IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.3527 OF 2021

Siddharth Narendra Banthia ...Petitioner
vs.
The State of Maharashtra and Another ...Respondents

VISHAL SUBHASH PAREKAR
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Date: 2022.07.26 17:33:00 +0530

Mr. Viresh Purwant a/w. Mr. Omkar Hase i/b. Sachin Deokar, for the Petitioner.
Ms. Aishwarya Kantawala, for Respondent No. 2.
Mr. A.R. Patil, APP for the State.

CORAM : N.J. JAMADAR, J.
RESERVED ON : 29th APRIL, 2022
PRONOUNCED ON : 26th JULY, 2022

JUDGMENT :

1. Rule. Rule made returnable forthwith and, with the consent of the counsels for the parties, heard finally.

This petition under Article 227 of the Constitution of India calls in question the legality, propriety and correctness of an order passed by the learned Additional Sessions Judge, Pune on 3rd September, 2021 on an application (Exhibit 20), in Sessions Case No. 188 of 2019 whereby the prayer of the petitioner to discharge him from the prosecution came to be rejected.

2. The background facts necessary for determination of this petition can be stated as under:

a] Ms. S (hereinafter referred to as “prosecutrix”) is an actress by profession. Her marriage was solemnized on 21st November, 2002. However, in the year 2004, the said marriage was dissolved by mutual consent. One of the friends of the prosecutrix introduced the petitioner to her. In the year 2008, the petitioner represented to her that he would assist her in procuring a flat at Mumbai under Government’s 10% discretionary quota. The petitioner induced the prosecutrix to part with a sum of Rs. 8 lakhs allegedly for payment to the middlemen. The flat could not be allotted till the month of March/April, 2010. The petitioner repaid a sum of Rs. 5 lakhs. The petitioner, however, developed intimacy with the prosecutrix.

b] In June, 2010 the petitioner proposed the prosecutrix. The petitioner represented that he was a bachelor. The petitioner met the mother and brother of the prosecutrix and gained their confidence as well. After the prosecutrix and her family members agreed to the said proposal, the marriage of the prosecutrix was solemnized with the petitioner on 23rd July, 2010 at Kita Cottage, Varsova, Andheri(w). Pre-marriage ceremonies were held at Flat No. 901, Pyramid Towers, Varsova, Andheri(w), which was taken on rent. None from the family members of the petitioner attended the said marriage. The petitioner claimed that since the marriage was inter caste, his family members did not attend the same.

c] In the month of September, 2010 a lady "M" called the prosecutrix and informed her that she was the wife of the petitioner and they had two issues out of the said wedlock. When confronted, the petitioner stated that the previous marriage was dissolved. The petitioner assured to show the divorce papers and also get the certificate of marriage with prosecutrix. In the meanwhile, the petitioner made the prosecutrix to open a joint account with ICICI Bank, Andheri branch, and withdrew huge amounts from the said account behind the back of the prosecutrix.

d] On 23rd July, 2010 the prosecutrix and the petitioner celebrated their first marriage Anniversary at Hotel Tunga, Andheri (E), Mumbai. The said event was reported in newspapers. "M" came to the house of the prosecutrix. In her presence, the petitioner conceded that the documents evidencing the alleged divorce between him and "M", which he had shown to the prosecutrix, were false. The petitioner claimed that he would ensure that separate provision was made for her first wife and children.

e] Prosecutrix and her mother met the parents of the petitioner. It transpired that the petitioner had deceived them by firstly representing that he was a bachelor and, later on, claiming that his first marriage was dissolved. The petitioner had allegedly obtained a forged marriage certificate as well. The prosecutrix thus instituted a

petition for annulment of marriage in the Family Court, Pune.

3. The prosecutrix, thereafter, approached Dattwadi police station, Pune and lodged report leading to registration of C.R. No. 148 of 2013 for the offences punishable under sections 420, 406, 467, 471, 474, 376, 323, 504, 506(i) and 494 of Indian Penal Code, 1860. Post completion of investigation, charge-sheet came to be lodged against the petitioner.

4. The petitioner preferred an application for discharge contending, inter alia, that the prosecutrix had made false and baseless allegations against the petitioner. Those allegations were vague. No specific date, time and place was mentioned with regard to any of the events which allegedly transpired. Moreover, the version of the prosecutrix was at variance with the averments in the petition for annulment of marriage. There was an inordinate delay of more than three years in lodging the first information report. Thus, the charge against the petitioner was groundless. Therefore, the petitioner deserved to be discharged.

5. The application was resisted by the prosecution.

6. The learned Additional Sessions Judge, after apprisal of the contentions in the application, reply thereto and the report under section 173 of the Code of Criminal Procedure and the documents annexed with it as well as the submissions canvassed across the bar, was persuaded to reject the application. The learned Additional Sessions Judge was of the view that there were sufficient grounds to proceed against the petitioner.

7. Being aggrieved, the petitioner has invoked the writ jurisdiction of this Court.

8. I have heard Mr. Purwant, learned counsel for the petitioner, Mr. Patil, learned APP for the State and Ms. Kantawala, learned counsel for respondent No. 2/prosecutrix. With the assistance of the learned counsel for the parties, I have perused the material on record including the report under section 173 of the Code and the documents annexed with it.

9. Mr. Purwant, learned counsel for the applicant, canvassed a two-fold submission. Firstly, the claim of the prosecutrix that her marriage was solemnized with the petitioner is required to be repelled for the reason that there is no material to show that the

marriage between the prosecutrix and her husband, solemnized in the year 2002, was legally dissolved. This negatives the very premise of the prosecution case that the petitioner obtained the consent of the prosecutrix by falsely representing that he was unmarried and thereby committed the offence of cheating and rape. Secondly, in any event, the offence punishable under section 376 of the Penal Code cannot be said to have been made out, by any stretch of imagination. The allegations in the first information report as well as the averments in the petition for annulment of marriage, according to Mr. Purwant, do not indicate even remotely that the alleged physical relations between the prosecutrix and the petitioner were without the consent of the prosecutrix. Mr. Purwant would further urge that if the offence punishable under section 376 of the Penal Code is held to be prima facie not made out, then the trial would be required to be held by the Court of learned Magistrate. The learned Sessions Judge did not properly appreciate this aspect of the offence punishable under section 376 of the Penal Code not having been prima facie made out and rejected the application by making general observations that there were sufficient grounds to proceed against the petitioner, submitted Mr. Purwant.

10. In order to lend support to the aforesaid submissions, Mr. Purwant took the Court through the allegations in the first information report and the averments in the petition for annulment of marriage. An endevour was made to compare and contrast the allegations in the first information report and the averments in the petition and highlight the inconsistency therein. Mr. Purwant, would further urge that in the written statement to the said Marriage Petition, the petitioner has categorically asserted that the marriage ceremony purported to be held on 23rd July, 2010 and the anniversary celebration, the following year, were merely props as the prosecutrix had induced the petitioner to perform the role of 'husband' for a programme to be aired. As the petitioner was fond of film and TV industry, the petitioner performed those roles and, in fact, the petitioner and the prosecutrix were never married and cohabited as husband and wife.

11. The learned APP, countered the submissions of Mr. Purwant. Laying emphasis on the material on record, especially the statements of witnesses, who attended the marriage and anniversary, the documents evidencing hiring of the premises on Leave and Licence, bank statements and photographs, the learned APP would urge that there is overwhelming material to lend support

to the allegations in the first information report. At this stage, the defence of the petitioner is not required to taken into account at all, submitted learned APP.

12. Ms. Kantawala, the learned counsel for respondent No. 2 at the outset, submitted that the instant petition does not deserve to be entertained as the learned Sessions Judge has framed charge against the applicant on 14th October, 2021, after the application for discharge came to be dismissed on 3rd September, 2021. In view of the aforesaid development, the challenge to the impugned order becomes unsustainable as the prayer for discharge cannot be countenanced after the framing of the charge.

13. Ms. Aishwarya Kantawala, submitted that the very premise of the petitioner that the marriage ceremony and the anniversary celebrations were mere props, renders the application for discharge untenable. In the face of the allegations in the first information report and overwhelming documentary evidence, this issue would surely warrant a trial. Ms. Kantawala further submitted that the thrust of the submission on behalf of the petitioner that, in any event the offence punishable under section 376 of the Penal Code cannot be said to have been made out, is based on an incorrect

impression of the definition of “rape”. The case at hand, according to Ms. Kantawala, would clearly fall within the ambit of clause “fourthly” as the petitioner being a married man had fully known that he was not the husband of the prosecutrix and made her to give consent believing that he is the man to whom she is lawfully married. Therefore, the offence punishable under section 376 of the Penal Code is prima facie made out. Resultantly, the learned Additional Sessions Judge committed no error in rejecting the application, submitted Ms. Kantawala.

14. The challenge to the tenability of the petition, in the context of its frame and the prayers therein, on the count of the framing of the charge cannot be said to be bereft of substance. It seems that after the application came to be rejected, on the next scheduled date the learned Sessions Judge framed charge against the petitioner and the petitioner abjured the guilt. Copies of the order framing charge and the plea of the petitioner are annexed to the affidavit filed on behalf of the respondent No. 2. It is trite that once a charge is framed, the scope of interference by the High Court, even in exercise of extraordinary writ jurisdiction, gets constricted. A proper remedy for an accused aggrieved by framing of the charge is to invoke the revisional jurisdiction. Indeed, the existence of an

alternative remedy is a self-imposed restraint. Yet, after the framing of the charge, the High Court may not interdict the trial unless the exercise of the jurisdiction becomes, in the peculiar facts of a given case, absolutely imperative to prevent the abuse of the process of the Court and secure the ends of justice.

15. In this context, Ms. Kantawala placed reliance on a judgment of the Supreme Court in the case of **Minakshi Bala vs. Sudhir Kumar and Others**[1]. Paragraph 7 reads as under:-

> 7] If charges are framed in accordance with Section 240 CrPC on a finding that a prima facie case has been made out as has been done in the instant case the person arraigned may, if he feels aggrieved, invoke the revisional jurisdiction of the High Court or the Sessions Judge to contend that the charge-sheet submitted under Section 173 CrPC and documents sent with it did not disclose any ground to presume that he had committed any offence for which he is charged and the revisional court if so satisfied can quash the charges framed against him. To put it differently, once charges are framed under Section 240 CrPC the High Court in its revisional jurisdiction would not be justified in relying upon documents other than those referred to in Sections 239 and 240 CrPC; nor would it be justified in invoking its inherent jurisdiction under Section 482 CrPC to quash the same except in those rare cases where forensic exigencies and formidable compulsions justify such a course. We hasten to add even in such exceptional cases the High Court can look into only those documents which are unimpeachable and can be legally translated into relevant evidence.

16. Nonetheless in the context of the challenge, especially to the

1 (1994) 4 SCC 142.

invocation of the provisions contained in section 376 of the Penal Code, I deem it expedient to appreciate the submissions keeping in view the broad parameters on which a prayer for discharge from prosecution is required to be appraised.

17. A profitable reference in this context can be made to the judgment of the Supreme Court in the case of **Union of India vs. Prafulla Kumar Samal and Another**[2]. The observations in paragraph Nos. 8 and 10 are instructive and hence extracted below:

> 8] The scope of section 227 of the Code was considered by a recent decision of this Court in the case of State of Bihar v. Ramesh Singh(1) where Untwalia, J. speaking for the Court observed as follows:-
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> "Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor pro poses to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebut ted by the defence evidence; if any, cannot show that the accused committed the offence then there will be no

2 AIR 1979 SUPREME COURT 366.

sufficient ground for proceeding with the trial".

This Court has thus held that whereas strong suspicion may not take the place of the proof at the trial stage, yet it may be sufficient for the satisfaction of ths Sessions Judge in order to frame a charge against the accused. Even under the Code of 1898 this Court has held that a committing Magistrate had ample powers to weigh the evidence for the limited purpose of finding out whether or not a case of commitment to the Sessions Judge has been made out.

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10] Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case

> and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

18. On the aforesaid touchstone, reverting to the facts of the case, I find it rather difficult to accede to the submissions on behalf of the petitioner that there is no material in support of the allegations of the prosecutrix that the petitioner made her to go through the ceremony of marriage, they resided together as husband and wife and there was a marriage anniversary celebration. In addition to the statement of the relatives of the prosecutrix, there are statement of witnesses, who attended the marriage ceremony, including the statement of the Manager of the Hall where the marriage ceremony was allegedly held and the Priest who solemnized the marriage. To add to this the statement of Dr. Murari Nanawati, indicates that the petitioner and the prosecutrix had visited his clinic and consulted him in respect of starting a family. There are medical reports which prima facie lend support to the claim of Dr. Nanawati. As indicated above, the prosecution has collected copies of the leave and licence agreement in respect of the premises which was allegedly taken on rent by the petitioner to cohabit with the prosecutrix, post marriage. The extract of the joint account maintained by the petitioner and prosecutrix is also pressed into service in support of the allegations.

19. In the face of the aforesaid material, at this juncture, it would be impermissible to discard the prosecution version on the ground that the petitioner has put forth a counter version, in his written statement to the Marriage Petition. Indeed it is a matter for trial. The necessary corollary of the aforesaid inference which, in the circumstances of the case, appears at this stage irresistible is that the question as to whether the petitioner forged the marriage certificate and other documents is also a matter for evidence and trial. I am, therefore, not persuaded to accede to the submission on behalf of the petitioner that even the offences other than the offence punishable under section 376 of the Penal Code are not prima facie made out.

20. This propels me to the pivotal challenge mounted on behalf of the applicant. Mr. Purwant urged with a degree of vehemence that since the prosecutrix has instituted a petition for annulment of marriage before the Family Court, by no stretch of imagination can it be said that the physical relations were without the consent of the prosecutrix. Amplifying the submission, Mr. Purwant would urge that if the Family Court rules that the marriage was valid, the prosecution under section 376 of the Penal Code would be wholly unsustainable. In no circumstances, according to Mr. Purwant, the

physical relations, in the backdrop of the case where the prosecutrix alleges that she was induced to solemnize the marriage by making a false representation that the petitioner was a bachelor, can be said to be without the consent of the prosecutrix. Therefore, the learned Session Judge committed a grave error in not discharging the petitioner from the prosecution at least for the offence punishable under section 376 of the Penal Code, submitted Mr. Purwant.

21. I have given anxious consideration to the aforesaid submission. At the first blush, the submission appears attractive. The submission, however, losses sight of the elements which vitiate the consent of a woman for the sexual act. Clause 'fourthly' to section 375 of the Penal Code addresses a situation where though the sexual act is with the apparent consent of the prosecutrix, in law the consent is vitiated on account of the circumstances enumerated therein which have the effect of negating the consent. Clause fourthly reads as under:-

> *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.

22. From the text of clause *fourthly*, it becomes abundantly clear

that the act with the apparent consent would fall within the dragnet of offence of rape if the man knows that -

a) he is not the husband of the woman, and

b) the woman gave consent because she believed that he is another man to whom she is or believes herself to be lawfully married.

23. To bring the sexual act within the mischief of clause *fourthly,* two states of mind are necessary. First, a state of mind on the part of the man manifested in the knowledge that he is not the husband of the prosecutrix and that the consent is given under a mistaken belief. Second, the state of mind of the prosecutrix manifested in her belief that she is lawfully or believes herself to be lawfully married to the man.

24. From the point of view of the prosecutrix, her belief as to her situation in life qua the man, accused of committing the rape, is of decisive significance. This belief, in turn, ought to be induced by a positive act on the part of the man to make her believe that she is married to him. If there is evidence to show the existence of circumstances which made the prosecutrix to entertain such belief, then clause *fourthly* would be attracted as the aspect of knowledge

on the part of the man that he is not her husband is often an objective fact. To put it in other words, clause *fourthly* is attracted where there is knowledge on the part of the man about he being not the husband of the prosecutrix and the consent is on account of such mistaken belief that he is her husband and a belief on the part of the prosecutrix that she is the wife of the man. If the aforesaid twin conditions are prima facie made out then the challenge to the prosecution on the ground that the physical relations were with the consent of the prosecutrix does not merit acceptance.

25. In the case at hand the prosecutrix categorically alleges that the petitioner made her to solemnize the marriage and cohabit with her by making a representation that he is unmarried. Since the petitioner allegedly solemnized the marriage with the prosecutrix, during the life of his wife, the marriage was, thus, void. The petitioner knew that he is not the husband of the prosecutrix and yet allegedly had physical relations with her. In the circumstances of the case, prima facie, the submission on behalf of the respondent No. 2 that the prosecutrix would not have given consent but for the belief induced by the petitioner by falsely representing that he was unmarried (though much married) appears to carry substance.

26. Reliance by Ms. Kantawala on a judgment of the Supreme Court in the case of **Bhupinder Singh vs. Union of Territory of Chandigarh**[3] appears to be well placed. In the said case also, the appellant therein, who was already married and had children from the wedlock had induced the prosecutrix to enter into a marriage ceremony and cohabit with him. Later on, the fact that the appellant was already married and the first marriage was subsisting when the appellant went through the marriage ceremony with the prosecutrix came to light. In the backdrop of the said facts a submission was sought to be canvassed that the physical relations were with the consent of the prosecutrix and, therefore, the offence punishable under section 376 cannot be said to have been made out.

27. Repelling the submission, the Supreme Court enunciated the law as under:-

> 13] Learned counsel for the accused-appellant submitted that when the complainant knew that he was a married man and yet consented for sexual intercourse with him, Clause "Fourthly" of Section 375 IPC would have no application. It was also submitted that the fact that the complainant knew about his being a married man, is clearly established from the averments made in a suit filed by her where she had sought for a declaration that she is the wife of the accused. The sentence imposed is stated to be harsh. It was, however, pointed out that the compensation, as awarded by the High Court, has been deposited and withdrawn by the complainant.

3 (2008) 8 Supreme Court Cases 531.

> 14] Learned counsel for the State submitted that it is a clear case where Clause "Fourthly" of Section 375 IPC is applicable. Learned counsel for the complainant submitted that this was a case where no reduction in sentence was uncalled for. The High Court proceeded on an erroneous impression that the complainant knew that the accused was a married man. It was also submitted that the compensation as awarded, is on the lower side.
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> 15] Clause "*Fourthly*" of Section 375 IPC reads as follows:
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> "375 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:-
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> *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.
>
> 16] Though it is urged with some amount of vehemence that when complainant knew that he was a married man, Clause "Fourthly" of Section 375 IPC has no application, the stand is clearly without substance. Even though, the complainant claimed to have married the accused, which fact is established from several documents, that does not improve the situation so far as the accused-appellant is concerned. Since, he was already married, the subsequent marriage, if any, has no sanctity in law and is void ab-initio. In any event, the accused-appellant could not have lawfully married the complainant. A bare reading of Clause "Fourthly" of Section 375 IPC makes this position clear.

28. The aforesaid pronouncement was followed by the Delhi High Court in the case of **Divya Oram Kujur vs. State and Anr.**[4] wherein in somewhat similar fact-situation, the Delhi High Court had interfered

4 Cri. Revn. Petition No. 193 of 2012 Dt.27.02.2013

with the order passed by the learned Sessions Judge of discharging the accused therein of the offence punishable under section 376 of the Penal Code.

29. In the light of the aforesaid position in law, re-adverting to the facts of the case, prima facie, clause *fourthly* of section 375 of the Penal Code seems to be attracted. Firstly, there is material on record to show that the petitioner and the prosecutrix went through the ceremony of marriage. Secondly, there is adequate material to demonstrate that the petitioner and prosecutrix cohabited as husband and wife. Thirdly, it is not the case of the petitioner that his spouse was not living on the date when he went through the marriage ceremony. On the contrary, the petitioner asserts that the ceremonies were mere props. Fourthly, the assertion of the prosecutrix that she gave consent for the physical relations as she was made to believe that she is the wife of the petitioner is also prima facie borne out by the material on record. Conversely, it is not the case of the petitioner, that the prosecutrix knew that he was married and thus such a belief could not have been entertained.

30. The upshot of the aforesaid consideration is that there are sufficient grounds to proceed against the petitioner, even for the

offence punishable under section 376 of the Penal Code. The trial thus must proceed to its logical conclusion. Resultantly, the petition deserves to be dismissed.

Hence, the following order.

ORDER

1] The petition stands dismissed.

2] By way of abundant caution, it is clarified that the observations are confined to the consideration of the prayer for discharge and the trial Court shall decide the Session Case on its own merits and in accordance with law without being influenced by any of the observations made hereinabove.

3] Rule discharged.

(**N.J.JAMADAR, J.**)