
(2015) 10 JH CK 0124
In the Jharkhand High Court
Case No : Criminal Revision No. 314 of 2015

Kalim Ansari

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 06-10-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 227, 376
Penal Code, 1860 (IPC) — Section 375, 376, 384, 406, 415
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(1)(xii), 3(xii)

Citation : (2016) 1 AJR 18 : (2015) 4 JLJR 302

Hon'ble Judges : Ravi Nath Verma, J.

Bench : Single Bench

Advocate : Nilesh Kumar and Amit Kumar Sinha, for the Appellant; Shekhar Sinha, for the Respondent

Judgement

Ravi Nath Verma, J.—The petitioner calls in question the legality of the order dated 13.2.2015 passed by Additional Sessions Judge-I-cum-Special Judge, Dumka in Special (SC/ST) Case No. 1 of 2013 whereby and whereunder the petition filed by the petitioner for his discharge under Section 227 of the Code of Criminal Procedure (in short "the Code"), has been rejected. Bereft of unnecessary details, the facts which are necessary to be stated are that after the death of her father, the informant-Renu Devi applied for her service on compassionate ground in the year 1997 when this petitioner who was residing in a neighbouring house assured her to provide help in getting her service and also assured her that they will solemnize marriage and remain as husband and wife for whole life. On that assurance, the accused petitioner developed sexual relation with her but the family members opposed their relationship. Whereafter the petitioner brought her to Dumka and kept in a rented house and they continued their physical relation but whenever the informant asked to marry her, the petitioner always avoided the same on some pretext. It is also alleged that petitioner assured her that after getting service he will solemnize marriage with

her but even after getting job on 9.6.2003, he did not marry her and lastly refused to live with her. The petitioner by giving false promise always extorted her salary amount. The petitioner even put her in fear and demanded Rupees One lac and if the amount is not paid, he threatened to prepare a porn videography of their sexual relationship and will send the videos to her family members and in her office. Out of fear, she paid Rupees Sixty lac (sic--thousand?) on 25.10.2011 by withdrawing the same from Central Co-operative Bank, Dumka. Even then, the petitioner used to send threatening SMS on her mobile phone.

2. On the basis of said information, Dumka Town P.S. Case No. 67 of 2012 was instituted under Sections 376 /384 of the Indian Penal Code and also under Section 3(xii) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The police after due investigation submitted charge-sheet against the petitioner in the aforesaid Sections whereafter the case was committed to the Court of Sessions. Before the Sessions Court, the petitioner filed a petition for his discharge under Section 227 of the Code which was dismissed by the order impugned dated 13.2.2015 holding that there are sufficient prima facie material constituting offence under Section 376 as well as offence under Sections 420 /406 /384 of the Indian Penal Code and also prima facie material under Section 3(1)(xii) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act for the purposes of framing charge against the accused are available.

3. Mr. Nilesh Kumar, learned counsel appearing for the petitioner assailing the order impugned as perverse and bad in law, seriously contended that the informant being a major lady of 35 years old, having sufficient intelligence, cannot be said to be given her consent for sexual intercourse either under fear or under misconception of fact. It was also contended that they had solemnized marriage even though they were members of two different communities and were living in the same house which would appear from the fact that in the life insurance policy of the informant, the petitioner was shown as the nominee and in the identity card issued by Election Commission of India, she was shown to be the wife of this petitioner. It was also submitted that under given circumstances if at all any offence was made out, it was only under Section 417 of the Indian Penal Code and the allegation of rape under misconception and demand of money are all false and baseless in order to put the petitioner under pressure. Learned counsel in support of his contention relied on a case of Uday Vs. State of Karnataka, . It was also submitted that no case under any provision of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is made out against the petitioner and even in the F.I.R. there is no ingredient to constitute offence under the said Act.

4. Contrary to the aforesaid submissions, learned counsel representing the State submitted that the court below while rejecting the prayer for discharge of the petitioner had rightly considered the evidence available on record and found

sufficient prima facie material to frame charge against the petitioner. It was also submitted that the ingredients responsible to constitute offence under provision of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act are available on record and this is not the stage to make a roving enquiry or to see whether the trial would end in conviction or acquittal.

5. Before adverting to the rival submissions of the counsels, it is necessary to examine the relevant provision of Indian Penal Code namely Section 375 which reads as follows:--

"375. Rape.--A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:--

First--Against her will.

Secondly.--Without her consent.

Thirdly.--With her consent, when her consent has been obtained by putting her on any person in whom she is interested in fear of death or of hurt.

Fourthly.--With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.--With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.--With or without her consent, when she is under sixteen years of age.

Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.--Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

6. From bare reading of the aforesaid provision, it is clear that the word "consent" has wide impact on the issue involved in this case. The third, fourth and fifth categories which are enumerated above clearly stipulates the circumstances in which the consent given by the informant victim is vitiated and does not amount to consent in law. Though the word consent has not been defined anywhere in the Indian Penal Code but Section 90 of the Indian Penal Code deals with the consent known to be given under fear or misconception of fact. Hence, a reference of Section 90 is also necessary for proper adjudication of the matter which reads as follows:--

"90. Consent known to be given under fear or misconception.--A consent is not such a consent as it 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."

7. In the instant case, it appears that the informant was almost 35 years old matured lady with sufficient intelligence to understand the significance and moral quality of the act she was consenting to the petitioner to establish a physical relationship. Even it has come in the evidence that she lived with the petitioner for a long period and continued her physical relationship. She kept it a secret and lived like a husband and wife and never resisted the overtures of the petitioner and in fact she freely exercised a choice between resistance and assent. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. In the instant case, both lived in the same house for several years as a husband and wife even there is no evidence to prove conclusively that the petitioner never intended to marry the informant rather it appears that even though the marriage was not solemnized due to fear or opposition from the family members as the marriage was difficult on account of caste considerations but even then they continued their relationship as a husband and wife. All the above circumstances lead this Court to the conclusion that she freely, voluntarily and consciously consented to have sexual relationship with the petitioner and her consent was not in consequence of any misconception of fact. In the case of *Uday v. State of Karnataka* (supra) Hon"ble Supreme Court while dealing with almost similar situation held in Paragraph 21 as follows:--

"It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait-jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."

8. In view of the discussion made above, I find that the informant prosecutrix having an adult matured lady had sufficient intelligence to understand the significance and she was a consenting party to the petitioner in establishing physical relationship. Hence, I do not find any ingredient to constitute offence under Section 375 of the Indian Penal Code. However, there appears ingredient to constitute offence of cheating under Section 415 of the Indian Penal Code against the petitioner which is punishable under Section 417 of the Indian Penal Code. So far as the allegations of extortion and offence under Scheduled Castes and Scheduled Tribe (Prevention of Atrocities) Act are concerned, in my opinion the finding recorded by the court below needs no interference. Regard being had to the facts and circumstances, I do not find it to be a fit case for discharge of the petitioner under Section 227 of the Code. Hence, the case is remitted to the court concerned to proceed against the accused petitioner in accordance with law in the light of the discussion made above.