AFR

HIGH COURT OF CHHATTISGARH, BILASPUR
WPCR No. 508 of 2021

Reserved on 21.09.2021
Pronounced on 29.10.2021

1. Kailash Sonkar S/o Late Shri Gendlal Sonker Aged About 63 Years R/o Tillu Chowk, Old Basti, Raipur, District Raipur, Chhattisgarh.
2. Smt. Devhuti Sonker W/o Shri Kailash Sonker Aged About 55 Years R/o Tillu Chowk, Old Basti, Raipur, District Raipur, Chhattisgarh.
3. Nishant Sonker S/o Shri Kailash Sonker Aged About 32 Years R/o Tillu Chowk, Old Basti, Raipur, District Raipur, Chhattisgarh.
4. Prachi Sonker / Purbiya W/o Shri Vikram Purbiya Aged About 30 Years R/o Radha Swami Nagar, Bhatagaon, District Raipur, Chhattisgarh.

---- Petitioners

Versus

1. State Of Chhattisgarh Through Police Station Mahila Thana, District Raipur, Chhattisgarh.
2. Vandana Sonkar W/o Shri Nishant Sonkar Aged About 25 Years R/o A 504, Walfort Height, Bhatagaon, Raipur, District Raipur, Chhattisgarh.

---- Respondents

CRMP No. 659 of 2021

1. Shrimati Sarala Wd/o Narendra Kathira Aged About 64 Years Occupation- Housewife, R/o 34, Shashtrinagar, Nimach, Nearby Chauradia, Hospital, Madhya Pradesh.
2. Shri Nagesh S/o Narendra Kathira Aged About 37 Years Occupation- Housewife, R/o B-4, Plot No. 272, Jhankhand 1, Indirapur, Gajiyabad, Uttar Pradesh.
3. Smt. Sonal W/o Nagesh Kathira Aged About 33 Years Occupation- Housewife, Address-B-4, Plot No. 272, Jhankhand 1, Indirapur, Gajiyabad, Uttar Pradesh.

---- Petitioners

Versus

1. State Of Chhattisgarh Through Its Police Station Officer, Mahila Thana, Durg, District- Durg, Chhattisgarh.
2. Smt. Ashta W/o Yogesh Kathira Aged About 34 Years Occupation- Housewife, Now R/o- House No. 4, Street No. 4, Sector 10, Bhilai, District- Durg, Chhattisgarh.

---- Respondents

CRMP No. 664 of 2021

1. Rameshwar Kumar S/o Dhan Sai Kenwat Aged About 32 Years R/o Jangle Side, Magazine Road, Bankimongara, District Korba

Chhattisgarh

2. Dhan Sai S/o Late Chhedu Ram Aged About 57 Years R/o Jangle Side, Magazine Road, Bankimongara, District Korba Chhattisgarh
3. Ramshilla W/o Dhan Sai Aged About 55 Years R/o Jangle Side, Magazine Road, Bankimongara, District Korba Chhattisgarh
4. Parmeshwar Prasad S/o Late Kirtan Ram Aged About 36 Years R/o Jangle Side, Magazine Road, Bankimongara, District Korba Chhattisgarh
5. Rameshwari W/o Sukhdev Singh Kenwat Aged About 32 Years Village Dodki, Post And Police Station Sakti, District Janjgir Champa Chhattisgarh
6. Rajeshwari Kaiwartya W/o Dhan Singh Kaiwartya Aged About 28 Years R/o House No. 117, Shanti Chowk, Balodabazar, District Balodabazar Bhatapara Chhattisgarh

---- Petitioners

Versus

1. State Of Chhattisgarh Through Station House Officer, Police Station Bankimongara, District Korba Chhattisgarh
2. Smt. Meena Kaiwart W/o Rameshwar Kaiwart Aged About 30 Years R/o Jangle Side, Magazine Road, Bankimongara, District Korba Chhattisgarh

---- Respondents

For Petitioners	:	Mr. Awadh Tripathi, Mr. Neelesh M.Gaidhane, Mr. Rajeev Kumar Dubey, Advocates
For the State	:	Mr. S. C. Verma, A. G. along with Mr. H. S. Ahluwalia, Dy. A. G
For Respondents	:	Shri Vivek Sharma, Mr. P. R.Patankar along with Mr. Vaibhav Dhar Diwan, Ms. Deblina Maity, Advocates

Hon'ble Shri Justice Narendra Kumar Vyas

CAV ORDER

1. Since all the aforesaid petitions involve a common question of law, they are heard analogously on the applications for grant of interim relief and are being disposed of by this common order.
2. Heard learned counsel for the respective petitioners as well as learned Advocate General and counsel for respondent No. 2 on

applications for grant of interim relief.

3. The petitioners have filed present petitions challenging the registration of FIR under Section 498A, 377, 34 and Section 4 of Dowry Prohibition Act, 1961 on the basis of report lodged by their wives against husband and other relatives in various police stations and subsequent submission of charge-sheets. This Court while admitting the petition CrMP No.659 of 2021 on 12.07.2021 has issued notice to respondent No.2, in WPCR No. 508 of 2021 issued notice to respondent No. 2 on 11.08.2021 whereas in CrMP No.664 of 2021 notice was issued to respondent No. 2 on 12.07.2021, and in pursuance thereof they have entered appearance.

4. This Court while considering the prayer for interim relief has examined the facts of CrMP No.664/2021. This petition has been filed for quashing of the FIR registered at Police Station Bankimongra, District Korba in Crime No.48/20 under Sections 498-A, 377, 324, 323, 147,506-B of IPC, 1860 and Section 4 of Dowry Prohibition Act, 1961 against the petitioners and final charge-sheets are being challenged by the petitioners.

5. Learned counsel for the petitioners would submit that offence under Section 377 of IPC is not made out as petitioner and respondent No.2 are husband and wife. Along with charge sheet medical examination report of respondent No. 2 was also annexed and the Doctor has opined that no definite opinion can be given about anal sex, therefore, this Court has asked the learned Advocate General to assist the Court how the prosecution can establish the offence under Section 377 of IPC in case of husband and wife.

6. Before examining the contention of the respective parties, it is apt for this Court to extract the Section 377 of IPC which is extracted herein-below for convenience.

Section 377 of IPC is extracted below:-

> “377. Unnatural offences- Whoever voluntarily has carnal

> intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

7. The validity and constitutionality of the Section 377 of IPC are being challenged before the Hon'ble Supreme Court in case of **Navtej Singh Johar and Ors. Vs. Union of India**[1] and the Hon'ble Supreme Court has declared it ultra vires to the Constitution so far as it relates to homo sex, but its validity and constitutionality so far as it relates to non-consensual act against adults, all acts of carnal intercourse against minors and act of bestiality has been upheld.

8. Learned counsel for the petitioner would submit that as per Section 375 of the IPC, if a man has committed sexual intercourse with his wife, it will not fall within the ambit of rape under Section 375 of IPC if the age of the wife is over 18 years. Once sexual intercourse with wife does not fall within rape then any act committed by husband as enumerated in Section 377 will also not fall within the ambit of unnatural offences. He would rely upon the Paras No.217, 218, 219, 220, 221, 253 of the judgment passed in **Navtej Singh Johar(supra)** which are as under:-

> 217. Section 377 criminalises even voluntary carnal intercourse not only between homosexuals but also between heterosexuals. The major difference between the language of Section 377 and Section 375 is that of the element of absence consent which has been elaborately incorporated in the seven descriptions contained in the latter part of Section 375 IPC. It is the absence of willful and informed consent embodied in the seven descriptions to Section 375 which makes the offence of rape criminal.
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> 218. On the other hand, Section 377 IPC contains no such descriptions/exceptions embodying the absence of willful and informed consent and criminalises even voluntary carnal intercourse both between homosexuals as well as between heterosexuals. While saying so, we gain strength and support from the fact that the legislature, in its wisdom, while enacting Section 375 IPC in its amended form after the Criminal Law (Amendment) Act, 2013, has not employed the words —subject to any other provision of the IPC‖. The implication of the absence of these words simply indicates that Section 375 IPC which does not criminalize consensual carnal intercourse

1 AIR 2018 SC 341

between heterosexuals is not subject to Section 377 IPC.

219. Section 377, so far as it criminalises carnal intercourse between heterosexuals is legally unsustainable in its present form for the simple reason that Section 375 IPC clearly stipulates that carnal intercourse between a man and a woman with the willful and informed consent of the woman does not amount to rape and is not penal.

220. Despite the Criminal Law (Amendment) Act, 2013 coming into force, by virtue of which Section 375 was amended, whereby the words sexual intercourse‘ in Section 375 were replaced by four elaborate clauses from (a) to (d) giving a wide definition to the offence of rape, Section 377 IPC still remains in the statute book in the same form. Such an anomaly, if allowed to persist, may result in a situation wherein a heterosexual couple who indulges in carnal intercourse with the willful and informed consent of each other may be held liable for the offence of unnatural sex under Section 377 IPC, despite the fact that such an act would not be rape within the definition as provided under Section 375 IPC.

221. Drawing an analogy, if consensual carnal intercourse between a heterosexual couple does not amount to rape, it definitely should not be labelled and designated as unnatural offence under Section 377 IPC. If any proclivity amongst the heterosexual population towards consensual carnal intercourse has been allowed due to the Criminal Law (Amendment) Act, 2013, such kind of proclivity amongst any two persons including LGBT community cannot be treated as untenable so long as it is consensual and it is confined within their most private and intimate spaces.

253. In view of the aforesaid analysis, we record our conclusions in seriatim:-

> (i) The eminence of identity which has been luculently stated in the NALSA case very aptly connects human rights and the constitutional guarantee of right to life and liberty with dignity.

With the same spirit, we must recognize that the concept of identity which has a constitutional tenability cannot be pigeon-holed singularly to one‘s orientation as it may keep the individual choice at bay. At the core of the concept of identity lies self-determination, realization of one‘s own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and values or principles that are, to put in a capsule, ―constitutionally permissible‖.

(ii) In Suresh Koushal (supra), this Court overturned the decision of the Delhi High Court in Naz Foundation (supra) thereby upholding the constitutionality of Section 377 IPC and stating a ground that the LGBT community comprised only a minuscule fraction of the total population and that the mere fact that the said Section was being misused is not a reflection of the vires of the Section. Such a view is constitutionally impermissible.

> (iii) Our Constitution is a living and organic document capable of expansion with the changing needs and demands of the society. The Courts must commemorate that it is the Constitution and its golden principles to

which they bear their foremost allegiance and they must robe themselves with the armoury of progressive and pragmatic interpretation to combat the evils of inequality and injustice that try to creep into the society. The role of the Courts gains more importance when the rights which are affected belong to a class of persons or a minority group who have been deprived of even their basic rights since time immemorial.

(iv) The primary objective of having a constitutional democracy is to transform the society progressively and inclusively. Our Constitution has been perceived to be transformative in the sense that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead they ought to be given a meaningful construction which is reflective of their intent and purpose in consonance with the changing times. Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future.

(v) Constitutional morality embraces within its sphere several virtues, foremost of them being the espousal of a pluralistic and inclusive society. The concept of constitutional morality urges the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace. Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.

(vi) The right to live with dignity has been recognized as a human right on the international front and by number of precedents of this Court and, therefore, the constitutional courts must strive to protect the dignity of every individual, for without the right to dignity, every other right would be rendered meaningless. Dignity is an inseparable facet of every individual that invites reciprocative respect from others to every aspect of an individual which he/she perceives as an essential attribute of his/her individuality, be it an orientation or an optional expression of choice. The Constitution has ladened the judiciary with the very important duty to protect and ensure the right of every individual including the right to express and choose without any impediments

so as to enable an individual to fully realize his/her fundamental right to live with dignity.

(vii) Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the basis of one‘s sexual orientation would entail a violation of the fundamental right of freedom of expression.

(viii) After the privacy judgment in Puttaswamy (supra), the right to privacy has been raised to the pedestal of a fundamental right. The reasoning in Suresh Koushal (supra), that only a minuscule fraction of the total population comprises of LGBT community and that the existence of Section 377 IPC abridges the fundamental rights of a very minuscule percentage of the total populace, is found to be a discordant note. The said reasoning in Suresh Koushal (supra), in our opinion, is fallacious, for the framers of our Constitution could have never intended that the fundamental rights shall be extended for the benefit of the majority only and that the Courts ought to interfere only when the fundamental rights of a large percentage of the total populace is affected. In fact, the said view would be completely against the constitutional ethos, for the language employed in Part III of the Constitution as well as the intention of the framers of our Constitution mandates that the Courts must step in whenever there is a violation of the fundamental rights, even if the right/s of a single individual is/are in peril.

(ix) There is a manifest ascendance of rights under the Constitution which paves the way for the doctrine of progressive realization of rights as such rights evolve with the evolution of the society. This doctrine, as a natural corollary, gives birth to the doctrine of non-retrogression, as per which there must not be atavism of constitutional rights. In the light of the same, if we were to accept the view in Suresh Koushal (supra), it would tantamount to a retrograde step in the direction of the progressive interpretation of the Constitution and denial of progressive realization of rights.

(x) Autonomy is individualistic. Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person‘s nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual.

(xi) A cursory reading of both Sections 375 IPC and 377 IPC reveals that although the former Section gives due recognition to the absence of wilful and informed consent‘ for an act to be termed as rape, per contra, Section 377 does not contain any such qualification

embodying in itself the absence of wilful and informed consent‘ to criminalize carnal intercourse which consequently results in criminalizing even voluntary carnal intercourse between homosexuals, heterosexuals, bisexuals and transgenders. Section 375 IPC, after the coming into force of the Criminal Law (Amendment) Act, 2013, has not used the words subject to any other provision of the IPC‘. This indicates that Section 375 IPC is not subject to Section 377 IPC.

(xii) The expression against the order of nature‘ has neither been defined in Section 377 IPC nor in any other provision of the IPC. The connotation given to the expression by various judicial pronouncements includes all sexual acts which are not intended for the purpose of procreation. Therefore, if coitus is not performed for procreation only, it does not per se make it against the order of nature‘.

(xiii) Section 377 IPC, in its present form, being violative of the right to dignity and the right to privacy, has to be tested, both, on the pedestal of Articles 14 and 19 of the Constitution as per the law laid down in Maneka Gandhi (supra) and other later authorities.

(xiv) An examination of Section 377 IPC on the anvil of Article 14 of the Constitution reveals that the classification adopted under the said Section has no reasonable nexus with its object as other penal provisions such as Section 375 IPC and the POCSO Act already penalize non-consensual carnal intercourse. Per contra, Section 377 IPC in its present form has resulted in an unwanted collateral effect whereby even consensual sexual acts‘, which are neither harmful to children nor women, by the LGBTs have been woefully targeted thereby resulting in discrimination and unequal treatment to the LGBT community and is, thus, violative of Article 14 of the Constitution.

(xv) Section 377 IPC, so far as it criminalises even consensual sexual acts between competent adults, fails to make a distinction between non-consensual and consensual sexual acts of competent adults in private space which are neither harmful nor contagious to the society. Section 377 IPC subjects the LGBT community to societal pariah and dereliction and is, therefore, manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment. Therefore, in view of the law laid down in Shayara Bano (supra), Section 377 IPC is liable to be partially struck down for being violative of Article 14 of the Constitution.

(xvi) An examination of Section 377 IPC on the anvil of Article 19(1)(a) reveals that it amounts to an unreasonable restriction, for public decency and morality cannot be amplified beyond a rational or logical limit and cannot be accepted as reasonable grounds for curbing the fundamental rights of freedom of expression and choice of the LGBT community. Consensual carnal intercourse among adults, be it homosexual or

> heterosexual, in private space, does not in any way harm the public decency or morality. Therefore, Section 377 IPC in its present form violates Article 19(1)(a) of the Constitution.
> (xvii) Ergo, Section 377 IPC, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered under Section 377 IPC done between two individuals without the consent of any one of them would invite penal liability under Section 377 IPC.
> (xviii) The decision in Suresh Koushal (supra), not being in consonance with what we have stated hereinabove, is overruled.

9. Learned counsel for the petitioner would further submit that for proper functioning of marital life no consent is required for sexual intercourse, therefore, Section 375(2) will come in rescue of the petitioner from the allegation of offence under Section 377 as there is no requirement of law to have consent for committing sexual intercourse with wife otherwise whole society will be adversely affected, the family affairs will be in difficult preposition.

Section 375 (2) is extracted herein-below for convenience.

> "Explanation 2– Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form the verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:
>
> Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity."

10. The learned counsel for the petitioners would submit that even after amendment in Cr.P.C. in Section 161 of Cr.P.C. vide amendment dated 03.02.2013 that statement of a woman against an offence under Section 354, 354-A, 354-B, 354-C, 354-D, 376, 376-A, 376-B and 376-C, 376-D and 376-E or Section 509 of the IPC alleged shall be recorded by a police officer or woman officer but for registration of an offence under Section 377 of the IPC no

such amendment has been brought in the Cr.P.C. Similarly, Section 164 Cr.P.C. has been amended and cases punishable under Sections 354, 354-A, 354-B, 354-C, 354-D, 376, 376-A, 376-B and 376-C, 376-D and 376-E or Section 509 of the IPC the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in Sub-section (v) of Section 164 of the CrPC, but no such provisions for recording of statements for offence under Section 377 IPC have been made out, therefore, for prima-facie establishing the offences under Section 377 IPC further materials should be investigated by the investigating authority, in absence any prima facie material only on the basis of statement of wife the offence under Section 377 should have not been registered against the husband, therefore, registration of offence is an abuse of process of law which is liable to be quashed by this Court.

11. The learned counsel for the petitioners would further submit that as per Section 164-A of Cr.P.C. medical examination of victim of rape is necessary but in the case of offence under Section 377 IPC no such provisions have been inserted in Cr.P.C. therefore, some prima facie evidence should have been brought on record by the complaint or the prosecution for prima facie establishing the offence under Section 377 of the IPC.

12. Per contra Learned Advocate General referring to Section 154 of CrPC would submit that it is mandatory on the part of the police to register FIR on the basis of complaint made by the victim. He would also refer to Section 711 of Chhattisgarh Police Regulation according to which police has to record information as prescribed under the regulation and it is also mandatory for authority to register the offence on the basis of version of the victim.

> **"711**. If the information be tendered in writing, it will be endorsed with the date of presentation and the person tendering it will be required to sign it (if he has not already done so). If the written information relates to facts with which the person tendering it is acquainted and which he is able and will to state orally, he should be required to do so. If he knows nothing of the facts to which it refers, he

should be required to state the circumstances in which he brought it. In either case, the written information will be kept on record."

13. Learned Advocate General would rely upon the judgment of Hon'ble the Supreme Court in case of **Lalita Kumari Vs. Govt. of U.P**.[2] and he would rely upon judgment rendered by Hon'ble the Supreme Court in case of **Wahid Khan Vs. State of MP**[3] referring to Paras 16, 18, 19 & 20 which are extracted below:-

"16.The law on the point is now too well settled. No doubt, it is true that Dr. B. Biswas, who had initially conducted the medical examination of the prosecutrix, has not appeared on behalf of the prosecution to depose. But, that alone is not sufficient to discard the prosecution story. Corroboration is not the sine qua non for conviction in a rape case. In this regard, the most celebrated observations of Justice Vivian Bose in the case of Rameshwar v. State of Rajasthan AIR 1952 SC 54 may be quoted :

> " 19. The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...."

18.Thus, in a case of rape, testimony of a prosecutrix stands at par with that of an injured witness. It is really not necessary to insist for corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible. However, in the case in hand, even without the examination of doctor, the evidence of prosecutrix stands fully corroborated by the evidence of P.W.3-B.B. Subba Rao, Sub-inspector of the police station who had virtually caught the appellant red-handed. Thus, even if doctor had not been examined it would not throw or completely discard the prosecution story. The evidence of prosecution witnesses is fully trustworthy and there is no reason to doubt genuineness thereof.

19. It was also contended by learned counsel for the appellant that since hymen of the prosecutrix was found to be intact, therefore, it cannot be said that an offence of rape was committed on her by the appellant. This contention cannot be accepted as offence of rape has been defined in Section 375 of the IPC. Explanation to Section 375 reads thus:

> "Explanation. - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

It has been a consistent view of this Court that even a slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial.

20. It is appropriate in this context to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty Second Edition) at page 495 which reads thus :

2 2014(2) SCC 1
3 2010 (2) SCC 9

> "Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

14. Learned Advocate General would further submit that medical examination is not necessary and he would further rely upon judgment rendered by Hon'ble the Supreme Court reported in **State of Kerala vs. Kurissum Moottil Antony**[4] and would submit that on the basis of the statement of the victim the offence has been made out in the FIR which at this juncture cannot be quashed by this Court. The Hon'ble Supreme Court in **State of Kerala(Supra)** has held in Paras 3, 7, 8 & 11 as under:-

> "3.Factual background as unfolded during trial of the respondent was that on 10.11.1986 accused trespassed into the house of the victim-girl who was nearly about 10 years of age on the date of occurrence and committed unnatural offence on her. After finding the victim alone in the house the accused committed unnatural offence by putting his penis having carnal intercourse against order of nature. The victim (PW-1) told about the incident to her friend (PW-2) who narrated the same to the parents of the victim and accordingly on 13.11.1986 First Information Report was lodged. The investigation was undertaken by PW-11 who sent both the victim and the accused for medical examination. He also seized the dress worn by the victim at the time of occurrence. The Chemical Analyst report Ex.P7 indicated presence of human semen and spermatozoa on the dress of the victim. Potency of the accused was also proved by the doctor (PW-10) as per Ex.P6.
>
> 7. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case

4 2007(1) SCC 627

spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery. A similar view was expressed by this Court in Rafiq v. State of U.P. (1980 (4) SCC 262) with some anguish. The same was echoed again in Bharwada Bhogiabhai and Hirjibhai v. State of Gujarat (AIR 1988 SC 753). It was observed in the said case that in the Indian setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity or dignity had ever occurred. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in Rameshwar v. The State of Rajasthan (AIR 1952 SC 54) were, "The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...".

8. To insist on corroboration except in the rarest of rare cases is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars as in "the case of an accomplice to a crime". (See State of Maharashtra v. Chandra Prakash Kewalchand Jain (1990 (1) SCC 550). Why should be the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance.

11.The rule regarding non-requirement of corroboration is equally applicable to a case of this nature, relating to Section 377 IPC."

15. The issue requires to be considered by this Court is whether in absence of any medical evidence or any other material on record the offence under Section 377 can be prima facie established against the petitioner?

16. Learned counsel for the petitioner would submit that witness of offence cannot be present at the time of alleged offence as the sanctity of matrimonial life has to be maintained and there is no

such material on record that offence has been committed, even in the case in hand the complainant's medical examination specifically provides that no definite opinion can be given about anal sex. No material has been produced in final report submitted by investigating authority with regard to commission of offence under Section 377 IPC, as such in absence of any medical evidence or any material even Section 161 or 164 and 164-A Cr.P.C. does not provide any safeguard for protection of complainant from such offence. Therefore, prima facie I am of the view that there is no material for commission of alleged offence under Section 377 IPC against the petitioner- husband and his family members, as such, continuation of criminal proceedings so far as Section 377 IPC is nothing, but an abuse of process and trial will take long time, therefore, it is directed that trial may continue but no coercive steps for commission of offence under Section 377 of IPC be taken against the petitioners.

17. In CRMP No.659 of 2021 petitioners have challenged the registration of offence under Section 498-A read with 377, 34 of IPC and Section 4 of Dowry Prohibition Act registered before the Woman Police Station, Durg in Crime No. 73/20. In this case respondent No. 2 has refused to go for medical examination on the count that evidence has been omitted and long time has been lapsed. Therefore, prima facie I am of the view that there is no material for commission of alleged offence under Section 377 IPC against the petitioners, as such, continuation of criminal proceedings so far as Section 377 IPC is nothing but an abuse of process and trial will take long time therefore it is directed that trial may continue but no coercive steps for commission of offence under Section 377 of IPC be taken against the petitioners.

18. In WPCR No.508 of 2021 petitioners have challenged the registration of offence under Section 498-A read with 377, 34 of IPC registered before the Woman Police Station, Raipur in Crime No. 55/2021. In this case from bare perusal of the FIR it is found that there is no definite averment with regard to commission of

offence under Section 377 IPC, therefore, prima facie I am of the view that there is no material for commission of alleged offence under Section 377 IPC against the petitioners, as such, continuation of criminal proceedings so far as Section 377 IPC is nothing but an abuse of process and trial will take long time, therefore, it is directed that trial may continue but no coercive steps for commission of offence under Section 377 of IPC shall be taken against the petitioners.

19. So far as the prayer for stay of further proceedings for other offences than 377 IPC are concerned shall be examined after submission of return by the respondents. The petitioners are at liberty to file separate application for grant of interim relief after submission of return filed by the respondents.

20. Accordingly, the applications filed in the aforesaid case for grant of interim relief are disposed off.

Sd/-

(Narendra Kumar Vyas)

Judge

parul