

**HIGH COURT OF JAMMU AND KASHMIR AT
JAMMU**

Petition u/s 561-A No.246/2013
Cr.MA No. 298/2013

Date of decision: 27.09.2013

Rajinder Singh	vs.	State and ors.
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Coram:

HON’BLE MR. JUSTICE JANAK RAJ KOTWAL-JUDGE

Appearing counsel:

For petitioner (s): Mr. Pawan Kumar Kundal, Adv.
For respondent(s): None.

(i)	Whether to be reported in Press, Journal/Media:	Yes/No
(ii)	Whether to be reported in Journal/Digest:	Yes/No

1. This petition seeks invoking of inherent jurisdiction of this Court under Section 561-A of the Code of Criminal Procedure (for short the Code) for quashing FIR No. 160/2013 dated 11.09.2013 of Police Station, Kanachak, under Section 376 RPC registered on a report lodged by respondent No. 4.
2. Heard. I have perused the record.
3. On 10.09.2013, prosecutrix/respondent No. 4 lodged a written report at Police Station, Kanachak alleging that for ten years petitioner, having promised that he will marry her, had been having sexual intercourse with

her. On 08.09.2013, he forcibly took her with him in the night and raped her thrice in a field. However, he has refused to marry her saying that he will marry the girl selected by her mother and sister. On this, report aforesaid FIR has been registered against the petitioner. Petitioner seeks quashing of the same.

4. In seeking the quashing of the FIR, petitioner has contended that he and the prosecutrix reside in the same village. He belongs to Rajput family whereas the prosecutrix belongs to Scheduled Caste (Batwal) family. The prosecutrix was willing to marry with him and had made proposal of marriage but the proposal has been rejected by his family due to difference in caste of the two families. Even the prosecutrix, who is major of 25 years, knows that her marriage with the petitioner is not possible but still she is pressurizing him and his family for this marriage. He has been engaged to one Pooja Devi of Janipur, Jammu in May, 2013 and the prosecutrix is forcing him to break the engagement and solemnize marriage with her. His marriage with Pooja Devi was fixed for 12th of September, 2013 and marriage cards had been distributed before 08.09.2013. The prosecutrix, however, in a well hatched conspiracy has lodged report against him leveling false and frivolous

allegations and FIR has been registered on 11.09.2013. The Police have arrested the petitioner.

5. Petitioner's contention further is that even if the version of the prosecutrix is believed correct, it would appear that she was having love affair with him and was a consenting party to the sexual intercourses with her. The petitioner has further contended, to state verbatim, that "the respondent No. 4 is mature lady of 25 years made relations with the petitioner with her free consent since 10 years without any complaint from any corner and continues her relations with the petitioner 10 years long and she was well aware of fact there is a difference of caste between the petitioner and respondent and her marriage with the petitioner may not be possible and yet complainant/ respondent No. 4 continued her physical relations with the petitioner 10 years long. So, respondent No. 4 willfully and with her free consent made relations with the petitioner, so no offence of rape is made out against the petitioner from the story projected by the complainant."
6. I have given verbatim account of petitioner's version to point out that for the purpose of this petition there is a frank admission on his part that he had been having sexual intercourse with the prosecutrix for last ten

years, though according to him it was not rape but consensual sex as she was a consenting party knowing well that marriage between them was not possible due to difference in their castes.

7. Mr. Pawan Kumar Kundal, learned counsel for the petitioner sought to project that since the prosecutrix was a consenting party to the sexual intercourse, the report lodged by her does not make out a case of rape against the petitioner and the Police has committed error by registering FIR under Section 376 RPC. In support, Mr. Kundal relied upon *Udhey v. State of Karnataka*, AIR 2003 SC 1639. Mr. Kundal amplified his argument saying that it was known to the prosecutrix that she and petitioner belong to different castes and there was no possibility of marriage so it cannot be said that the prosecutrix, while consenting to the sexual intercourse with the petitioner was deceived by any promise of marriage made by him.
8. Before taking up the petitioner's contention on merit, I may briefly state the scope of jurisdiction under Section 561-A of the Code. High Court under section 561-A of the Code (sec. 482 of the Central Code) is vested with inherent jurisdiction to make such order as may be necessary to give effect to any order under the Code or to prevent abuse of process of any Court or otherwise to secure the ends of justice. This

jurisdiction of the High Court can be invoked to seek quashing of FIR and investigation by the police or any criminal proceedings pending in any Court if it is shown to the satisfaction of the Court that such proceedings is the abuse of process of that Court or tends to cause miscarriage of justice or the quashing is otherwise required to secure the ends of justice. The jurisdiction of the High Court is vast indeed but it is well settled that this jurisdiction is to be exercised cautiously, carefully and sparingly and the Court has not to function as a Court of appeal or revision. Supreme Court in *State of Haryana v Bhajan Lal*, AIR 1992 SC 604, has given categories of cases by way of illustration wherein such power can be used either to prevent the abuse of process of Court or to secure the ends of justice. The categories are:

“108.....

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
2. Where the allegations in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under S. 156(1) of the Code except under an order of a Magistrate within the purview of S. 155(2) of the Code.
3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under S. 155(2) of the Code.
 5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
 6. Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceedings is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.
 7. Where a criminal proceedings is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge”.
9. Supreme Court in Udhey’s case (supra) has observed:
- “21. It, therefore, appears that the consensus of judicial opinion is in favour of the view that the 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. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a

question of consent, but 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. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.”

10. It may be pointed out that in Udhey’s case (supra) accused/appellant was convicted by the Sessions Court for offence under Section 376 IPC (RPC). Conviction was upheld by the High Court. Vide the judgment relied upon by the petitioner, the appellant therein was acquitted of the offence. In that case, Supreme Court had noticed in the evidence that it was appellant (accused), who had proposed the prosecutrix to marry him, and it was the prosecutrix, who had told him that since they belong to different castes, such marriage was not possible.
11. In this case, having regard to the ground on which the petitioner seeks the quashing of the FIR, it needs to be underlined that allegation of the prosecutrix is twofold. Firstly, it is alleged that petitioner had been having sexual intercourse with her for 10 years with a promise of marrying her. The other allegation is that on 08.09.2013, petitioner took her forcibly in the night and raped her thrice in the field.

12. Petitioner's emphasis in seeking quashing of the FIR is confined to the first allegation about which he says that the prosecutrix was a consenting party knowing well that marriage between them was not possible. In this context it is important to note that it is not in the version of the petitioner that he had never made such a promise, much less, that he had ever cautioned or told the prosecutrix that marriage between them was not possible due to difference in caste of the two families. It is also not his say that he could not marry her due to difference in the caste. Petitioner's contention that the prosecutrix had consented to sexual intercourse in spite of knowing that marriage between them was not possible cannot be accepted at this stage because difference in religion or caste cannot be taken as universal impediment to the marriage between two persons involved in intimate relation for number of years.
13. Question whether the prosecutrix was in love with petitioner and voluntary consenting party to repeated sex or had consented only because of the promise of marriage having been made by the petitioner is required to be investigated and decided on the basis of the evidence and not merely on the basis of contentions of the parties. Quashing the FIR at this stage would tantamount to accepting petitioner's plea

on its face value and rejecting prosecutrix's allegation out rightly. To do so is beyond the scope of jurisdiction under Section 561-A of the Code.

14. Contextually, it is useful to refer to a recent observation of Their Lordships in *Deepak Gulati v. State of Haryana*, Criminal Appeal No. 2322 of 2010 decided on 20.5.2013.

“18. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examined whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus the court must examined whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. 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 mis-representation made to her by the accused, or where an accused on account of circumstances which he could not have every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the Court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.”

15. Above apart, the other allegation of the prosecutrix is specific too and needs to be looked into in context with petitioner's contention in para 4 of the petition that his marriage with one Pooja Devi has been settled and invitation cards were also distributed before 8th September, 2013. Allegation implies that even after settlement of his marriage to another girl, the petitioner took the prosecutrix forcibly with him and raped her thrice in a field. This allegation may be true or may not, but cannot be rejected by quashing the FIR without investigation.
16. FIR, at the pre investigation stage, as in this case, can be quashed, if allegations made by the complainant do not prima facie constitute any offence or make out a case against the accused, even if, uncontrovered allegations are taken at their face value. It is not so here.
17. For aforementioned, case of quashing the FIR at this stage is not made out. Petition is, therefore, dismissed as without any merit alongwith connected Cr. MA.

(Janak Raj Kotwal)
Judge

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27.09.2013
Karam