

"CR"

R.NARAYANA PISHARADI, J

Crl.M.C.No.8778 of 2017

Dated this the 27th day of May, 2019

ORDER

The petitioner is the accused in the case C.P.No.13 of 2017 on the file of the Court of the Judicial First Class Magistrate-1, Pathanamthitta. He is accused of committing an offence punishable under Section 376 of the Indian Penal Code.

2. The case against the petitioner was registered as Crime No.2211 of 2014 of the Pathanamthitta police station on the basis of the first information statement given to the police by the victim lady, the first respondent herein. After completing the investigation of the case, Annexure-3 final report was filed against the petitioner alleging that he had committed rape on the first respondent. On the basis of the final report, committal proceedings were initiated against the petitioner and the case is pending as C.P.No.13 of 2017 on the file of the Court of the Judicial First Class Magistrate-1, Pathanamthitta. The petitioner seeks to quash the proceedings against him by invoking the

power of this Court under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code').

3. The material averments in the first information statement given to the police by the first respondent are as follows: The first respondent had got acquainted with the petitioner through "facebook". She was in love with the petitioner. He had promised her that he would marry her. On 14.12.2014, she reached Coimbatore at the request of the petitioner. They went together to Ooty and took a room in a lodge there and stayed there till 17.12.2014. During this period, the petitioner had sexual intercourse with her several times against her will. On 17.12.2014, they returned to Coimbatore and resided there. On 18.12.2014, they reached Kollam and the petitioner took her to the house of his relative. On 19.12.2014, the relatives of the petitioner came there and threatened her. Apprehending that they would cause harm to her, she escaped from there and reached the house of the sister of her father and resided there. She reported the matter to the police on 20.12.2014.

4. Heard learned counsel for the petitioner and the learned Public Prosecutor and also the learned counsel for the

first respondent.

5. Learned counsel for the petitioner as well as the first respondent submitted that the petitioner has married the first respondent and they are now living together and leading a happy married life. Learned counsel for the first respondent submitted that the first respondent has got no grievance against the petitioner and there is no objection to quash the proceedings against him. The first respondent has filed an affidavit to that effect. Further, the petitioner and the first respondent have together filed an application to compound the offence allegedly committed by the petitioner.

6. Annexure-2 is the copy of the marriage certificate. It shows that the marriage between the petitioner and the first respondent was solemnized on 30.01.2015 under the Special Marriage Act, 1954.

7. The question arises whether the prosecution against the petitioner for committing an offence punishable under Section 376 I.P.C can be quashed on the ground that the parties have compromised and settled the matter and that the petitioner has married the victim of the offence.

8. In **Shimbhu v. State of Haryana : AIR 2014 SC**

739, the Apex Court has held as follows:

"Further, a compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle. Since the Court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent, there is every chance that she might have been pressurized by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. In fact, accepting this proposition will put an additional burden on the victim. The accused may use all his influence to pressurize her for a compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe in considering the compromise arrived at between the parties in rape cases to be a ground for the Court to exercise the discretionary power under the proviso of Section 376(2) of I.P.C."

9. In **Shimbhu** (supra), the Apex Court has categorically held that rape is a non-compoundable offence and it is an

offence against the society and is not a matter to be left for the parties to compromise and settle. However, it is to be noted that in **Shimbu** (supra), what the Apex Court considered was the sentencing policy to be adopted by the courts in case of conviction of the offence of rape. It was a case of gang rape on a 16 years old girl. The only question considered by the Apex Court in that case (as revealed from paragraph 6 of the decision) was whether the appellants-accused in that case had made out a case for imposition of a lesser sentence than ten years.

10. In **State of M.P v. Madanlal : AIR 2015 SC 3003**, the Hon'ble Supreme Court has held as follows:

"We would like to clearly state that in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the "purest treasure", is lost. Dignity of a woman is a part of her non

- perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error. We are compelled to say so as such an attitude reflects lack of sensibility towards the dignity, the elan vital, of a woman. Any kind of liberal approach or thought of mediation in this regard is thoroughly and completely sans legal permissibility."

11. **Madanlal** (supra) also holds in categorical terms that compromise or settlement between the accused and the victim in a case of rape has no legal sanction and under no circumstances, conception of compromise can be thought of in a case of rape.

12. Rape is a non-compoundable offence. It is an offence

against the society. It is not a matter for the parties to compromise and settle. Compromise or settlement between the accused and the victim in a case of rape has no legal sanction and under no circumstances, conception of compromise can be thought of in a case of rape. Prosecution of a person for committing an offence punishable under Section 376 I.P.C cannot be quashed on the ground that the accused and the victim have compromised and settled the matter.

13. The question remains whether the marriage between the accused and the victim can be considered as a sufficient ground to quash the prosecution proceedings against the petitioner. The court can consider whether the averments in the first information report and other materials disclose commission of an offence of rape or only an act of consensual sex. In a case where the allegation is that the accused had sexual intercourse with a woman by obtaining her consent for such act by making a promise to marry her and when he subsequently marries her, it does not constitute a compromise or settlement between the accused and the victim. It really means fulfilment of the promise made by the accused to the prosecutrix. It is a fact which can be taken into consideration by

the court to exercise the discretion to invoke the power under Section 482 of the Code.

14. The first respondent is an educated lady. She was studying for degree course at the time of the alleged incident. She was aged 20 years at that time. She was in love with the petitioner. The petitioner had promised her that he would marry her. She voluntarily went to Coimbatore at the request of the petitioner. She voluntarily went to Ooty with him and resided with him in a hotel for four days. The averment in the first information statement that, the petitioner had forcible sexual intercourse with her against her will, has to be considered in the light of the aforesaid circumstances. In the subsequent statement given to the police, the first respondent has stated that the petitioner made her to believe that he would marry her and took her to Ooty and made sexual intercourse with her. In the affidavit filed by the first respondent, it is stated that she was forced to sign the first information statement at the instance of her mother and other relatives and that she had no intention to implicate the petitioner in a case of rape. These circumstances lead to an irresistible inference that the first respondent had given consent for sexual intercourse on the

promise made by the petitioner that he would marry her.

15. Section 90 of the Indian Penal Code states that a consent is not such a consent as is intended by any section of the Penal 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.

16. Consent is an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of the act complained of. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 I.P.C requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained on a careful study of all relevant circumstances. 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. 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. 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.

17. A question would arise whether the accused had made a false promise of marriage with the fraudulent intention of inducing the victim to sexual intercourse. There is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the accused had actually wanted to marry the victim or had mala fide motives and had made a false promise of marriage only to satisfy his lust. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely

on account of the misconception created by 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. If the accused had any mala fide intention and if he had clandestine motives, it is a clear case of rape. If it is found that from the inception the accused who gave the promise to the prosecutrix to marry did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 I.P.C. But, acknowledged consensual physical relationship between the parties would not constitute an offence punishable under Section 376 of the Indian Penal Code.

18. The aforesaid principles have been highlighted by the Apex Court in the decisions in Uday v. State of Karnataka: AIR 2003 SC 1639, Deelip Singh alias Dilip Kumar v. State of Bihar: AIR 2005 SC 203, Deepak Gulati v. State of Haryana: AIR 2013 SC 2071, Dhruvaram Murlidhar Sonar v. State of Maharashtra : AIR 2019 SC 327 and Anurag Soni v. State of Chhattisgarh : AIR 2019 SC 1857.

19. In the instant case, as noticed earlier, the circumstances of the case would show that the first respondent had given consent for sexual intercourse on the promise made by the petitioner that he would marry her. In fact, she has given statement to the police to that effect. The petitioner had no fraudulent intention in making the promise that he would marry the first respondent. The promise made by him to marry the prosecutrix was not a false promise made only with the intention to satisfy his lust. This is evident from the fact that he married the victim lady within a short period after the incident. It is a marriage solemnized under the Special Marriage Act, 1954 and not merely a registration of marriage under Section 15 of that Act. In such circumstances, it has to be found that what occurred was only acknowledged consensual physical relationship between the parties. In this factual scenario, prosecution of the petitioner for committing an offence of rape would be an abuse of the process of the court. Continuation of the prosecution will cause embarrassment to the couple and it would create discords in their happy matrimonial life. Even if the prosecution against the petitioner is continued, prospects of an ultimate conviction is remote and bleak. In the light of these

circumstances, I am of the considered view that this is a fit case where the power of this Court under Section 482 of the Code can be exercised to quash the proceedings against the petitioner.

20. Consequently, the petition is allowed. Annexure-3 final report and all proceedings pursuant thereto against the petitioner in C.P.No.13 of 2017 on the file of the Court of the Judicial First Class Magistrate-1, Pathanamthitta, are quashed.

21. In order to avoid embarrassment to the first respondent, it is directed that her real name shall not be disclosed in the cause title of this order, but her name shall be shown as "Ms.X"

(sd/-)

R.NARAYANA PISHARADI, JUDGE

jsr/09/05/2019

APPENDIX

PETITIONER'S EXHIBITS:

- ANNEXURE 1** **TRUE COPY OF THE FIR AND THE FIRST
INFORMATION STATEMENT DATED 29-12-2014
IN CRIME NO.2211 OF 2014 OF
PATHANAMTHITTA POLICE STATION.**
- ANNEXURE 2** **A TRUE COPY OF THE MARRIAGE CERTIFICATE
DATED 30-1-2015.**
- ANNEXURE 3** **TRUE COPY OF THE FINAL REPORT IN CRIME
NO.2211 OF 2014 OF PATHANAMTHITTA
POLICE DATED 20-12-2014.**

RESPONDENTS' EXHIBITS:

NIL

TRUE COPY

PS TO JUDGE