

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

TUESDAY, THE 12TH DAY OF OCTOBER 2021 / 20TH ASWINA, 1943

CRL.MC NO. 3377 OF 2021

PETITIONER/PETITIONER:

BABU

AGED 27 YEARS

S/O. GOVINDAN, ALAKKOD, KOROM, KANNUR DISTRICT.

BY ADV T.V.JAYAKUMAR NAMBOODIRI

RESPONDENTS/DEFACTO COMPLAINANT:

- 1 STATE OF KERALA
 REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
 ERNAKULAM-682031
- 2 XXX
 (DEFACTO COMPLAINANT)

ADVOCATE SEENA C., PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
12.10.2021, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER

Dated this the 12th day of October, 2021

This Crl.M.C. has been filed seeking to quash Annexure-A4 final report in Crime No.165/2019 of Kasargod Police Station. Petitioner is the sole accused in the said crime which has been registered under Sections 366, 376 and 506(1) of IPC.

2. It is alleged that the accused got acquaintance through face book with the defacto complainant, who has been living separate from her husband. Thereafter, he made her believe that he would give parental protection to her child. Subsequently, on 02.3.2019 he took her from Neeleswaram on his bike bearing registration No.59 S- 179 to Kasaragod at Anakkuur to a lodge. Thereafter, he took room No.205 in the said lodge and had sexual intercourse with the defacto complainant in between 12.00 hours and 16.30 hours on several occasions. Thereby, the accused committed offences punishable under Sections 366, 376 and 506(1) of IPC.

3. Annexure-A1 is the copy of FIR. Annexure-A2 is a copy of complaint given to the Police. Annexure-A3 is the copy of FIS. Annexure-A4 is the certified copy of the final report.

4. According to the learned counsel for the petitioner, even if the entire allegations made in the FIR, FIS and her statement are accepted, an offence under Section 376 IPC will not attract. She is a married woman having a daughter. The prosecution case itself is that though she had been living separate from her husband, no divorce has been obtained. According to him the allegations in the complaint and FIS would only go to show that there exists consensual act of sexual intercourse between the petitioner and defacto complainant. Hence, the alleged offence will not attract.

5. The learned Public Prosecutor on the other hand would contend that there is no delay in filing the complaint and she was living separate from her husband and there was a promise of marriage by the petitioner and thereafter a forceful act has been committed. There are materials to attract the offence against the petitioner.

6. Learned counsel for the petitioner placed reliance on ***Maheshwar Tigga v. State of Jharkhand [2020(10) SCC 108]***. In that case accused was charged under Sections 90, 375, 376, 323 and 341 of the I.P.C. where in it has been held that consent given under misconception of fact is no consent in the eye of law.

In that case prosecution was that before 4 years of lodging the FIS accused outraged the modesty of victim at point of a knife. He had since been promising to marry her and on that pretext continued to establish physical relations with her as husband and wife. Paragraph No.20 and 25 of the above decision was highlighted by the learned counsel which reads thus:

"20. We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her, because of her deepseated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations in this regard in Uday (supra) are considered relevant:

25. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from

his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."

7. The learned counsel drew my attention to Paragraph No.9 of the decision in **Santhosh v. State of Kerala (2020 KHC 898)** which reads thus:

"9. Now it will be pertinent to refer to the nature of the allegations raised in the impugned criminal proceedings at Annexure A1. The specific case of the 2nd respondent in the impugned criminal proceedings at Annexure A1 is to the effect that she had already married another person and had a child in that marital relationship and that some time from July 2012 onwards, the petitioner/accused had befriended her and after knowing fully well that the 2nd respondent is a married lady having a child and also knowing that the 2nd respondent belongs to SC Community and that the petitioner does not belong to the Scheduled Caste Community, had assured and given a promise to her that he would marry her after she secures divorce from her husband and that based on the said assurance, they had entered into sexual relationship for quite some time for the period from July 2012 to February 2019 on various occasions as on a day in July 2012, on a day in the last week of August 2017, on a day in February 2019, etc. and that later the petitioner had stopped the affair and that she had given her consent to have sexual relationship with the petitioner on the assurance of the petitioner that he would marry her, etc. and that petitioner has thus committed the above said offences. Even going by the admitted case of the 2nd respondent, she is already a married woman having a child and that the petitioner knew that she was already married and that she belongs

to Scheduled Caste Community and that it is only on the basis of his promise that he would marry her after she secures divorce from her husband that she had entered into sexual relationship with the petitioner on various occasions as narrated in the impugned criminal proceedings etc. Even if it is assumed that the abovesaid allegations are broadly true, then it has to be noted that the alleged promise said to have been made by the accused to a married woman having a child and that too, during the subsistence on marital issue with her husband that the accused would marry her after she secures divorce and that on the basis of this assurance, they had entered into sexual relationship etc., would clearly lead to a situation, wherein it has to be held that such an alleged promise said to have been made by the accused to a married lady that he would marry her after she secures divorce and that on this basis, they had entered into sexual relationship etc. cannot be said to be an agreement which is enforceable in law, as such an agreement, if any, arrived at between the parties is certainly opposed to public policy and morals and is unconscionable as envisaged in S.23 of the Indian Contract Act. Such an unenforceable promise cannot be the basis for the de facto complainant and the prosecution to contend that the consent of the woman was obtained on the basis of misconception of facts as understood in S.90 of I.P.C. Therefore, the entire case built up by the prosecution that the consent of the woman was obtained on the basis of misconception of facts, would crumble to ground in view of the admitted case of the prosecution that the understanding was arrived at between the accused and the 2nd respondent who is a married woman having a child, etc. Therefore, going by the totality of the facts and circumstances of the case, it is only to be held that even if it is assumed that the allegations of sexual incidents are broadly true, then it is to be only held that such incidents would have happened only on the basis of consent

between the parties. So it is only to be held that the very foundation of the allegations to sustain the offence as per S.375 of the IPC will crumble to the ground. In the light of these aspects, it is only to be held that the initiation and continuance of the impugned criminal proceedings at Annexure A1 is thus liable for interdiction at the hands of this Court in exercise of the inherent powers under S.482 of the Cr.P.C for the simple reason that otherwise the continuance of the impugned criminal proceedings would be nothing but an abuse of the process of Court and would amount to sheer wastage of the precious resources and time of the judicial organs, the prosecution machinery and the investigation machinery. Hence,, the plea of the petitioner for quashment of the impugned criminal proceedings is to be allowed only on this short ground."

8. Paragraph Nos.41, 55, 59 and 66 of the decision in **Jose Thettayil v. SHO, Aluva East Police Station [2013 (3) KHC 336]** was highlighted by the learned counsel which reads thus:

"41. If the conduct of the victim towards the person concerned at the relevant time is such a nature so as to create an impression in his mind and belief that she has consented by free will for the commission of the act, then later on it could not be said that there was misconception of fact. It has been held that voluntary submission by the woman while she has the power to resist, no matter how reluctantly yielded, amounts to consent and that removes an essential element from the crime of rape. Generally it is stated that the claim of rape has to be considered in the circumstances presented by the case. It is well settled that passiveness or submission by themselves are not evidence of

consent. A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, passive giving in when volitional faculty is either clouded by fear or vitiated by duress cannot be deemed to be consent as understood in law. Consent, in order to constitute as a defence of allegation of rape, should require a voluntary participation after having weighed the pros and cons of the act consented to and victim has made a conscious choice between resistance and assent.

55. On the other hand, the impression that one gathers from a reading of the complaint is that the third respondent was collecting materials to ensure that the son of the petitioner marries her. If for that end, she shared bed with both the son and the father, it escapes ones understanding how it could be said that the acts committed by the petitioner were without her consent. Even assuming that the third respondent laboured under the impression that if she did not share bed with the petitioner, the marriage would not take place, that cannot also be taken as a misconception of fact. In order to constitute misconception of fact, the facts should emanate from the person concerned and lead to a situation where the victim is made to believe in the promise and thereby succumbs to the insistence on the part of the person concerned for sexual intercourse. Only under such circumstance, it could be said that the consent falls within the ambit of Section 90 of I.P.C. The essential ingredient is that the person concerned knows at the very inception itself that the representation made by him is false and he also knows that the victim yielded believing that representation to be true. If as a matter of fact, the third respondent in the case on hand believed that it would be handy and useful to have web camera draw the sexual exploits with both the father and son for her safety and security, it could not be said that rape was committed by the petitioner.

59. On a reading of the complaint as a whole in the case on

hand, except for the vague assertion that there was no 'proper consent', which lacks meaning in the context of the other statements in the complaint, there is nothing even to remotely suggest that the ingredients of the offence of rape are made out. It would appear, on the other hand, that the third respondent with the object to ensure that son of the petitioner marries her had consented to the acts so as to collect materials to pressurize the petitioner's son to marry her. There is nothing to show that the physical contacts if at all any between the petitioner and the third respondent were not voluntary and were against her will and consent. The act of sharing the bed with the father and son and capturing the same on the web camera shows that the third respondent had willingly and knowingly participated in the acts complained of.

66. Even though the learned DGP has a contention that it was a trap laid by the petitioner to gain access to the lady and that he from the very inception had no intention to have his son married to the victim, the complainant does not seem to have such a case. Even in the counter affidavit filed by the third respondent before this court, there is no assertion that by giving the promise of marriage the complainant was compelled to have physical contact with either of the accused. On the other hand, the sequence of events and the conduct of the victim would lead to the conclusion that she had voluntarily entered into physical contacts with the two accused persons. May be that she has her own reasons for doing so. But having done so, to turn round and say that it is rape, may not be capable of acceptance.

9. As per the settled position of law consensual act of sexual intercourse would not attract, the ingredients of Section 375 of IPC. The entire allegations in FIR, FIS and the subsequent

statement of the defacto complainant were to the effect that she got acquaintance with the petitioner through face book and fall in love with him. It is also alleged that promising to marry her, she had been taken to Madhhur Temple. A room was taken in the lodge and he went out for purchasing a wedding saree and he returned without purchasing saree and subsequently without her consent had sexual inter course thrice on that day.

10. First of all, defacto complainant is a married woman having a child and her marriage is also in subsistence. In the said circumstances, prima facie the allegation regarding promise to marry will not attract. As per the Hindu Marriage Act, 1955, Section 5(i) a marriage can be solemnised between any two Hindus if neither party has a spouse living at the time of marriage. Here the prosecution allegation itself is that she is living separate from her husband and she has no case that she got a legal divorce from her husband. Hence, she cannot conduct a marriage legally during the subsistence of her marriage. So the alleged promise to marriage has no legal effect. So also the entire allegations in the complaint only would go to show that she went along with him, and he took a room in a lodge and thereafter they had physical relationship. There is nothing to infer forceful act from the side of

the petitioner. Moreover, she also filed an affidavit in which she had categorically stated that she had consensual sex with the petitioner.

11. So there are sufficient materials to show that the sexual relationship between the petitioner and defacto complainant prima facie appears to be consensual. Hence offence under Section 366, 376 and 506(1) of IPC will not be attracted and hence continuation of the proceedings against the petitioner would be an abuse of process of law.

In the result Crl.M.C. is allowed and Annexure-A4 final report in Crime No.165/2019 of Kasargod Police Station, pending as C.P. No.158/2019 before the Judicial First Class Magistrate Court, Kasaragod, is hereby quashed.

Sd/-
M.R.ANITHA
JUDGE

SMF

APPENDIX OF CRL.MC 3377/2021

PETITIONER ANNEXURE

Annexure A1	TRUE COPY OF THE FIR IN CRIME NO. 165/2019 OF KASARGOD POLICE STATION.
Annexure A2	TRUE COPY OF THE COMPLAINT
Annexure A3	TRUE COPY OF THE FI STATEMENT DATED 07.03.2019 IN CRIME NO. 165/2019 OF KASARGOD POLICE STATION.
Annexure A4	CIRTIFIED COPY OF THE FINAL REPORT IN CRIME NO. 165/2019 OF KASARGOD POLICE STATION.
Annexure A5	TRUE COPY OF THE INTERIM ORDER DATED 10.03.2021 IN CRL. M.C. 4684/2019.
Annexure A6	TRUE COPY OF THE ORDER DATED 24.03.2021 IN CRL. M.C. 4684/2019.
Annexure A7	AFFIDAVIT SIGNED BY 2ND RESPONDENT DATED 26.03.2021.

//TRUE COPY//

PA TO JUDGE