

Court No. - 65

Case :- APPLICATION U/S 482 No. - 35613 of 2019

Applicant :- Kamal Pal

Opposite Party :- State Of U.P. And Another

Counsel for Applicant :- Santosh Yadav, Vimal Chandra Pathak

Counsel for Opposite Party :- G.A.

Hon'ble Dinesh Kumar Singh-I,J.

Heard Sri Santosh Yadav, learned counsel for the applicant, Sri Bhaiya Ghanshyam Singh, learned A.G.A. appearing for the State and perused the record.

This application under Section 482 Cr.P.C has been moved with a prayer to quash the charge sheet bearing No. 01 of 2019 dated 12.02.2019 under Sections 366, 376, 328, 323, 506, 406 of IPC arising out of First Information Report No. 2371 of 2018, Police Station Shahibabad, District Ghaziabad along with cognizance order dated 18.03.2019 in Criminal Case No. 10724 of 2019 passed by Chief Judicial Magistrate, Ghaziabad together with the entire proceeding of the said Criminal Case pending in the Court of Chief Judicial Magistrate, Ghaziabad and also a prayer is made to stay the proceedings of this Criminal Case till the disposal of this application.

It is argued by the learned counsel for the applicant that the accused applicant has been falsely implicated by the opposite party No. 2 who is the mother of the victim because the victim wanted to marry him. Attention is drawn to page - 31 of the paper book, which is the statement of opposite party No. 2 recorded by the Investigating Officer. In her statement the opposite party No. 2 has stated that she suspects the involvement of the accused-applicant in this case. Thereafter, the learned counsel for applicant has also drawn the attention of this Court to page No. 34 of the paper book, which is a copy of the G.D. Details dated 22.09.2018 and on the basis of it, it is argued that both the opposite party No. 2 as well as her daughter had themselves gone to the police station to get their statement recorded, which clearly suggests that she was not abducted by the accused applicant and this prosecution case is false. Attention has also been drawn to page - 35 of the paper book, which is statement of the victim recorded under Section 161 Cr.P.C. in which allegation of rape has been made upon the accused applicant who after committing rape upon her, had given assurance to marry her and subsequently, when she said to marry he committed mar-pit with her and refused to marry. At page No. 44 of the paper book, is the injury memo, which shows that no injury found on the person of the victim. It is further submitted that in the statement recorded under Section 164 Cr.P.C. which is at page No. 46, she has levelled false allegation against the accused applicant of having committed rape upon her and also she has tried to implicate the brother of the applicant for the first time. This statement was recorded twenty days after the occurrence and it is argued that this statement would reflect that the victim and accused applicant were having close friendship and used to love each other

and accused had given her assurance that he would marry her. Thereafter, it was argued that in the said statement this allegation is false that some intoxicating substance was given to her in cold drink and thereafter rape was committed upon her by the accused applicant. Attention has also been drawn to one application made by the victim to Station House Officer, which is annexed at page No. 67 of the paper book. In this application she has clearly stated that she was not having cordial relation with her mother as she used to harass her and she wanted to live alone as she had become major. Pointing out this application, it was argued that the victim has falsely implicated the accused applicant because she wanted to marry the applicant and was annoyed with her mother. Lastly, it is submitted by the learned counsel for applicant that these facts have been ignored by the Investigating Officer and the charge-sheet has been submitted in a routine manner, which is nothing but an abuse of the process of Court and in the interest of justice, the charge sheet deserves to be quashed by this Court.

Learned A.G.A. has vehemently opposed the prayer for quashing of the charge-sheet and has stated that the evidence which has been collected by the Investigating Officer cannot be looked into in this Application under Section 482 Cr.P.C. as the same would require trial. Reliance has been placed by the learned A.G.A. upon the decision pronounced very recently in **Criminal Appeal No.675 of 2019 (Arising out of S.L.P. (Crl.) No.1151 of 2018) (Md. Allauddin Khan Vs. The State of Bihar & Ors.)** decided on 15th April, 2019, Supreme Court observed as to what should be examined by High Court in an application under Section 482 Cr.P.C. and in paras 15, 16 and 17 said as under: -

"15. The High Court should have seen that when a specific grievance of the appellant in his complaint was that respondent Nos. 2 and 3 have committed the offences punishable under Sections 323, 379 read with Section 34 IPC, then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not. In other words, in order to see whether any prima facie case against the accused for taking its cognizable is made out or not, the Court is only required to see the allegations made in the complaint. In the absence of any finding recorded by the High Court on this material question, the impugned order is legally unsustainable.

16. The second error is that the High Court in para 6 held that there are contradictions in the statements of the witnesses on the point of occurrence.

17. In our view, the High Court had no jurisdiction to appreciate the evidence of the proceedings under Section 482 of the Code Of Criminal Procedure, 1973 (for short "Cr.P.C.") because whether there are contradictions or/and inconsistencies in the statements of the witnesses is essentially an issue relating to appreciation of evidence and the same can be gone into by the Judicial Magistrate during trial when the entire evidence is adduced by the parties. That stage is yet to come in this case." (Emphasis supplied)

In the aforesaid matter the Hon'ble Supreme Court has held that in the proceedings under Section 482 Cr.P.C. the evidence gathered by the Investigating Officer cannot be looked into and the same would require trial.

I have gone through the First Information Report. It is mentioned in it by the opposite party No. 2 (mother of the victim) that on 25.06.2018 her daughter (victim) aged about 20 years was enticed away by the applicant who works at

Shalimar Garden Harmukh Clinic and used to come at Harmukh Clinic daily. She has apprehension that her daughter would be killed as her mobile phone was reporting closed. The Investigating Officer after having recorded the statements of as many as five witnesses has submitted the charge-sheet. The truthfulness of the statements of the witnesses cannot be scrutinized in Application under Section 482 Cr.P.C.

Now, the learned counsel for applicant, places reliance upon the pronouncement of the Hon'ble Apex Court in ***Pramod Suryabhan Pawar Vs. The State of Maharashtra & another, Criminal Appeal No. 1165 of 2019 (@ SLP (Crl) No. 2712 of 2019), para - 19*** of this judgment is as follows:-

"19. The allegations in the FIR indicate that in November 2009 the complainant initially refused to engage in sexual relations with the accused, but on the promise of marriage, he established sexual relations. However, the FIR includes a reference to several other allegations that are relevant for the present purpose. They are as follows:

- i. The complainant and the appellant knew each other since 1998 and were intimate since 2004;*
 - ii. The complainant and the appellant met regularly, travelled great distances to meet each other, resided in each other's houses on multiple occasions, engaged in sexual intercourse regularly over a course of five years and on multiple occasions visited the hospital jointly to check whether the complainant was pregnant; and*
- (iii) The appellant expressed his reservations about marrying the complainant on 31 January 2014. This led to arguments between them. Despite this, the appellant and the complainant continued to engage in sexual intercourse until March 2015"*

Thereafter, this Court places reliance upon pronouncement made by the Hon'ble Apex Court in ***Anurag Singh Versus Chhatisgarh, 2019 SCC online SC 509, para - 37 and 39*** of the report are reproduced below:-

"37. The sum and substance of the aforesaid decisions would be that if it is established and proved 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 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Section 375 of the IPC and can be convicted for the offence under Section 376 of the IPC.

39. Considering the aforesaid facts and circumstances of the case and the evidence on record, the prosecution has been successful in proving the case that from the very beginning the accused never intended to marry the prosecutrix; he gave false promises/promise to the prosecutrix to marry her and on such false promise he had a physical relation with the prosecutrix; the prosecutrix initially resisted, however, gave the consent relying upon the false promise of the accused that he will marry her and, therefore, her consent can be said to be a consent on misconception of fact as per Section 90 of the IPC and such a consent shall not excuse the accused from the charge of rape and offence under Section 375 of the IPC. Though, in Section 313 statement, the accused came up with a case that the prosecutrix and his family members were in knowledge that his marriage was already fixed with Priyanka Soni, even then, the prosecutrix and her family members continued to pressurise the accused to marry the prosecutrix, it is required to be noted that first of all the same is not proved by

the accused. Even otherwise, considering the circumstances and evidence on record, referred to hereinabove, such a story is not believable. The prosecutrix, in the present case, was an educated girl studying in B. Pharmacy. Therefore, it is not believable that despite having knowledge that that appellant's marriage is fixed with another lady - Priyanka Soni, she and her family members would continue to pressurise the accused to marry and the prosecutrix will give the consent for physical relation. In the deposition, the prosecutrix specifically stated that initially she did not give her consent for physical relationship, however, on the appellant's promise that he would marry her and relying upon such promise, she consented for physical relationship with the appellant-accused. Even considering Section 114-A of the Indian Evidence Act, which has been inserted subsequently, there is a presumption and the court shall presume that she gave the consent for the physical relationship with the accused relying upon the promise by the accused that he will marry her. As observed hereinabove, from the very inception, the promise given by the accused to marry the prosecutrix was a false promise and from the very beginning there was no intention of the accused to marry the prosecutrix as his marriage with Priyanka Soni was already fixed long back and, despite the same, he continued to give promise/false promise and alluded the prosecutrix to give her consent for the physical relationship. Therefore, considering the aforesaid facts and circumstances of the case and considering the law laid down by this Court in the aforesaid decisions, we are of the opinion that both the Courts below have rightly held that the consent given by the prosecutrix was on misconception of fact and, therefore, the same cannot be said to be a consent so as to excuse the accused for the charge of rape as defined under Section 375 of the IPC. Both the Courts below have rightly convicted the accused for the offence under Section 376 of the IPC."

In view of the above position of law, it is apparent that whether accused wanted to marry the victim right from very beginning or not and whether consent given by victim for sexual intercourse was a free-consent or not is a subject matter of evidence, which is only possible to be decided after trial.

From the perusal of material on record and looking into the facts of this case, at this stage, it cannot be said that no cognizable offence is made out against the applicant. All the submissions made at the Bar relates to the disputed questions of fact, which cannot be adjudicated upon by this Court in proceedings u/s 482 Cr.P.C. At this stage only prima facie case is to be seen in the light of law laid down by Hon'ble Supreme Court in cases of **R. P. Kapur vs. The State Of Punjab, AIR 1960 SC 866, State of Haryana and others Vs. Ch. Bhajan Lal and others, AIR 1992 SC 604 and State of Bihar and Anr. Vs. P.P. Sharma, AIR 1991 SC 1260** lastly **Zandu Pharmaceutical Works Ltd. and Ors. Vs. Md. Sharaful Haque and Ors., AIR 2005 SC 9**. The disputed defense of the accused cannot be considered at this stage.

The prayer for quashing the proceedings of the aforesaid case is refused.

However, the applicant may approach the trial court to seek discharge at appropriate stage, if so advised, and before the said forum, he may raise all the pleas which have been taken by him here.

The applicant shall appear before the court below within 30 days from today and may move an application for bail. If such an application is moved within the said time limit, the same would be disposed of in accordance with law without being influenced by the observations made above.

For a period of 30 days, no coercive action shall be taken against the accused applicant in the aforesaid case. But if the accused does not appear before the court below, the court below shall take coercive steps to procure his attendance.

With aforesaid direction, this application is finally *disposed of*.

Order Date :- 25.9.2019

LBY