
(2008) 03 CAL CK 0005
In the Calcutta High Court
Case No : C.R.R. No. 441 of 2007

Partho Pratim Phukan @ Meja

APPELLANT

Vs

State of West Bengal and Another

RESPONDENT

Date of Decision : 14-03-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Hindu Marriage Act, 1955 — Section 13B
Penal Code, 1860 (IPC) — Section 376, 420

Citation : (2008) 4 CHN 570

Hon'ble Judges : S.P. Talukdar, J

Bench : Single Bench

Advocate : Milon Mukherjee, Saibal Mondal and Biswajit Manna, for the Appellant; Ranjit Kumar Ghosal, for the Respondent

Judgement

S.P. Talukdar, J.—The petitioner by filing the instant application u/s 482 of the Code of Criminal Procedure sought for quashing of the proceedings of B.G.R. Case No. 395/99 pending before the learned Court of Additional Chief Judicial Magistrate, Alipore. This relates to Jadavpur PS Case No. 51 dated 30th January, 1999 u/s 376/420 of the Indian Penal Code.

2. The complaint was lodged by Smt. Ishita Deb in the Jadavpur Police Station alleging commission of offence punishable under Sections 376/420 of the Indian Penal Code thereby giving rise to Jadavpur Police Station case No. 51 dated 30th January, 1999. The complainant claimed to be self-employed English teacher who was residing alone for about two years before meeting the accused/petitioner. She is a graduate from St. Xavier's College with Honours in English. She was previously attached to Asoke Hall, Calcutta. Her pre-occupation with students, drama classes, music and painting, left her with hardly any time to get acquainted with the local residents. The petitioner having similar convent background and having similarity in taste and aptitudes, there developed a relationship between the two. With the idea to get such relationship mature in a marriage, they started living together and cohabited in 6.9.1998 onwards. The

de facto complainant got pregnant. Accused/petitioner promised to marry her as early as possible but to her utter surprise, on 5th December, 1998, the petitioner changed his mind and expressed his inability to marry the de facto complainant who was advised to abort the baby.

3. On the basis of such complaint, police took up investigation. After few days of detention the petitioner was out on bail. After completion of investigation, police authority submitted chargesheet on 28.1.2002 u/s 376/420 of the Indian Penal Code. Though Mrs. Sharbani Nakra (Saha) was made a co-accused, investigating authority did not submit chargesheet against her. She was accordingly discharged.

4. The petitioner in the present application alleged that at the relevant time, the de facto complainant was the married wife of one Anirban Chowdhury. Such marriage took place on 31st January, 1991. It was duly solemnized according to Hindu Rites and Customs. After marriage the de facto complainant resided with her husband at her matrimonial house. Subsequently, however, she left her matrimonial home and the said marriage ultimately ended in a decree of divorce u/s 13B of the Hindu Marriage Act on 20.2.1999.

5. The de facto complainant was about 28 years and the petitioner was 27 years of age at the relevant time of the incident. She did not appear for medical examination in course of investigation. If there had been any physical relationship between the two, it was certainly on mutual consent and it could not constitute any offence under the Penal Code.

6. In such circumstances, the petitioner prayed for quashing of the case against him.

Section 376 of the Indian Penal Code defines rape as follows:

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 a 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 has 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 16 years of age.

7. Mr. Milon Mukherjee, appearing as learned Counsel for the petitioner, submitted that there can be no question of any offence of cheating as it was not legally possible for the petitioner to marry a person who was married to another person. After referring to the relevant dates, it was submitted that after about a month from the date of the complaint, the marriage between the de facto complainant and her former husband was dissolved by a decree of divorce. It was next submitted that having regard to the age of the de facto complainant as well as other facts and circumstances, question of commission of offence of rape u/s 376 also could not arise.

8. It is clear from the materials in the case diary that the complainant freely exercised a choice between the resistance and assent. It cannot be said that she did not know the consequences of the act. Since materials on record suggest that the complainant freely, voluntarily and consciously consented to having sexual intercourse with the present petitioner, her consent could not be in consequence of any misconception of fact.

9. Relying on the decision of Uday v. State of Karnataka reported in 2003 CrILR (SC) 555 it was submitted by Mr. Mukherjee that a false promise is not a fact within the meaning of the Code. The Apex Court in the said case held that "there is no straight-jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary or its given under a misconception of fact." The test laid down by the Courts could provide with necessary guidance to the judicial mind while considering the question of consent.

10. Attention of the Court was also invited to a Single Bench decision of this Court in the case of Krishna Pada Mahato v. State of West Bengal reported in 2004 C Cr. LR (Cal) 945, wherein the learned Single Bench held that in absence of misconception of fact and the victim being a consenting party, there can be no offence of rape.

11. Mr. Ghoshal, learned Counsel for the State, produced the case diary. The materials in the case diary however, do not bring about any change in complexion.

12. Following the guidelines given in the case of State of Haryana and others Vs. Ch. Bhajan Lal and others, , this Court is of the view that proceeding further with the case under reference will be sheer abuse of the process of Court.

13. In such view of the matter, I am of the opinion that there is no rational justification for proceedings further with the case under reference. Accordingly, the application being C.R.R. No. 441 of 2007 be allowed. The case being B.G.R. Case No. 395 of 1999 pending before the learned Court of Additional Chief Judicial Magistrate, Alipore arising out of the Jadavpur Police Station Case No. 51 dated 30th January. 1999 u/s 376/420 of the Indian Penal Code be quashed.

14. The petitioner/accused person be discharged from bail bond. Send a copy of

this judgment to the learned Court of Additional Chief Judicial Magistrate, Alipore, for information and necessary action. The case diary be returned through learned Counsel for the prosecution.

15. Criminal Department is directed to supply certified copy of this judgment, if applied for, to the learned Counsel for the parties as expeditiously as possible upon due compliance with the legal formalities.