

(2023) 06 KL CK 0404

In the High Court Of Kerala

Case No : Criminal Miscellaneous Petition No. 7507 Of 2017

Kripesh Krishnan

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 26-06-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 164, 313, 320, 482
Indian Penal Code, 1860 — Section 90, 307, 375, 376, 376(1)
Kerala Police Act, 2011 — Section 57

Citation : (2023) 06 KL CK 0404

Hon'ble Judges : K.Babu, J

Bench : Single Bench

Advocate : T.Madhu, C.R.Saradamani, Sangeetha Raj, A.Manikandan

Final Decision : Allowed

Judgement

K.Babu, J

1. The prayer in this Crl.M.C. is as follows:-

"..... to quash Annexure-A5 final report and all further proceedings pursuant to it in Crime No.188/2017 of Neeleswaram Police Station, Kasaragod District, which is now pending as C.P.No.61/2017 on the files of the Learned Judicial First Class Magistrate's Court-II, Hosdurg, as against the petitioner, so as to secure the ends of justice."

2. Heard Shri.T.Madhu, the learned counsel for the petitioner and the learned Public Prosecutor.

3. The petitioner is the accused in Crime No.188/2017 of Neeleswaram Police Station. He faces charge under Section 376(1) of the Indian Penal Code.

4. The facts leading to the registration of the aforesaid crime are as follows:-

Respondent No.2 was found missing from her house since 11 a.m. on 26.3.2017. Based on the information regarding the missing of respondent No.2,

Neeleswaram Police registered the above said FIR under the caption Section 57 of the Kerala Police Act. The SHO conducted investigation and traced out respondent No.2 on 27.3.2017 near Calicut Airport. On 28.3.2017 her statement was recorded. She stated that she is a married woman and her husband is working in a Gulf Country. She left the marital home and reached her parental house. She was in love with the petitioner, who was working in a ship. The petitioner is also a married person and the father of a child. Both of them decided to go to Mangalore in a car. They went to Parassinikadavu and stayed in a hotel. Respondent No.2 was produced before the jurisdictional court. Her statement was recorded under Section 164 Cr.P.C.. In the statement under Section 164 Cr.P.C., respondent No.2 stated that she had developed an acquaintance with the petitioner since 2016. Though she required to stop the relationship, the petitioner wanted to maintain the same. The petitioner even threatened that he would commit suicide if respondent No.2 proceeded to stop the relationship. The petitioner and respondent No.2 indulged in sexual relationship. The Police, after conducting investigation, submitted final report against the petitioner, alleging the offence punishable under Section 376(1) of the Indian Penal Code.

5. The petitioner seeks to quash the entire criminal proceedings on the ground that the parties settled their disputes. Respondent No.2 filed an affidavit stating that she has settled her dispute with the petitioner and that she does not want to proceed with the criminal prosecution against him.

6. The learned Public Prosecutor, on instructions, submitted that the matter was enquired into through the Investigating Officer, who has taken the statement of the defacto complainant, and it is reported that the dispute between the parties has been amicably settled.

7. The Apex Court in *Gian Singh v. State of Punjab* [2012 (4) KLT 108 (SC)], *Narinder Singh and others v. State of Punjab and Others* [(2014) 6 SCC 466], and *State of Madhya Pradesh v. Laxmi Narayan and Others* [(2019) 5 SCC 688] considered the power of the High Court to quash criminal proceedings in FIR/ complaint in exercise of its inherent jurisdiction where the offences are not compoundable under Section 320 Cr.P.C.

8. In *Gian Singh* (supra), the Apex Court held thus:-

"57. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under S.320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend

on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc., cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominantly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

9. In *Narinder Singh and others* (supra), the Apex Court held thus:-

"29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used,

etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

10. In *State of Madhya Pradesh v. Laxmi Narayan and Others* (supra), approving the ratio in *Gian Singh and Narinder Singh* a three-Judge Bench of the Apex Court held that in exercise of the powers under Section 482 Cr.P.C., on the ground that the parties have resolved their entire dispute between themselves, High Court would not rest its decision merely because there is a mention of a penal section of a heinous crime in the FIR or charge. The Apex Court added that it would be open to the High Court to examine whether incorporation of a penal section of heinous crime is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing of charges under the said penal section.

11. In *Kapil Gupta v. State of NCT of Delhi and Another* (2022 SCC OnLine SC

1030), following Narinder Singh and others (supra), the Apex Court held that though the Court should be slow in quashing the proceedings wherein heinous and serious offences are involved, the High Court is not foreclosed from examining as to whether there exists material for incorporation of such an offence or as to whether there is sufficient evidence which if proved would lead to proving the charge for the offence charged with. The Apex Court further observed that High Court has also to consider whether the settlement between the parties will result in harmony between them, which may improve their mutual relationship. The Supreme Court added that the stage of the proceedings at which the application for quashing the proceedings is brought before the Court is also to be taken into account.

12. In Kapil Gupta the Apex Court was considering the legality of quashing an FIR wherein the offence alleged was Section 376 IPC. In paragraphs 15, 16 & 17 the Apex Court observed thus:-

"15. The facts and circumstances as stated hereinabove are peculiar in the present case. Respondent No. 2 is a young lady of 23 years. She feels that going through trial in one case, where she is a complainant and in the other case, wherein she is the accused would rob the prime of her youth. She feels that if she is made to face the trial rather than getting any relief, she would be faced with agony of undergoing the trial.

16. In both the cases, though the charge sheets have been filed, the charges are yet to be framed and as such, the trial has not yet commenced. It is further to be noted that since the respondent No. 2 herself is not supporting the prosecution case, even if the criminal trial is permitted to go ahead, it will end in nothing else than an acquittal. If the request of the parties is denied, it will be amounting to only adding one more criminal case to the already overburdened criminal courts.

17. In that view of the matter, we find that though in a heinous or serious crime like rape, the Court should not normally exercise the powers of quashing the proceedings, in the peculiar facts and circumstances of the present case and in order to give succour to Respondent No. 2 so that she is saved from further agony of facing two criminal trials, one as a victim and one as an accused, we find that this is a fit case wherein the extraordinary powers of this Court be exercised to quash the criminal proceedings."

13. The present case has not been committed to the Sessions Court for trial. Respondent No.2 is not supporting the prosecution case. She requested that she may be saved from the agony of facing a criminal trial.

14. However, the main ground urged by the petitioner is that even going by the admitted prosecution material, it can be seen that the alleged incidents of sexual relationship happened based on the consent between the parties, and therefore, it does not constitute the required ingredients of the offence as alleged as per Section 375 of IPC, which is punishable under Section 376 IPC.

15. Section 375 of the Indian Penal Code sets out the ingredients of the offence under Section 376 IPC. In the facts of the present case, the description Secondly under Section 375 IPC read with Section 90 IPC is relevant.

16. Section 375 IPC reads thus:-

"375. Rape.- xx xx xx

Secondly.- Without her consent.

xx xx xx

Explanation 2. - Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity."

17. Section 90 IPC reads thus:-

"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;

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."

18. "Consent" is stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression "consent". Section 90, though, does not define "consent", but describes what is not consent. "Consent", for the purpose of Section 375, 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 fully exercised the choice between resistance and assent. Whether there was consent or not is to be ascertained only by a careful study of all relevant circumstances.

19. Consent may be expressed or implied, coerced or misguided, obtained willfully 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 clear distinction between 'rape' and 'consensual sex'. There may be cases 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. (Vide: Anurag Soni v. State of Chhattisgarh [(2019) 13 SCC 1], State of H.P. v. Mango Ram [(2000) 7 SCC 224], Deepak Gulati v. State of Haryana [(2013) 7 SCC 675], Kaini Rajan v. State of Kerala [(2013) 9 SCC 113].

20. In Deelip Sing alias Dilip Kumar v. State of Bihar [(2005) 1 SCC 88], the Supreme Court considered the relevant questions relating to "consent" as defined in the Indian Penal Code. The Supreme Court considered the following questions:-

(1) Is it a case of passive submission in the face of psychological pressure exerted or allurements made by the accused or was it a conscious decision on the part of the prosecutrix knowing fully the nature and consequences of the act she was asked to indulge in?

(2) Whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her?

It was a case in which a girl fell in love with her neighbour. She alleged that the accused committed rape on her and later consoled her by saying that he would marry her. She continued sexual relationship with him on account of the promise made by him to marry her. The relationship between them continued. The accused later avoided her.

With that factual background, the Supreme Court held that the girl had taken a conscious decision, after active application of mind to the events that had transpired. It was further held that it is a case of breach of promise for marriage and not a case of rape.

21. In Deepak Gulati v. State of Haryana [(2013) 7 SCC 675], while drawing a distinction between 'rape' and 'consensual sex', the Supreme Court observed that when the prosecutrix voluntarily maintained intimate contact with the accused and proceeded with him to different places and indulged in sexual relationship without any objection at any stage, it is not possible to apprehend the circumstances in which rape can be levelled against him.

22. In the instant case, the prosecutrix was a married woman having her husband and children. She was fully aware of the fact that the petitioner was also a married man. She maintained to have sexual relationship with the accused on many occasions. She stayed with the petitioner/accused in a room in a hotel. It is difficult to conclude that the prosecutrix had not given consent for the sexual relationship with the petitioner under any misconception of facts so as to hold that the petitioner is guilty of having committed rape within the meaning of Section 375 of IPC.

23. In Naim Ahamed v. State (NCT of Delhi) (2023 SCC OnLine SC 89), while dealing with a similar fact situation, the Apex Court observed thus:-

"21. In the instant case, the prosecutrix who herself was a married woman having three children, could not be said to have acted under the alleged false promise given by the appellant or under the misconception of fact while giving the consent to have sexual relationship with the appellant. Undisputedly, she continued to have such relationship with him at least for about five years till she gave complaint in the year 2015. Even if the allegations made by her in her deposition before the court, are taken on their face value, then also to construe such allegations as 'rape' by the appellant, would be stretching the case too far. The prosecutrix being a married woman and the mother of three children was matured and intelligent enough to understand the significance and the consequences of the moral or immoral quality of act she was consenting to. Even otherwise, if her entire conduct during the course of such relationship with the accused, is closely seen, it appears that she had betrayed her husband and three children by having relationship with the accused, for whom she had developed liking for him. She had gone to stay with him during the subsistence of her marriage with her husband, to live a better life with the accused. Till the time she was impregnated by the accused in the year 2011, and she gave birth to a male child through the loin of the accused, she did not have any complaint against the accused of he having given false promise to marry her or having cheated her. She also visited the native place of the accused in the year 2012 and came to know that he was a married man having children also, still she continued to live with the accused at another premises without any grievance. She even obtained divorce from her husband by mutual consent in 2014, leaving her three children with her husband. It was only in the year 2015 when some disputes must have taken place between them, that she filed the present complaint. The accused in his further statement recorded under Section 313 of Cr. P.C. had stated that she had filed the complaint as he refused to fulfill her demand to pay her huge amount. Thus, having regard to the facts and circumstances of the case, it could not be said by any stretch of imagination that the prosecutrix had given her consent for the sexual relationship with the appellant under the misconception of fact, so as to hold the appellant guilty of having committed rape within the meaning of Section 375 of IPC."

24. Having considered the totality of the facts and circumstances of the case, this Court is of the view that the impugned criminal proceedings against the petitioner are liable to be quashed, exercising the inherent power conferred on this Court under Section 482 of Cr.P.C. as its further continuance would amount to an abuse of the process of this Court.

In the result, the CrI.M.C. is allowed. All further proceedings in C.P.No.61 of 2017 on the file of the Judicial First Class Magistrate's Court-II, Hosdurg stand hereby quashed.