

(2019) 03 CAL CK 0085

In the Calcutta High Court

Case No : Criminal Revision (CRR) No. 2535 Of 2013

Md. Nizam Hussain Vs State Of West Bengal & Anr?

Date of Decision : 14-03-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164, 227, 482
Indian Penal Code, 1860 — Section 90, 376, 415, 417, 420

Citation : (2019) 03 CAL CK 0085

Hon'ble Judges : Shivakant Prasad, J

Bench : Single Bench

Advocate : Tarique Quasimuddin, Zainab Tahir, Sudip Ghosh, Bitasak Banerjee

Final Decision : Disposed Off

Judgement

The petitioner has assailed the order dated July 5, 2013 passed by the learned Additional District & Sessions Judge, Court No. 2, Sealdah, South 24-Parganas whereby the petitioner's application for discharge under Section 227 of the Code of Criminal Procedure, 1973 was rejected.

Prosecution case was started on the basis of a written complaint of the opposite party no. 2 and a specific case being Narkeldanga Police Station Case No. 05 of 2013 dated January 3, 2013 under Sections 417/420/376 IPC, bearing G.R. No. 32 of 2013 was registered and after investigation charge-sheet being 10 of 2013 dated February 7, 2013 under Sections 417/420/376 IPC was submitted against the petitioner/accused to stand trial in open Court. The case was committed to the Court of Sessions and Sessions Case No. 10(3) of 2013 was registered before the learned 2nd Additional District & Sessions Judge at Sealdah and a date was fixed for consideration of charge when an application under Section 227 of the Code of Criminal Procedure was filed with a prayer for discharge on behalf of the petitioner on the contention that proper scrutiny of the FIR being the written complaint it will emerge that there is no ingredient of Section 376 IPC as the allegation made in the complaint does not fulfil the ingredient of Section 376 of the Indian Penal Code.

The provisions of Section 376 IPC may be quoted herein for useful consideration:

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" 376. 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 or 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."

It is contended that in the charge-sheet the prosecution has relied on the recorded statement of the defacto complainant under Section 164 CrPC, made before the learned Judicial Magistrate. On meticulous scrutiny through the statement it will transpire that the age of the defacto complainant is 36 years old which can be safely construed that she was quite matured and wise enough to enter into any relationship. It will also transpire that prior to divorce of the defacto complainant the accused used to visit her and they became very friendly and she used to share her problem with him and subsequently they became very close. My attention is invited to the statements so recorded by the learned Magistrate at page 49, which speaks about the fact of involvement of the prosecutrix with the petitioner.

It is submitted that the opposite party no. 2 had physical relationship with the petitioner for more than two years, such long duration confirms that both of them being adult were consenting party and thus the question of rape cannot be considered. Such fact does not constitute misconception of fact. The Hon'ble Apex Court in several landmark decisions have observed that a belief that the promise of marriage was meant to be fulfilled is not a misconception of fact. In the instant case nowhere from the FIR or statement under Section 164 CrPC it reveals that the consent of the victim/defacto complainant was hesitant, reluctant or grudging rather she consciously consented/permitted to enter into physical relationship.

It is also submitted as regards the charge under Section 417 that it provides for punishment for cheating defined in Section 415 of IPC. It is argued that there is neither any ingredient of cheating nor any inducement by the petitioner thereby causing delivery of any property and not a single iota of evidence has been collected by the Investigating Officer while submitting charge-sheet to attract

Section 417 and Section 420 IPC.

It is also submitted that the learned Judge has made it clear in his order that he has no inherent power to discharge the accused whereas power to discharge the accused is provided in Section 227 of the CrPC itself and argued that the order impugned is mechanical and without any basis, accordingly, the petitioner has prayed for setting aside the order impugned.

I have perused the order impugned. The learned Judge having considered certain decisions as referred to in his order has come to the conclusion that the decisions referred to by the parties are distinguishable on facts, circumstances at that stage of the case and fixed the next date for appearance and framing of charges which stage is long pending.

The grounds in this revisional application taken by the learned counsel for the petitioner are no doubt worth consideration which can be considered at the stage of trial on evidence inasmuch as fact as to whether the petitioner extracted the consent of the prosecutrix as prima facie emerged from the statement of the prosecutrix recorded under Section 161 by the I.O. and Statement under Section 164 of CrPC recorded by Judicial Magistrate during investigation are required to be adjudged.

It may be noted that allegedly the prosecutrix gave her consent for physical relation with the petitioner on promise and assurance to marry her and due to such promise she gave kulla talaque to her erstwhile husband to marry the petitioner so much so that her daughter started recognizing the petitioner as her father.

Though a promise to marry without cogent evidence may not give rise to misconception of fact within the meaning of Section 90 of Indian Penal Code, such misconception has to be clarified on evidence that such representation was deliberately made by the petitioner with a view to elicit the consent of the prosecutrix without having the intention to marry her. If on facts it is proved in evidence that the petitioner did not really entertained such intention of marrying her, nevertheless, on facts disclosed at this stage, it appears that admittedly the prosecutrix is 36 years of age on the date of alleged incident and is a mother of a daughter whereas the petitioner is aged about 27 years and a student of Homeopathy college in Kolkata and alleged physical relation developed in her house when she was a married woman with a daughter.

Therefore, all such factual aspects of the case has to be judged on evidence.

That apart, bearing in mind the principle laid down by the Hon'ble Apex Court, power under Section 482 of the CrPC should not be exercised in the prosecution cases which involves offences like murder, rape and dacoity etc. as they have serious impact on the society, I am not inclined to exercise the inherent power in quashing the proceeding in Sessions Case under reference pending in the Court of Additional District & Sessions Judge, 2nd Court, Sealdah.

Accordingly, the revisional application is dismissed with direction to the learned trial Court to hold the trial as expeditiously as possible, preferably within a period of three months from the date of communication of this order by holding day to day trial of the case.

Thus, CRR 2535 of 2018 is disposed of.

Let urgent xerox certified copy of this order, if applied for, be given to the parties after completion of all legal formalities.