

In Re: Mursalim Sk.

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Court : Kolkata

Decided On : Jul-02-2007

Reported in : 2007CriLJ4783

Judge : Pratap Kumar Ray, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 167(2) and 439; ;
[Indian Penal Code \(IPC\), 1860](#) - Sections 90, 376, 376(2) and 493

Appeal No. : C.R.M. No. 5519 of 2007

Appellant : In Re: Mursalim Sk.

Advocate for Def. : Dipti Mitra, Adv.

Advocate for Pet/Ap. : Tapan Dutta Gupta and ;Partha Sarathi Ghosh, Adv.

Disposition : Application rejected

Judgement :

ORDER

Pratap Kumar Ray, J.

1. Heard the learned Advocates appearing for the parties.
2. This is an application under Section 439 of the Code of Criminal Procedure which has been referred to this Bench by the Hon'ble the Chief Justice by order

dated 18th June, 2007 in view of conflicts of opinion of the Hon'ble members of the Division Bench (Coram : Amit Talukdar and Arun Kumar Bhattacharya, JJ.) while considering the application under Section 439 of the Code of Criminal Procedure filed prior to the statutory period of 90 days was over in terms of Section 167(2) of the Code of Criminal Procedure, a time limit for filing the charge-sheet. From the First Information Report lodged by the complainant to the concerned Officer in charge of the Police Station, it appears that the allegation was made by the complainant, a poor lady, that the accused on the assurance to marry her cohabited and as a resultant effect she became pregnant, but ultimately the accused refused to marry her. It was further alleged that the accused was pressurizing her to cause abortion by medicine. On the basis of the said First Information Report, Mayureshwar Police Station Case No. 39/07 dated 6th April, 2007 under Section 493/376 of the Indian Penal Code was instituted against the accused who is the applicant of the said application praying for bail.

3. Amit Talukdar, J. while hearing the matter sitting in the Division Bench on the basis of the reasons as stated thereto re fused to grant bail. The reasons as assigned by His Lordship are as follows.

1. It appears from the case diary that the petitioner taking the advantage of the plight of the victim girl, who is a widow, cohabited with her and as a result of which she conceived.

2. There was a promise of marriage from which subsequently the petitioner backtracked.

3. The petitioner although is in custody for 58 days and charge-sheet has not been submitted I am of the considered view that in the event the petitioner is released on bail, keeping in mind the allegations in the case diary, it would send a wrong signal down.

4. On the other hand Arun Kumar Bhattacharya, J., another Hon'ble member of the Bench, passed order to release the accused on bail of Rs. 10,000/- with two sureties of Rs. 5000/- each, one of whom must be local, to the satisfaction of the learned Additional Chief Judicial Magistrate, Rampurhat on condition that after

being released on bail the accused/petitioner should meet the Investigating Officer twice a week until further orders. His Lordship held that it was a case of cohabitation on consent and there was nothing to suggest either in the First Information Report or in the case diary that such consent was obtained fraudulently, hence as settled by this Court earlier, the offender could not be roped with an offence of rape as per decision of the Apex Court reported in AIR 2003 SC 1639 : 2003 Cri LJ 1539.

5. In view of such divergent and conflicting opinion, the matter has been referred to this Bench by the Hon'ble the Chief Justice as already noted above.

6. Before considering that issue and for an answer to the reference, the relevant provisions of Section 376 of the Indian Penal Code as well as meaning of the word 'consent' in terms of Section 90 of the Indian Penal Code is required to be discussed.

7. Section 90 of the Indian Penal Code reads such.

90. Consent known to be given under fear or misconception.--A consent is not such a consent as is 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; or

Consent of insane person.--if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.--unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

8. Section 376 of the Indian Penal Code reads such.

376. Punishment for rape.--(1) Whoever, except in the case provided by Sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be

for life, or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.(2) Whoever,-

(a) being a police officer commits rape-

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape.

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

9. Having regard to the provision of Section 90 of the Indian Penal Code it appears that if the basis of consent is on 'consent' by defining misconception of the fact, the act shall not be deemed as on 'consent', and it has full applicability in a case under Section 376 I.P.C. in view of the use of the sentence 'that the definition of the word consent could be applied in respect of the word 'consent' as mentioned in the entire code.' Hence when the legislature at their wisdom has stipulated that meaning of word 'consent' under Section 90 of the Code should be applied in any Section of the Code, it has applicability to the meaning of the word 'consent' as it appears in Section 376 of the Indian Penal Code. It is true that if there is a consent by any adult member in cohabitation, there is no offence of rape under Section 376 of the Indian Penal Code. But before reaching to that conclusion that there was a consent of cohabitation by the female partner with the male one, it requires to decodify the word 'consent' in the angle of Section 90 of the Indian Penal Code which speaks that if there is any misconception of fact, it will be deemed as no consent; even in respect of its applicability under Section 376 of the Indian Penal Code also as it appears from the views expressed by the Apex Court in the case of Uday v. State of Karnataka reported in AIR 2003 SC 1693 : 2003 Cri LJ 1539 as has been relied upon by Arun Kumar Bhattacharya, J. to grant bail as already quoted. Now 'misconception of fact' issue, if any, could be decided only on considering the evidence on record as it is within the factual matrix of oral evidence of the victim and the witnesses concerned. Whether any consent arose out of misconception of fact or not cannot be decided until and unless there is evidence on trial by taking deposition of the witnesses concerned.

10. Furthermore the 'misconception of fact' by its nature presupposes the understanding and conceptuality of fact in a particular way and/or not which also depended upon the mental maturity of the person concerned which also have a reflection on consideration of the factors, namely, socio economic condition as well

as psychological and genetical factors and its molecular vibrant to understand the issue. Naturally in the case of rape under Section 376 of the Indian Penal Code, misconception of fact depends on its identification vectors, namely educational standard of the lady concerned, social position in terms of economical factor of that particular lady as well as her protective factors in the society.

11. In the case of Uday v. State of Karnataka. The Apex Court considered the issue whether there is any mis-consent of the fact while according consent by the lady, the Court was considering the issue at post-trial stage and thereby on analyzing the evidence on record came to the conclusion that as the victim lady therein was intelligent enough to understand the effect of cohabitation as she was a student of a College and she had the knowledge beforehand that in view of the social position and more particularly the caste system as prevalent thereof, there was no chance of marriage with that particular man against whom an allegation was made under Section 376 of the Indian Penal Code on the allegation that on assurance of marriage there was a cohabitation, it was a case of consent cohabitation. The Apex Court placed more emphasis on social status of the particular complainant of that case and on the mental maturity due to education. On that factual background in the post-trial stage the issue was decided by the Apex Court and it was held that there was consent as the allegation of misconception of fact was not proved by evidence. Having regard to that issue, the Apex Court in subsequent judgment in the case of Yedla Srinivasa Rao v. The State of A.P. reported in 2007 (1) SCC (Criminal) 557 wherein the said case Uday (supra) was referred to, distinguished it on factual matrix and on reflection of different cases as referred to including a case of Jayanti Rani Panda v. The State of West Bengal reported in 1984 Cr LJ 1535 where the lady was only aged 16 years who was the complainant. Furthermore whether assurance to marry or not to marry as alleged also requires to be proved by evidence through witnesses concerned and/or by prosecutrix herself, that is, the victim girl which requires trial on evidence. Hence unless and until those material factors are brought in the record by trial on evidence, the Court has no relevant data at the pre-trial stage as to whether there is an element of misconception of fact or not, and/or whether consent to marry was withdrawn or not, or the accused refused to marry, which are the material factors and/or ingredients to identify the word 'misconception of

fact'. As already discussed that the misconception of fact and its conclusion thereof requires adjudication on the basis of the evidence and materials on record and whether the accused refused to marry or not after the lady conceived due to cohabitation, all are within the domain of factual matrix which at the pre-trial stage are absent. Hence the pre-trial stage while dealing with the application under Section 439 of the Code of Criminal Procedure, the Court is to consider only the allegation of the First Information Report. In the First Information Report as already quoted above, the complainant alleged that on the assurance of marriage she consented in cohabitation, but after she became pregnant, the accused refused to marry. Those few lines of allegation, as already quoted, requires adjudication at the present moment to identify the issue whether it is a case where order to release on bail could be passed. The allegation of rape now in zygote stage in the ovary in biological term which requires further growth, by evidence at the time of trial, to consider as to whether there is insufficient materials to attract the offence under Section 376 of the Indian Penal Code. Furthermore the social aspect of the issue also to be looked into. Here the lady is a poor and lonely lady who alleged the commission of such offence. Section 376 of the Indian Penal Code is a provision which could be termed as protective umbrella of the ladies, that is, the women from illegal sexual approach. Women are vulnerable persons in the society and having regard to the social impact of the issue in question and having regard to the factors that 'mis-conception of fact' could be decided and considered at the post-trial stage on the basis of the evidence on record, this Court is of the view that at this stage there is no applicability of the case as relied upon by Arun Kumar Bhattacharya, J., namely, the case of the Apex Court in *Uday v. The State of Karnataka* (supra). Having regard to that, this Court is of the view that it is a very premature stage to hold that there was nothing to suggest that 'such consent was obtained'. Considering this aspect of the matter, this Court is of the view that it is not a fit case to grant bail at this stage and the issue is answered accordingly.

12. Having regard to above, this Court do agree with the views expressed by Amit Talukdar, J.

13. Hence the application for anticipatory bail accordingly stands rejected by majority view on the ratio 2:1 by answering the reference.

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