

Kondra Ashok Kumar Vs State Of Telangana

Court: High Court For The State Of Telangana:: At Hyderabad

Date of Decision: Jan. 28, 2022

Acts Referred: Code Of Criminal Procedure, 1973 â€” Section 29, 209, 313, 323, 325, 397, 401
Indian Penal Code, 1860 â€” Section 90, 294(b), 375, 376, 417, 420, 506
Evidence Act, 1872 â€” Section 114A

Hon'ble Judges: Dr. G. Radha Rani, J

Bench: Single Bench

Advocate: Palle Nageswar Rao

Final Decision: Dismissed

Judgement

1. This Criminal Revision Case is filed by the petitioner/ respondent/accused under Sections 397 and 401 Cr.P.C. aggrieved by the order dated

20.11.2014 passed in CrI.M.P. No.1828 of 2014 in CC No.253 of 2013 by the II Additional Judicial Magistrate of First Class, Kothagudem.

2. The case of the petitioner in brief was that the complainant, by name, Kalava Padma lodged a report against him on 07.03.2013 at 7.00 PM stating

that she was married to one Parameshwara Rao, who was a KTPS employee. Her husband died due to ill health on 25.12.1999. On compassionate

grounds, she was provided a job in KTPS, Paloncha. The accused was also working in the KTPS, Paloncha as Junior Assistant and he developed

intimacy with her and had sexual intercourse with her on a false promise to marry her. Further, he also stated that he would marry her when his

brother returned from London in the month of May, 2012. Later she asked the accused about the marriage, but he refused to marry her and abused

her in filthy language and threatened her with dire consequences. She approached elders and the elders conducted a panchayat. The accused refused

to marry her and stated as such before the panchayat elders. Basing on the said report, police registered a case in Crime No.141 of 2013 for the

offences under Sections 417, 294(b), 420 and 506 IPC and after investigation, filed charge sheet against the accused for the said offences.

3. The case was taken cognizance by the II Additional Judicial Magistrate of First Class, Kothagudem. During the course of trial, the prosecution got

examined the complainant as PW.1. While the matter was coming for cross examination, the learned Assistant Public Prosecutor of the said Court

filed a petition under Section 323 Cr.P.C. that the evidence of PW.1 was attracting the ingredients of Section 376 IPC and as the same was triable by

the Court of Sessions, prayed to convert the said CC as PRC and commit the matter to the Court of Sessions. The accused filed counter to the said

petition. The learned II Additional Judicial Magistrate of First Class, Kothagudem on hearing the learned Assistant Public Prosecutor and the learned

Defence counsel on record, passed the impugned order allowing the petition directing the office to convert the CC into PRC and to submit the case

records to the Principal District and Sessions Court, Khammam.

4. Aggrieved by the same, the petitioner/accused filed this revision contending that the police after thorough investigation into the matter and after

recording the statements of all the witnesses, filed charge sheet for the offences under Sections 417, 294(b), 420 and 506 IPC. When once the

investigation was completed there was no justification in holding that the ingredients of Section 376 IPC were attracted. The court below ought to

have seen that there was no medical report or documentary evidence to prove that the 2nd respondent had sexual intercourse with the petitioner

except her oral evidence. If the ingredients of Section 376 IPC were attracted, the police would have certainly mentioned the same in the charge

sheet, but later the prosecution came up with the petition relying on the oral testimony of PW.1/de facto complainant, which was not sustainable in the

eye of law and prayed to set aside the order dated 20.11.2014 passed by the II Additional Judicial Magistrate of First Class, Kothagudem.

5. Heard the learned counsel for the revision petitioner and the learned Additional Public Prosecutor.

6. The learned counsel for the revision petitioner contended that all the material was available with the Magistrate by the time of taking cognizance of

the case itself. The cognizance was taken only for the offences under 417, 294(b), 420 and 506 IPC. PW.1-complainant had stated nothing new

except what was stated by her in the complaint itself. The Court ought not to have committed the case to the Court of Sessions. Section 323 Cr.P.C.

was applicable only in cases of case and counter case and relied upon the Judgments of the Hon'ble Apex Court in Sudhir and others v State of

Madhya Pradesh 2001 (2) SCC 688 and of the Judgments of the High Court of A.P. in Marakula Agamma v. State of Andhra Pradesh 1977 Law Suit

(AP) 6 and in State v. Rajkumar Gattni 1979 Law suit AP 249.

7. The learned Additional Public Prosecutor reported to decide the petition on merits.

8. Perused the record. PW.1 stated in her deposition that after the death of her husband, she got a job in KTPS, Paloncha on compassionate grounds.

She along with accused used to work at same place in KTPS. One year prior to her report to the police, the accused developed intimacy with her by

making false promise to marry her. Thereafter, they moved together closely. The accused informed her that his brother was staying in London and

promised to marry her after his return and had sexual intercourse with her. His brother came from London in the month of May 2012. Then she asked

the accused about the marriage, for which he postponed the matter and started avoiding her. Then, she along with her mother went to the house of the

accused and asked about marriage. He refused their request and abused them in filthy language and threatened them with dire consequences and

necked them out from his house. Then, she along with her mother went to her relatives and informed them about the acts of the accused then the

elders called the accused and his brother to the panchayat on 21.04.2013. The accused pleaded guilty before the elders, but stated that he could not

marry a widow and abused them. As the accused did not heed to the words of the elders, she lodged the report before the police.

9. Basing on the said evidence, the Assistant Public Prosecutor filed a petition that the said evidence was attracting the ingredients of Section 376

IPC, which was exclusively triable by the Court of Sessions. The learned Judge, after extracting Section 323 Cr.P.C. observed that it was abundantly

clear that the Section would give power to the Magistrate to commit a case to the Court of Sessions at any stage of trial. Cognizance was taken under

Sections 417, 420, 294(b) and 506 IPC for the offence of cheating by making false promises but during evidence it was revealed that the case was not

mere cheating since inception the accused was not having any intention to marry the victim but only to fulfil his sexual lust, he made her believe that

he would marry her for which she consented under a misconception of fact that he would marry her. As per the evidence of PW.1 even in the

panchayat before the elders the accused pleaded guilty on one side but on the other side denied to marry her as such, he deceived the complainant

under a misconception of fact and it was an appropriate case to commit it to the Court of Sessions for trial for the offence under Section 376 IPC.

10. Now, the points that arise for consideration before this Court are:

1) Whether Section 323 Cr.P.C. gives power to the Magistrate to commit the case to the Court of Sessions and it was applicable to cases other than

case and counter cases?

2) Whether the facts of the case would attract the ingredients of Section 376 IPC?

10. Point No.1:

It is considered necessary to extract Section 323 Cr.P.C.

“323. Procedure when, after Commencement of inquiry or trial, Magistrate finds case should be committed. If, in any inquiry into an offence or a

trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the

Court of Session, he shall commit it to that Court under the provisions hereinbefore contained 1 and thereupon the provisions of Chapter XVIII shall

apply to the commitment so made.

As per the above provision, the Magistrate, at any stage of the proceedings during the course of trial or enquiry can commit the case to the court of

Sessions if he or she comes to the opinion that from the facts disclosed a case was made out which need to be tried by the Court of Sessions. It is

only the satisfaction of the Magistrate concerned upon which the case could be committed to the Court of Sessions. It is only required that the

Magistrate should give reasons for his thinking that the case ought to be tried by the Sessions Court. The powers of the Magistrate under Section 323

Cr.P.C. are wide in nature and not circumscribed to any extent.

The learned counsel for the petitioner relied upon the Judgment of the Hon'ble Apex Court in Sudhir case (1 supra), wherein it was held that:

"Where one of the two cases (relating to the same incident) if charge sheet or complained of, involved offences or offence exclusively triable by a

court of Sessions but none of the offences involved on the other case is exclusively triable by the Sessions Court, the Magistrate has no hesitate from

committing the former case to the Sessions Court as provided in Section 209 Cr.P.C. Though the next case cannot be committed in accordance with

Section 209 of the Code, the Magistrate has, nevertheless, power to commit the case to the court of Sessions. Section 323 is incorporated in Cr.P.C.

to meet similar cases also.

The above judgment would disclose that Section 323 was incorporated in Cr.P.C. to meet similar cases also. But, it had not stated that it is confined to

only such cases of case and counter case.

He relied upon the judgment of the High Court of A.P. in Marakula Agamma case (2 supra), wherein it was held that:

"7. It is true that Section 323 confers in general a wide and comprehensive power on the Magistrate to commit the accused to the Sessions Court

at any time before signing the judgment, if it appears to him that the case is one which ought to be tried by a Court of Session. The expression 'ought

to be tried by the Court of Session' employed in Section 323 is very significant in the sense that it confers jurisdiction to the Magistrate to commit the

accused to Court of Session and also imposes, the conditions under which the power given to the Magistrate under this section has to be exercised. It

would mean that though the offences are not exclusively triable by a Court of Session, yet the Magistrate has jurisdiction to commit the accused to

Court of Session, if the case, in the Magistrate's opinion, ought to be tried by a Court of Session. Inability to award adequate punishment does not

constitute a valid ground for committing the accused to the Court of Session by a Magistrate under this section, since Section 325 gives power to the

Magistrate in such a case to submit (without convicting the accused) the case to the Chief Judicial Magistrate who is competent to award a sentence

of imprisonment up to 7 years. This benefit was not available for 1st Class Magistrate Under Section 349 of the old Code and it was confined only to

Second Class or Third Class Magistrates. A First Class Magistrate has, under the old Code, no other alternative than to commit the case to Court of

Session if he is of the opinion that a higher sentence has to be inflicted. But Section 325 is now made applicable to the First Class Magistrate also. The

creation of the Chief Judicial Magistrate Under Section 29, Cr.P.C. (new) if intended to give relief to the Court of Session, as the Chief Judicial

Magistrate is empowered to impose a sentence of imprisonment for 7 years. When Section 325 is available in the Code to assist the Magistrate to

submit the case to the Chief Judicial Magistrate for awarding adequate sentence prescribed for the offences with which the accused stand charged,

the learned Magistrate committed illegality in committing the case Under Section 323 to the Court of Session on the ground that it is the Court of

Session that is competent to give adequate sentence in the case on hand. Even the ground that heavy amounts were involved in the case and hence

the case ought to be disposed of by Sessions Court is not a proper ground for committing the case Under Section 323 to the Court of Session. A

Magistrate cannot be appalled or awe-stricken on finding that the case has involved a large amount and hence he cannot dispose of the case. If heavy

amounts are involved, that will be a circumstance to be taken into consideration for awarding higher sentence. But that cannot be a ground for the

Magistrate to commit the case Under Section 323, Cr.P.C. to the Court of Session. The Bombay High Court in *Emperor v. Achal Das Jethamal* AIR

1926 Bom 251 : (27 Cri LJ 479) held that merely because large amounts were involved in an offence of cheating, the case cannot be committed by a

Magistrate to a Court of Session.

The observations in the above case also would not disclose that the power under Section 323 Cr.P.C. was limited to cases where the Magistrate was

of the opinion that he was unable to award adequate punishment. The above case would disclose that Section 325 Cr.P.C. was applicable to such

cases and as such it could not be a ground for the Magistrate to commit the case under Section 323 Cr.P.C.

The High Court of A.P. in *Rajkumar Jagani* case (3 supra), held that:

7. Section 323 is a general provision. It applies to all cases tried under the Code. It corresponds to section 347 of the old Code except that the

words "or High Court" in Section 347 are deleted in Section 323. The Section confers in general terms a wide and comprehensive power on a

Magistrate to commit a case to the Court of Session at any stage of the enquiry or trial before signing the judgment if only it appears to him that the

case is one which ought to be tried by a Court of Session. If the Case appears to be one which is exclusively triable by a Court of Session the

Magistrate has no alternative but to commit the case to Court of Session as required under Section 209 Cr. P. C. it is only a case which appears to

the Magistrate to be one which ought to be tried by the Court of Session that the Magistrate can act under this section. The words "if it appears to

him" contemplate the formulation of a judicial opinion. Though the discretion to commit is wide under this section, the discretion has to be exercised

judicially and no hard and fast rule can be uncited as to in what cases committal should be made under this section and in what other cases it

should not be made. It all depends on the facts and circumstances of each case.

Thus, the above judgment also would not limit the power of the Magistrate to commit the matter to the Sessions Court if the Magistrate was of opinion

that it ought to be tried by the Court of Sessions. Hence, I do not find any illegality in applying Section 323 Cr.P.C. by the Magistrate in the facts of

the case.

11. POINT No.2:

Now coming to the second point: whether the facts of the above case would attract the offence under Section 376 IPC? Section 375 IPC defines the

offence of rape and enumerates seven descriptions of the offence. The description No.2 certainly speaks of rape without her consent. Thus, sexual

intercourse by a man with a woman without her consent would constitute the offence of rape. Consent is defined under Section 90 IPC, as consent

known to be given under fear or misconception. Section 90 IPC reads as under:

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

Thus, if consent is given by the person under a misconception of a fact, it is no consent. Having sexual intercourse by giving false assurance to marry

the complainant and thereafter refusing to marry her, would show the conduct of the accused that he procured her consent only for the reason of

having sexual relationship with her. The said act of the accused would fall under the definition of rape as he had sexual intercourse with the woman

with her consent, but the said consent was obtained under a misconception of fact as defined under Section 90 IPC. The alleged consent was not

voluntary and the trial court was of the view that the accused indulged in sexual intercourse with the complainant by covering his true intention, which

would amount to not only cheating but also would attract the offence under Section 375 IPC.

The Hon'ble Apex Court in Anurag Soni v. State of Chattisgarh in CrI.A No.629 of 2019 held as under:

"14. 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 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 114A 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.

Thus, the facts of the case that having a sexual relationship with a woman on promising to marry her and obtaining her consent by misrepresentation

and later denying to marry would attract the offence under Section 375 IPC. Hence, I do not find any illegality in the order of the trial Court to set

aside the same.

12. In the result, the Criminal Revision Case is dismissed confirming the order dated 20.11.2014 passed in CrI.M.P. No.1828 of 2014 in CC No.253 of

2013 by the II Additional Judicial Magistrate of First Class, Kothagudem.

Miscellaneous petitions pending, if any, shall stand closed.