessions case No. 238 (DM) /2022 under Section 376/406 IPC.