

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE**

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 01ST OF MAY, 2024

MISCELLANEOUS CRIMINAL CASE No. 8388 of 2023

BETWEEN:-

.....APPLICANT

(BY SHRI SAJIDULLA KHAN - ADVOCATE)

AND

**1. STATE OF MADHYA PRADESH THROUGH
POLICE STATION KOTWALI DISTRICT
JABALPUR (MADHYA PRADESH)**

2.

.....RESPONDENTS

***(RESPONDENT NO.1/ STATE BY SHRI DILIP
PARIHAR - PANEL LAWYER, RESPONDENT NO.2
BY SHRI UMESH VAIDH - ADVOCATE)***

.....
"Reserved on : 29/04/2024"

"Pronounced on : 01/05/2024"
.....

*This application having been heard and reserved for order, coming
on for pronouncement this day, the court passed the following:*

ORDER

This application under Section 482 of Cr.P.C. has been filed seeking following relief(s):-

"It is therefore, most humbly prayed that in the interest of justice the Hon'ble Court may kindly be pleased to call for the record of the matter and after examining the same be further pleased, be kind enough to allow this petition and quash and set aside first information report vide crime no.377/2022 for offence under section 377, 506 I.P.C. at P.S. Kotwali Jabalpur pending before Add. Session Court P.O. Shri Jai Singh Saraute in ST No.642/2022 (State versus Manish Sahu), in the ends of law."

2. It is the case of prosecution that respondent No.2 lodged the FIR against the applicant on 24/08/2022 at Police Station Kotwali, District Narsinghpur for offence under Sections 377, 506 of IPC. The said FIR was registered at '0' and was transferred to Police Station Kotwali Jabalpur, District Jabalpur. It was alleged by respondent No.2 that she got married to the applicant on 18/05/2019 in accordance with Hindu rites and rituals. They are not blessed with any child. She was being harassed by her in-laws physically and mentally on account of non-fulfilment of demand of dowry and accordingly, from 14/02/2020 she is residing in her father's house and accordingly, she has lodged a report for cruelty for which trial is pending. It was further alleged that after her marriage, when respondent No.2 went to her matrimonial house for the second time, then in the intervening night of 06/06/2019 and 07/06/2019 applicant had committed unnatural sex with her and thereafter on multiple occasions, he committed unnatural sexual intercourse with her

and had also extended a threat that in case if information in this regard is given to anybody, then he would divorce her. Just in order to save her self-respect, she was continuously tolerating the unnatural act of her husband and did not make the aforesaid allegations in her first report. It was alleged that today she has come to lodge the FIR because her case was listed before the Family Court and she did not attend the said proceedings because on the previous date i.e. 18/07/2022, applicant had extended a threat that in case if she meets him, then he would commit the same offence. When she was crying after remembering the old memories, then on the query raised by her mother, she informed her about the unnatural sex committed by her husband and therefore, the FIR is being lodged.

3. Challenging the FIR lodged by respondent No.2, it is submitted by counsel for the applicant that applicant and respondent No.2 are husband and wife. Any unnatural sex between husband and wife is not an offence under Section 377 of IPC. Furthermore, respondent No.2 did not make these allegations in her first report and the second report with regard to commission of unnatural sex has been levelled in order to make the offence non-cognizable.

4. *Per contra*, application is vehemently opposed by counsel for respondent No.2. It is submitted that an unnatural sex with his own wife is an offence punishable under Section 377 of IPC and therefore, Police has rightly filed the charge-sheet for the said offence.

5. Considered the submissions made by counsel for the parties.

6. The pre-amended definition of "rape" as given under Section 375 of IPC reads as under:-

"375. Rape.- A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

First.- Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under sixteen years of age.

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

*Exception.-*Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

7. The definition of "rape" was amended by Act No.13 of 2013 and the amended definition of "rape" as defined under Section 375 of IPC reads as under:-

"375. Rape.- A man is said to commit "rape" if he—

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:—

First.- Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

- Fifthly.*- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
- Sixthly.*- With or without her consent, when she is under eighteen years of age.
- Seventhly.*- When she is unable to communicate consent.

Explanation 1.- For the purposes of this section, "vagina" shall also include *labia majora*.

Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of 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.

Exception 1.- A medical procedure or intervention shall not constitute rape.

Exception 2.- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

8. From plain reading of un-amended and amended definition of "rape", it is clear that the multiple acts have been specifically brought within the definition of "rape".

9. Section 375(a) of IPC (amended definition) includes penetration of penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or with any other person. Thus, the act of unnatural sex has been made a part of definition of "rape". Section 375(a), (b), (c) & (d) of IPC includes all sorts of unnatural acts. Therefore, if a person penetrates his penis into the mouth, urethra or anus of a woman, would be guilty of committing rape.

10. Now the only question for consideration is as to whether a husband during the subsistence of marriage while residing together can be said to be guilty of marital rape or in other words, whether consent of wife residing along with her husband during the subsistence of marriage can claim that the sexual act was committed with her without her consent.

11. Section 375 *Exception 2* of IPC provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. The only exception to this provision is Section 376-B of IPC where the sexual act with his own wife during the separate living on account of judicial separation or otherwise would be a rape.

12. Thus, when rape includes insertion of penis in the mouth, urethra or anus of a woman and if that act is committed with his wife, not below the age of fifteen years then consent of the wife becomes immaterial.

13. The Supreme Court in the case of **Navtej Singh Johar and Others Vs. Union of India, Ministry of Law and Justice** reported in **(2018) 1 SCC 791** had referred the following question to the Larger Bench for adjudication:-

"8. It is necessary to note, in the course of hearing on a query being made and Mr Datar very fairly stated that he does not intend to challenge that part of Section 377 which relates to carnal intercourse with animals and that apart, he confines to consenting acts between two adults. As far as the first aspect is concerned, that is absolutely beyond debate. As far as the second aspect is concerned, that needs to be debated. The consent between two adults has to be the primary precondition. Otherwise the children would become prey, and protection of the children in all spheres has to be guarded and protected. Taking all the aspects in a cumulative manner, we are of the view, the decision in *Suresh Kumar Koushal case* [*Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] requires reconsideration. As the question relates to constitutional issues, we think it appropriate to refer the matter to a larger Bench."

14. Thus the question is as to whether a consensual unnatural act between two adults may be of same gender or of different gender would be an offence under Section 377 of IPC or not?

15. The Supreme Court in the case of **Navtej Singh Johar and Others Vs. Union of India Through Secretary, Ministry of Law and Justice** reported in **(2018) 10 SCC 1** has held as under:-

"609. This case has required a decision on whether Section 377 of the Penal Code fulfils constitutional standards in penalising consensual sexual conduct between adults of the same sex. We hold and declare that in penalising such sexual conduct, the statutory provision violates the constitutional guarantees of liberty and equality. It denudes members of the LGBT

communities of their constitutional right to lead fulfilling lives. In its application to adults of the same sex engaged in consensual sexual behaviour, it violates the constitutional guarantee of the right to life and to the equal protection of law.

610. Sexual orientation is integral to the identity of the members of the LGBT communities. It is intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy. Section 377 is founded on moral notions which are an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture. Our Constitution, above all, is an essay in the acceptance of diversity. It is founded on a vision of an inclusive society which accommodates plural ways of life.

611. The impact of Section 377 has travelled far beyond criminalising certain acts. The presence of the provision on the statute book has reinforced stereotypes about sexual orientation. It has lent the authority of the State to the suppression of identities. The fear of persecution has led to the closeting of same sex relationships. A penal provision has reinforced societal disdain.

612. Sexual and gender-based minorities cannot live in fear, if the Constitution has to have meaning for them on even terms. In its quest for equality and the equal protection of the law, the Constitution guarantees to them an equal citizenship. In decriminalising such conduct, the values of the Constitution assure to the LGBT community the ability to lead a life of freedom from fear and to find fulfilment in intimate choices.

613. The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a

universal appeal, straddling age and time. In protecting consensual intimacies, the Constitution adopts a simple principle : the State has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation.

614. This reference to the Constitution Bench is about the validity of Section 377 in its application to consensual sexual conduct between adults of the same sex. The constitutional principles which we have invoked to determine the outcome address the origins of the rights claimed and the source of their protection. In their range and content, those principles address issues broader than the acts which the statute penalises. Resilient and universal as they are, these constitutional values must enure with a mark of permanence.

615. Above all, this case has had great deal to say on the dialogue about the transformative power of the Constitution. In addressing LGBT rights, the Constitution speaks—as well—to the rest of society. In recognising the rights of the LGBT community, the Constitution asserts itself as a text for governance which promotes true equality. It does so by questioning prevailing notions about the dominance of sexes and genders. In its transformational role, the Constitution directs our attention to resolving the polarities of sex and binarities of gender. In dealing with these issues we confront much that polarises our society. Our ability to survive as a free society will depend upon whether constitutional values can prevail over the impulses of the time.

616. A hundred and fifty-eight years is too long a period for the LGBT community to suffer the indignities of denial. That it has taken sixty-eight

years even after the advent of the Constitution is a sobering reminder of the unfinished task which lies ahead. It is also a time to invoke the transformative power of the Constitution.

617. The ability of a society to acknowledge the injustices which it has perpetuated is a mark of its evolution. In the process of remedying wrongs under a regime of constitutional remedies, recrimination gives way to restitution, diatribes pave the way for dialogue and healing replaces the hate of a community. For those who have been oppressed, justice under a regime committed to human freedom, has the power to transform lives. In addressing the causes of oppression and injustice, society transforms itself. The Constitution has within it the ability to produce a social catharsis. The importance of this case lies in telling us that reverberations of how we address social conflict in our times will travel far beyond the narrow alleys in which they are explored.

618. We hold and declare that:

618.1. Section 377 of the Penal Code, insofar as it criminalises consensual sexual conduct between adults of the same sex, is unconstitutional;

618.2. Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution;

618.3. The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation;

618.4. Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law; and

618.5. The decision in *Koushal* [*Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] stands overruled."

16. Thus, it is clear that a consensual sexual conduct between adults of the same sex cannot be termed as an offence under Section 377 of IPC. Thus in nutshell, it can be said that if an unnatural sex takes place between two persons of either same gender or different gender with the consent of both the parties, then it would not be an offence under Section 377 of IPC.

17. Thus the consent of both the parties is necessary for taking the act out of the purview of Section 377 of IPC. However, this Court after considering the amended definition of "rape" as defined under Section 375 of IPC has already come to a conclusion that if a wife is residing with her husband during the subsistence of a valid marriage, then any sexual intercourse or sexual act by a man with his own wife not below the age of fifteen years will not be rape. Therefore, in view of the amended definition of "rape" under Section 375 of IPC by which the insertion of penis in the anus of a woman has also been included in the definition of "rape" and any sexual intercourse or sexual act by the husband with her wife not below the age of fifteen years is not a rape, then under these circumstances, absence of consent of wife for unnatural act loses its importance. Marital rape has not been recognized so far.

18. Under these circumstances, this Court is of considered opinion that the allegations made in the FIR would not make out an offence under Section 377 of IPC. My view is fortified by a judgment passed by Co-ordinate Bench of this Court in the case of **Umang Singhar Vs.**

State of Madhya Pradesh, Through Station House Officer and Another reported in **2023 SCC OnLine MP 3221**.

19. Another submission made by counsel for the applicant that since respondent No.2 did not make the allegation of unnatural sex on the first occasion clearly falsifies the allegations made in the second FIR and they are afterthought in nature is concerned, this Court is of considered opinion that after having come to a conclusion that the act of unnatural sex by a husband with his legally wedded wife residing with him is not an offence under Section 377 of IPC, no further deliberations are required as to whether FIR was lodged on the basis of frivolous allegations or not.

20. For the reasons mentioned above, this Court is of considered opinion that even if the entire allegations made by respondent No.2 against the applicant are considered on their face value, still no offence under Section 377 of IPC would be made out.

21. Accordingly, FIR in Crime No.377/2022 registered at Police Station Kotwali Jabalpur and criminal prosecution of the applicant, is hereby **quashed**.

22. Application succeeds and is hereby **allowed**.

(G.S. AHLUWALIA)
JUDGE

S.M.