

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr.MMO No. 153 of 2016.

Date of decision: December 20, 2016.

Dushyant Kumar.

.....Petitioner.

Versus

State of Himachal Pradesh & anr.

.....Respondents.

Coram

The Hon'ble Mr. Justice Dharam Chand Chaudhary, *Judge.*

Whether approved for reporting?¹ Yes.

For the petitioner : Mr. Nimish Gupta, Advocate.

For the respondents : Mr. Pramod Thakur, Addl. AG, for respondent No. 1.

Ms. Bhawana Dutta, Advocate, for respondent No. 2.

Dharam Chand Chaudhary, J. (Oral)

Petitioner is an accused in a case registered by the police of Police Station, Chintpurni District Una under Section 376 of the Indian Penal Code vide FIR No. 48 of 2015. The second respondent is the complainant. She was married to one Shri Nitu in the year 1993 and three children born to her out of this wedlock. On account of certain differences with her husband she started living separately from her husband said Shri Nitu. She

¹ *Whether the reporters of the local papers may be allowed to see the Judgment? yes.*

had been selling cloth bags at Chintpurni. She came in contact of accused-petitioner who also used to supply cloth bags in Himachal Pradesh. She told him that her marriage with said Shri Nitu stands dissolved by a decree of divorce. It is in the year 2011 he proposed to solemnize marriage with her and represented that he will look after her children also. He thereby succeeded in making physical relation with her. They both started living with each other under the same roof at Chintpurni. He had also been going and meeting to her parents and other relations. The accused-petitioner allegedly assaulted her sexually for a period over four years. As and when she insisted for solemnization of marriage he used to pacify her that the marriage will be solemnized soon as and when the dispute qua land and water at his native place is settled. He also deferred her visit to his native place and to his parents on lame excuses. It is somewhere in the year 2012, she became pregnant. He made her to have some tablets forcibly. On account of that she developed problems including pain in stomach. She was taken by him to Sonia Clinic, Mubarakpur, Nangloi (Delhi) and got pregnancy terminated there. Later on, he refused to solemnize marriage with her and she was also threatened with dire consequences in case tried to contact him even over telephone also.

2. It is in this backdrop, FIR came to be registered against the accused-petitioner. The investigation has been conducted by the police and now report under Section 173 Cr.P.C. has been filed in the Court.

3. The FIR has been sought to be quashed on several grounds, however, mainly that in view of the complainant legally wedded wife of Shri Nitu she could have not been allured to solemnize marriage by the accused-petitioner nor subjected to sexual intercourse at that pretext. It is also canvassed that the evidence collected by the investigating agency even if taken as it is, no finding of conviction could have been recorded against the accused-petitioner. Also that allowing the criminal proceedings to continue against the accused-petitioner would amount to abuse of the process of law.

4. Learned Additional Advocate General has contended that the offence the accused-petitioner has committed is not only heinous but serious in nature which according to him not only affect an individual i.e. the complainant but has wide repercussion in the society at large also.

5. Mrs. Bhawana Dutta, Advocate, learned Counsel representing the respondent No. 2-complainant while arguing that the accused-petitioner has taken undue benefit of the poverty and separation of the prosecutrix from her husband has subjected her to sexual intercourse at the pretext of

solemnization of marriage with her and as such there is no question of quashing the FIR or the pending criminal proceedings against him.

6. The law on the subject is no more *res-integra* as the Apex Court in *Prashant Bharti Vs. State (NCT of Delhi), (2013) 9 Supreme Court Cases 293* in a similar set of facts and circumstances has quashed criminal proceedings initiated against the accused. This judgment reads as follows:

“17. It is relevant to notice, that she had alleged, that she was induced into a physical relationship by Prashant Bharti, on the assurance that he would marry her. Obviously, an inducement for marriage is understandable if the same is made to an unmarried person. The judgment and decree dated 23.9.2008 reveals, that the complainant/prosecutrix was married to Lalji Porwal on 14.6.2003. It also reveals, that the aforesaid marriage subsisted till 23.9.2008, when the two divorced one another by mutual consent under [Section 13B](#) of the Hindu Marriage Act. In her supplementary statement dated 21.2.2007, the complainant/prosecutrix accused Prashant Bhati of having had physical relations with her on 23.12.2006, 25.12.2006 and 1.1.2007 at his residence, on the basis of a false promise to marry her. It is apparent from irrefutable evidence, that during the dates under reference and for a period of more than one year and eight months thereafter, she had remained married to Lalji Porwal. In such a fact

situation, the assertion made by the complainant/prosecutrix, that the appellant-accused had physical relations with her, on the assurance that he would marry her, is per se false and as such, unacceptable. She, more than anybody else, was clearly aware of the fact that she had a subsisting valid marriage with Lalji Porwal. Accordingly, there was no question of anyone being in a position to induce her into a physical relationship under an assurance of marriage. If the judgment and decree dated 23.9.2008 produced before us by the complainant/prosecutrix herself is taken into consideration alongwith the factual position depicted in the supplementary statement dated 21.2.2007, it would clearly emerge, that the complainant/prosecutrix was in a relationship of adultery on 23.12.2006, 25.12.2006 and 1.1.2007 with the appellant-accused, while she was validly married to her previous husband Lalji Porwal. In the aforesaid view of the matter, we are satisfied that the assertion made by the complainant/prosecutrix, that she was induced to a physical relationship by Prashant Bharti, the appellant-accused, on the basis of a promise to marry her, stands irrefutably falsified.

22. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under [Section 482](#) of the Code of Criminal Procedure (hereinafter referred to as "the [Cr.P.C.](#)") has been dealt with by this Court in *Rajiv Thapar & Ors. vs. Madan Lal Kapoor* wherein this Court inter alia held as under:

"29. The issue being examined in the instant case is the jurisdiction of the High Court under [Section 482](#) of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under [Section 482](#) of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section -482 of the [Cr.P.C.](#) the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have

been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under [Section 482](#) of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice. ◇

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under [Section 482](#) of the Cr.P.C.:-

30.1. Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

30.2 Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

30.3 Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

30.4 Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5 If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under [Section 482](#) of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused.”

7. Similar is the ratio of the judgment of the High Court of Delhi dated 21.5.2015 title *Manoj Bajpai v. State of Delhi, W.P. (CRL) 771/2014 and Crl. M.A. 5999/2014*. This judgment also reads as follows:

“34. The factual details referred in the foregoing paras reflect that:-

(i) The complainant came in contact with the petitioner and started living in his house for 18

months and during this period, they had physical relationship.

(ii) The complainant was already married to Mukesh Jassal and had two children. The marriage was subsisting during this period. Even the petition for divorce by mutual consent u/s 13B Hindu Marriage Act was filed only on 3rd December, 2012 and the marriage was dissolved by decree of divorce dated 4th July, 2013, i.e., much after the registration of this FIR.

(iii) The allegations of the complainant that her objectionable photographs were taken by applying narcotic on her is not substantiated as her allegations of use of narcotic could not be substantiated during the investigation of the case or through medical examination.

(iv) Keeping in view the fact that both, the petitioner as well as the complainant, were married which marriage was still subsisting, therefore, the complainant could not have been induced into physical relationship based on assurance of marriage.

(v) The physical relationship between the complainant and the accused was admittedly consensual.

(vi) In her statement u/s 164 Cr.P.C., the complainant asserted that her consent was based on inducement of marriage, however, this aspect of assurance stands falsified.

(vii) The acknowledged consensual physical relationship between the parties would not constitute

an offence u/s 376 IPC, especially, because both the complainant as well as petitioner were major on the date of occurrence.

(viii) As per the FSL report, there was no evidence of any blood or semen and, therefore, DNA analysis was not conducted.

(ix) After the filing of this FIR, another complaint was filed by the complainant against the petitioner on the allegations of threatening her to withdraw this case which resulted in registration of FIR 295/13 dated 2nd June, 2013 u/s 195A/323/506 IPC, with PS New Ashok Kumar. As per the status report dated 9th March, 2015 filed by the State, allegations were not substantiated and as such, the case was cancelled on 2nd September, 2013.

(x) The petitioner had alleged that due to his ill health he closed his clinic at Mayur Vihar, Delhi in the month of May, 2012. On the request of the complainant to provide her accommodation for 2-3 days, petitioner allowed her to reside in Delhi Clinic for a few days, however, in the month of August, 2012, he came to know that the complainant had changed the locks of the premises and started misusing the clinic premises without his knowledge, therefore, he asked her to vacate the said premises. The complainant failed to accede to his request rather threaten to implicate him in false and baseless cases, as such, the petitioner approached different authorities vide his letter dated 1st September, 2012 to CDMO, East Delhi, SHO Police Station, New Ashok Nagar and through newspaper dated 2nd September,

2012 in Rashtriya Sahara. Against these allegations, no pleadings whatsoever have been filed by the complainant. Even during the course of hearing, the material relied upon by the accused was not refuted.

(xi) The petitioner filed a civil suit bearing Suit No.26/2013 for mandatory injunction/possession/mesne profits/damages against the complainant.

(xii) A settlement deed dated 7th October, 2013 was arrived at between the parties whereby it was agreed that the petitioner shall withdraw his suit pending before the Additional District Judge and the complainant would cooperate with the petitioner in quashing the FIR. As per the copies of the proceedings placed on record pursuant to the statement made by both the parties, the petitioner withdrew the suit.

(xiii) The factum of entering into a compromise deed between the parties has been verified by the State and in fact the prosecutrix herself furnished the copy of the MOU executed in October, 2013, whereby the petitioner agreed to execute a gift deed in respect of half portion of LIG Flat No. 97A, Ground Floor, Pocket A-III, Mayur Vihar, Phase-III, Delhi-96 in favour of the complainant after getting conversion from lease hold to free hold by DDA and the petitioner shall pay a sum of Rs.11,000/- per month to the complainant and both the parties would withdraw the cases filed against each other. It is the case of the petitioner that pursuant to this compromise, he withdrew the suit filed by him but the complainant resiled from the

settlement and further put the condition that the petitioner should deposit sufficient amount in fixed deposit in bank in her name”.

8. Now adverting to the facts of this case. The complainant admittedly is the legally wedded wife of Shri Nitu. In the report under Section 173 Cr.P.C. though there is a reference of dissolution of her marriage with said Shri Nitu in the year 2014, however, in view of the statement of her mother recorded on 3.8.2015 under Section 161 Cr.P.C. and placed on record along with the copy of police report the marriage of the prosecutrix with said Shri Nitu was not dissolved by a decree of divorce even by that date also. Being so, how she could have fallen prey to the allurements of solemnization of marriage allegedly given to her by the accused-petitioner knowing fully well that she was legally wedded wife of Shri Nitu aforesaid. Even if it is believed to be true that her marriage with said Shri Nitu was dissolved in the year 2014 how she could have allowed the accused to subject her to sexual intercourse in the year 2011 and started living with him under the same roof as her first marriage was subsisting at that time.

9. Admittedly, there were physical relations between the accused-petitioner and the complainant. Such relations on the face of the record available at this stage cannot be said to be forcible or against her will and without her consent and rather

consensual as she was a consenting party to such relation with the accused-petitioner. A married woman having her husband alive and three children maintaining physical relation with a third person that too during the currency of her marriage, cannot be said to be heard of any complaint that she has been subjected to sexual intercourse without her consent and against her will.

10. Scientific investigation is not there because the prosecutrix did not opt for undergoing the medical examination. In such a situation, allowing the criminal proceedings to continue would amount to abuse of process of the court as is held by the Apex Court in Prashant Bharti's case cited supra. As a matter of fact in that case also the complaint was that the accused allured the prosecutrix, a married woman, to solemnize marriage with her and at that pretext subjected her to sexual intercourse. The Apex Court has held that in the case of an unmarried woman one can understand that she fell prey to the allurements so given to her by the accused. However, there is no question of a married woman to fall prey to any such allurements given to her knowing fully well that she was married and could have not solemnized the second marriage till subsistence of her first marriage. Similar were the facts of Manoj Bajpai's case supra.

11. In view of legal as well as factual aspect of the matter discussed hereinabove in the light of the arguments

addressed on both sides, this court is satisfied that the evidence available at this stage even if taken as it is no findings of conviction under Section 376 of the Indian Penal Code can be recorded against the accused-petitioner. Allowing the criminal proceedings to continue would rather amount to abuse of the process of law, besides wastage of the precious court time which can be utilized to decide the genuine cases pending in large number in the Court.

12. The petition is accordingly allowed. Consequently, FIR No. 48 of 2015 registered against the accused-petitioner in Police Station, Chintpurni District Una is quashed and further proceedings pending in the Court of learned Additional Sessions Judge-II, Una shall also stand quashed. The petition is accordingly disposed of.

(Dharam Chand Chaudhary),
Judge.

December 20, 2016,
(vs)