

(2012) 06 GAU CK 0147

In the Gauhati High Court

Case No : Criminal Rev. P. No. 101 of 2004

Shri Goutam Prasadi

APPELLANT

Vs

The State of Tripura.

RESPONDENT

Date of Decision : 02-06-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 207, 208, 209, 226
Penal Code, 1860 (IPC) — Section 375, 376, 376(1), 415, 417

Citation : (2012) 3 GLD 626

Hon'ble Judges : Subhasis Talapatra, J

Bench : Single Bench

Advocate : P.K. Biswas, for the Appellant; A. Ghosh, Addl. PP., for the Respondent

Final Decision : Allowed

Judgement

Subhasis Talapatra, J.—Heard Mr. P. K. Biswas, learned counsel appearing for the petitioner as well as Mr. A. Ghosh, learned counsel appearing for the respondent. This criminal revision petition, filed u/s 401 read with Section 397 of the Code of Criminal Procedure, 1973 (in short, hereinafter referred to as Cr.P.C.) is directed against the order dated 26.08.2004 passed by the learned Additional Sessions Judge, Belonia, South Tripura in ST 29 (ST/B) 2004.

2. On completion of the investigation in Belonia Police Station Case No.53 of 2002 as was registered under Sections 493/376/506 of the Indian Penal Code (in short, IPC), the charge-sheet was filed against the petitioner and having been committed to the learned Court of Sessions, the case was fixed on 26.08.2004 for discussion of charge u/s 226 Cr.P.C.

3. After completion of hearing, the learned Addl. Sessions Judge, Belonia, South Tripura did not discharge the petitioner and decided to frame charge as per provisions of Section 228 Cr.P.C. and accordingly charge u/s 376(1) IPC was framed to which the petitioner pleaded not guilty. By the impugned order the learned Addl. Sessions Judge has observed as under:

I have gone through the FIR, 161 statement and the statement of the victim girl recorded u/s 164 Cr.P.C. It is true that the victim girl was 18 years old at the time of the commission of the offence. But she stated in the statement u/s 164, Cr.P.C. that she was forced to have a sexual intercourse with the accused. Accused promised to marry her and also seduced her to have a sexual intercourse. So, it is not a free consent. The consent obtained against her will and the man knows that he is not her husband. It is true that the girl did not believe (sic) herself to be lawfully married with the accused. There was no fake marriage. So, the fact is disclosed from the investigation does not constitute an offence punishable u/s 493, I.P.C. No offence is also committed against property as woman is not a property. So, accused discharged. From the charge u/s 493 and 417, I.P.C. and also 506, I.P.C. But the alleged fact as disclosed from the investigation definitely constitute an offence punishable u/s 376(1), I.P.C. Accordingly charge framed u/s 376(1), I.P.C. Accused pleaded not guilty to the charge.

4. It appears that in exercise of power conferred upon the learned Sessions Court u/s 227 Cr.P.C., the petitioner was discharged for alleged commission of offence under Sections 493, 417 and 506 IPC. However, the petitioner was not entirely discharged inasmuch as the learned Addl. Sessions Judge framed the charge against the petitioner u/s 376(1) IPC in exercise of power as conferred u/s 228 Cr.P.C.

5. Being aggrieved by that order of framing the charge u/s 376(1) IPC, the present petition has been filed on the ground that the materials as was available to the learned Court of the Addl. Sessions Judge do not constitute any charge u/s 376(1) IPC and as such the said finding as extracted, according to Mr. P. K. Biswas, learned counsel appearing for the petitioner, is perverse and unsustainable being palpably wrong and the petitioner is entitled to be discharged from the charge u/s 376(1) IPC.

6. In support of his contention Mr. Biswas, learned counsel for the petitioner placed reliance on a decision in K. P. Thimmappa Gowda v. State of Karnataka as reported in 2011 AIR SCW 2281. In that case the apex Court held as under:

13. In the present case, the facts are that Rathnamma herself stated in her evidence that she had sex with the appellant on several occasions. It is also an admitted fact that the FIR against the appellant was lodged just a few days before the birth of Rathnamma's child, which means there is delay of over 8 months in lodging the FIR. The finding of the trial court; which has not been disturbed by the High Court, is that Rathnamma was about 18 years of age at the relevant time. On these facts a view is reasonably possible that Rathnamma had sex with the appellant with her consent and hence there was no offence u/s 376, IPC because sex with a woman above 16 years of age with her consent is not rape.

7. On the other hand, Mr. Ghosh, learned Addl. PP for the State submits that

from the statement of the prosecutrix as recorded u/s 164, Cr.P.C., it would be apparent before this Court that there is no express consent but if any implied consent is assumed that was given under misconception of fact as defined in Section 90 IPC, which stipulates as under:

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;

8. In view of this, Mr. Ghosh, learned Addl. PP contends that "the consent" as claimed to have been given by the prosecutrix cannot be treated as the consent, the term as appearing in Section 375 IPC. Mr. Ghosh strongly contended that the rape on the prosecutrix has been committed without her consent.

9. Prior to appreciating the materials which were considered by the learned Addl. Sessions Judge, Belonia, South Tripura in regard to misconception of fact, the ratio as laid by the apex Court in Uday Vs. State of Karnataka, , may profitably be reproduced:

21. 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 straitjacket 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 the 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 a 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.

10. Learned trial Court while framing charge u/s 376(1) IPC considered two statements of the prosecutrix viz. the complaint and the statement as recorded u/s 164 Cr.P.C. In the complaint, the prosecutrix stated that " Shri Gautam Prasadi, getting me alone and alluring me with the prospects of marriage indulged in illicit acts with me. At present I am pregnant for eight months." Apart that, no other statement is available regarding the elements of rape with or without consent. The latter part of the complaint is stuffed with attempts for termination of pregnancy of the prosecutrix.

The statement as recorded u/s 164, Cr.P.C. is elaborate. In that statement the pertinent parts may be segmented and narrated hereunder:

a. I stayed in the house alone. On taking that opportunity Gautam Prasadi son of Priyalal Prasadi of our village used to visit in our house for the last one and half years and used to tell me that he would marry me and that your father is poor and he would not be able to arrange your marriage. I would take you.

b. By taking the advantage of visiting our home after one and half months Gautam came to my room. At that time I was cooking curry in an oven outside the room. It was winter season. Gautam asked me to come inside the room sitting in a khat. I entered into my room and sat on a piri. He told me that I am his wife so indulge in such acts as are done by husband and wife. I refused and told that I would do so after marriage. He told me that he would marry me within two months. Then also I had refused. Suddenly Gautam Prasadi extinguished the kerosene lamp and embraced me with one hand and by another hand he was pressing my breast of the left side and fell me down on a bamboo made platform. Thereafter, he started pressing my breast. He told me that I was his wife and was putting off trouser. Then he began kissing and put my panty down. I told that my health was not well to release me that day. It could be performed the next day. Even then he tried to do that thing but would not do so.

c. But his whitish sticky materials fell on my belly, leg and in the mouth of my vagina. On the next day at about 8 a.m. I went to our well to fetch water. Father was not in the house. At that time Gautam came. Out of shame I returned without having any conversation with him. He went away.

d. On that day, in the evening, Gautam again came and sat inside the room. At that time I was outside the room. On entering into the room I found that Gautam was sitting. I told him what you had done on the last day, you had soiled my whole body including my belly with the whitish discharge. You might go. He was kissing me and took off the trouser and laying me on the platform made of bamboo and put off my panty and indulging in vile acts saying that we were husband and wife. From that day the vile act started to take place. On the following day I was feeling pain to walk. Even there was burning sensation during discharge of urine. Despite my telling him about such problems, Gautam indulged in vile acts with me on the following day also. Gautam told me that on the following day he would take a joint photograph but on that day he did not come and on the following day he came and said about the inconveniences in the house. On the following day also he had performed the bad things. In this way he continuously cohabited with me for about three months except the days of illness. I used to fall ill on the second day of every month and he did not come for 6/7 days. Thereafter, he used to come often and cohabit with me.

e. After three months, i.e. the last part of Poush last year they brought me to Dr. Santosh Chakraborty of Shibpur. After examining me the doctor pushed an injection to my naval and pushed saline in my hand. Gautam along with his friend Krishna Sen was sitting with me. In the afternoon at about 4 p.m. one red tablet was given to me and I was asked to go home. The doctor told me to go for a check up on 4th day again so as to ascertain whether I was free from

pregnancy or not. On the 4th day I was pushed toxoide and saline. Gautam paid Rs.500/- in my presence to the doctor for performing DNC. The doctor demanded more money. On the said day when we were on the way home, Gautam dropped me from the vehicle when we reached half of the distance. Since then I did not find Gautam. Till this day he did not enquire about my condition and at the time of dropping me from the vehicle he said that next day he would take me for DNC and asked me to stay in my sister's house. But on the following day he did not come. Till this day he did not meet me. As there was no DNC, pregnancy this day was for more than 8 months. I was waiting with hope that Gautam would marry me. It was written in the doctor's papers that I was shown as wife of Gautam. He did bad things with me with an assurance of marriage.

11. It would be evident that there was no assurance of marriage on the day of committing rape on the prosecutrix. On the first day what the prosecutrix distinctly stated of that occasion is available in the extracted part. For underlining, this part is again restated. "was doing bad works and telling that we are husband and wife". Thereafter, the prosecutrix and the petitioner continued cohabitation and according to the prosecutrix cohabitation continued for the next three months and she became pregnant. Even in the statement as made before the Court u/s 164 Cr.P.C., there had been no assurance of the marriage though in the last part generally the prosecutrix stated from the very beginning he did bad things with an assurance of marriage. But in her detailed statement no such assurance is available. The prosecutrix being a grown up mature female could well understand the meaning of status of husband and wife. Unless there was marriage, the status of husband and wife cannot be achieved. As such, what the petitioner alleged to have stated at the time of committing intercourse with the prosecutrix as alleged is not of making any assurance or promise of a marriage but as if they were husband and wife.

12. Learned Addl. Sessions Judge has correctly observed while discharging the petitioner from the charge of cohabitation on deceitful inducement on a plea of lawful marriage that there was no fake marriage or any act to create belief that the prosecutrix was married to the petitioner and there was no act of deception by the petitioner.

13. In view of this, there is no material available either in the complaint or in the statement as recorded u/s 164 Cr.P.C. to frame the charge against the petitioner u/s 376(1) IPC. In absence of any deception or misrepresentation or promise or allurement at the time of committing the sexual intercourse or under fear of injury it cannot be stated that consent was given under misconception of fact or fear. From the sequence of the conduct of the prosecutrix it would emerge that she was consenting voluntarily and that was the reason for filing the complaint after eight months from the day of occurrence and without any explanation for such delay in the complaint or in the statement as recorded u/s 164 Cr.P.C. Even though K. P. Thimmappa Gowda(Supra) as relied by Mr. Biswas, learned counsel for the petitioner is a decision relating to a case where trial commenced and the

trial Court acquitted the accused but that was interfered by the High Court holding that accused had raped the prosecutrix on a promise to marry her. But the Supreme Court on appreciation of the evidence reversed the finding of the High Court and affirmed the judgment of the learned trial Court.

14. But in the instant case, trial has not commenced as yet but the materials particularly the materials available in the statement as recorded u/s 164, Cr.P.C. cannot constitute the charge u/s 376(1), IPC. In this regard, it is pertinent to point out that the provisions of Section 226 of the Cr.P.C. is not an empty formality but it is a filter to scuttle the frivolous prosecution. In Section 227, Cr.P.C. it has been provided that on consideration of the record of the case and the documents submitted therewith, it would be decided by the Sessions Judge whether the accused should be discharged or against him the charge would be framed u/s 228 Cr.P.C.

15. The expression, the records of the case and documents submitted therewith, bears a reference to Section 209, Cr.P.C. which provides as under:

209. Commitment of case to Court of Session when offence is triable exclusively by it. - When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall -

(a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

16. The apex Court in State of Karnataka Vs. L. Muniswamy and Others, held that " at the stage of framing charges the Court cannot apply its judicial mind to the consideration whether or not there is any ground for presuming the commission of the offence by the accused. The order framing a charge affects a person's liberty substantially and therefore it is the duty of the court to consider judicially whether the material warrants the framing of the charge. It cannot blindly accept the decision of the prosecution that the accused be asked to face a trial."

17. In another decision, in State of Maharashtra, Etc. Etc. Vs. Som Nath Thapa, Etc. Etc., the apex Court held that "If on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable

consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

18. The judicial view in this regard has been crystallized in *State of Madhya Pradesh Vs. Mohanlal Soni*, and in *Onkar Nath Mishra and Others Vs. State (NCT of Delhi) and Another*, .

19. In *State of Madhya Pradesh v. Mohanlal Soni (supra)* the apex Court held as under:

11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there from, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.

12. In *State of Karnataka v. L. Muniswamy*, a three judge Bench of this Court had observed that at the stage of framing the charge, the Court has to apply its mind to the question whether or not there is any ground for presuming the commission of the offence by the accused. As framing of charge affects a person's liberty substantially, need for proper consideration of material warranting such order was emphasized.

20. In *Onkar Nath Mishra and others (supra)* the apex Court held that " the crystallized judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused."

21. Therefore, the primary duty at the time of framing of the charge is to consider the materials on record and if on such consideration the Court comes to the conclusion that the commission of the offence is a probable consequence then the charge can be framed.

22. In the instant case the prosecutrix is an adult female having the age of giving consent. Unless it can be considered that there was no consent or the rape has been committed without consent as provided u/s 375 of the IPC, then the

charge would be framed against the petitioner.

23. As discussed already there is no allegation that there was resistance or without consent the "rape" was committed. Even no consent has been obtained on misconception of fact. In view of this the impugned order fails the test of Section 227, Cr.P.C. Had there been proper consideration of the materials on record, the petitioner would have been discharged.

24. However, this Court while examining the impugned judgment would find that the finding of the learned Sessions Judge in regard to ingredient of Section 417, IPC is entirely unsustainable. The law is well settled in regard to cheating. For dispelling any confusion the decision of Karnataka High Court in IC P. Thimmappa Gowda(supra) the part which was not interfered by the Apex Court is reproduced:

To convict a person u/s 417 IPC, the prosecution has to prove that the accused has committed deception on PW-9 and intentionally inducing PW- 9 to do or omit to do anything which she would not have done or omitted if she were not so deceived and which act or omission caused damage and harm to PW-9 in body, mind and reputation. The evidence of PW-9 clearly discloses that the accused who had employed the poor illiterate girl induced PW-9 to allow him to have sexual intercourse with her after the first time he had forcibly and deceptively abused her sexually and thereafter by intentionally inducing PW-9 by deception stating that he would marry her, made her to cause damage and harm to her body, mind and reputation. The evidence given by PW-9 is very clear in that aspect of the matter and we hold that the accused has also committed an offence u/s 415 IPC which is punishable u/s 417 IPC.

The sum and substance of this observation is that the prime consideration for framing a charge u/s 417, IPC in regard to sexual intercourse on promise of marriage would be based on two elements: (1) whether the accused has committed deception or intentionally induced the prosecutrix to do or omit to do anything which she would not have done or omitted if she were not so deceived and (2) whether such act has caused damage and harm to the prosecutrix in body, mind and reputation. As such, the finding that woman is not property and no charge therefore can be framed u/s 417, IPC is entirely erroneous and unwarranted. However, since there is no allegation of making promise at the time of commission of sexual intercourse in this case no presumption of deception to constitute cheating u/s 415, IPC can be had for the purpose of framing of charge u/s 417, IPC.

25. This Court, however, finds no reasons or infirmity to alter the finding of the learned Addl. Sessions Judge, Belonia, South Tripura whereby the petitioner was discharged from the allegation of committing offence u/s 493 IPC. For the reasons as stated above, the impugned order is set aside and the petitioner is discharged from the charge u/s 376(1) IPC.

Accordingly, this petition is allowed.

Send down the LCRs.