

MANU/WB/0640/2014

Equivalent/Neutral Citation: 2014(4)ECrN 905

IN THE HIGH COURT OF CALCUTTA

CRR 2848 of 2013

Decided On: 12.09.2014

Pinki Pramanik **Vs.** State of West Bengal

Hon'ble Judges/Coram:

Subrata Talukdar, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Anand Grover, Kaushik Gupta, Amritananda Chakraborty and Arijit Bhusan Bagchi

For Respondents/Defendant: Amartya Ghosh, Rajdeep Majumder and Partha Baidya

Case Note:

Criminal - Discharge petition - Dismissal of - Present application filed for challenging order whereby, Applicant's petition for discharge consequent to filing of charge sheet for offence of rape, was dismissed - Whether dismissal of discharge petition was maintainable - Held, fact that Applicant was suffering from DSD or male pseudo hermaphroditism - As per medical record, Appellant was incapable of performing sexual intercourse - Prosecution failed to prove ingredients necessary for committing offence of rape by Appellant - There was no medical evidence of any grievous injury allegedly suffered by complainant during her long live-in relationship with Appellant - Therefore, dismissal of discharge petition was not maintainable - Application allowed. [paras 54, 55, 59 and 62]

JUDGMENT

Subrata Talukdar, J.

1. Subrata Talukdar, J.: By filing this criminal revisional application being CRR 2848 of 2013, the petitioner, Pinki Pramanik, a transgender and an athlete, challenges the Order dated 18th June, 2013 passed by the Id. 2nd Additional District Court, Barasat in Sessions Case no. 03(02), 2013 arising out of Baguihati P.S. Case no. 449 of 2012 under Sections 417/376/325/506 IPC thereby dismissing the discharge petition filed by the petitioner u/s. 227 read with Section 228 of the Code of Criminal Procedure (for short Cr.P.C.).

2. By the said Order impugned dated 18th June, 2013 the Id. 2nd Additional Sessions Court was pleased to consider the application for discharge consequent to filing of charge sheet preferred by the petitioner u/s. 227 Cr.P.C. The said application was dated 2nd April, 2013.

3. The Id. 2nd Additional Sessions Court was pleased to record as follows:-

a) That the de facto complainant/present Opposite Party no. 2 (for short OP2) lodged an FIR being Baguihati P.S. Case no. 449/2012 against the present

petitioner under Sections 417/376/325/493/420/506 IPC. It was submitted on behalf of the petitioner that there is no material in the Case Diary to show that the accused person has committed any offence u/s. 376/493/325 of the IPC.

b) It was further argued on behalf of the petitioner that as per the medical examination report of the C.M.O.H., North 24-Parganas it is evident that the petitioner is not capable of sexual intercourse like an ordinary male. Therefore, the charge of rape was not sustainable.

c) The arguments of the petitioner were opposed by the prosecution on the ground that there was enough prima facie medical evidence on record to show that the petitioner is not a female person and therefore it would not be in the best interests of the trial to conclude at the threshold that the petitioner is not capable of committing rape. The prosecution relied on a decision of the Hon'ble Apex Court in the matter of Amit Kapoor Vs. Ramesh Chandra reported in MANU/SC/0746/2012 : 2013(1) SCC (CRI) pg. 986 to argue that at the stage of considering a discharge application the competent Court is only concerned with the strong suspicion regarding commission of the offence and not a final test of guilt prior to framing of charges.

The prosecution further argued the point that even two charges can be framed in the alternative when it is doubtful as to which offence was acutely made out. The prosecution emphatically opposed the discharge of the petitioner qua the offence u/s. 376 IPC on the further ground that the medical report does not grant a clean chit to the petitioner. The opinion of the medical experts was strongly relied upon by the prosecution to urge dismissal of the application u/s. 227 Cr.P.C.

d) It was noticed by the Ld. Additional Sessions Court that the medical examination of the petitioner discloses that Pinki Pramanik is incapable of performing sexual intercourse like that of an adult male in the ordinary course of nature. The Ld. 2nd Additional Sessions Court also noticed the definition of the offence of rape in the Indian Penal Code which points to a man physically forcing himself upon a woman to have sexual intercourse.

In the above context, in the further opinion of the Ld. 2nd Additional Sessions Court, when the Medical Board had opined that the petitioner is not a female in the ordinary sense of the term, the allegations of rape within the meaning of the IPC cannot be considered to be baseless, concocted and false at this stage of the proceeding.

e) The Ld. 2nd Additional Sessions Court further held that no final opinion can be given in respect of the sex of the petitioner and, the opinion of the Medical Board in this respect although not a piece of conclusive evidence in every case, such opinion is likely to play an important role in the present case. The Ld. 2nd Additional Sessions Court was also pleased to hold that neither the report of the Medical Board describes the petitioner as a man within the meaning of the Indian Penal Code and therefore the arguments submitted on behalf of the petitioner could not also be discarded.

f) Describing the facts of the present case as unusual compared to the usual criminal proceedings that are brought before the Court, the Ld. 2nd Additional Sessions Court was pleased to come to the considered view that at the stage of framing of charge, in the facts of this case it would be inappropriate to presume

that there is no ground to proceed against the petitioner. The Id. 2nd Additional Sessions Court was pleased to find that a prima facie case has been made out and therefore framed charges under Sections 376 and 493 IPC. The petition u/s. 227 Cr.P.C. was rejected.

4. Aggrieved thereby the petitioner has filed the present application being CRR 2848 of 2013.

5. Sri Anand Grover, Ld. Senior Counsel appearing for the petitioner has raised the following issues of fact and law:-

i) He argues that the present petition involves crucial questions of constitutional law, viz. whether a woman with an intersex anatomy and who is not capable of penile penetration can be accused of the offence of rape within the meaning of Section 375 IPC. Section 375 IPC is only attracted when a man indulges in sexual intercourse with a woman achieving penetration.

ii) The petitioner being a well-known athlete from the State of West Bengal is a woman with an intersex anatomy and has competed as a female in national and international athletic events. She has also described herself as a woman to the world at large.

iii) Taking this Court through the facts of the case Sri Grover submits that on the 13th of June, 2012 the Baguihati P.S. registered FIR no. 449/2012 against the petitioner as well as her parents namely, Sri Durga Pramanik (father) and Smt. Pushpa Pramanik (mother) under Sections 417/376/325/506 IPC. It was alleged in the FIR that the petitioner was not a woman but a man who had reportedly raped the de facto complainant/OP2 on the false promise of marriage. It was further alleged that the petitioner had cheated the Government of West Bengal by misrepresenting herself as a woman and thereby obtained benefits from the Government including allotment of land.

iv) On the 14th of June, 2012 the petitioner was arrested by the Baguihati Police Station and remanded to judicial custody on 15th of June, 2012 by the Ld. Chief Judicial Magistrate, Barasat. The medical examination of the petitioner was conducted during this period and the petitioner was taken to the male prisoners cell of Dum Dum Central Correctional Home which, according to Sri Grover, is in violation of her human rights in as much as no woman can be confined in a cell reserved for males.

v) On 25th of June, 2012 the petitioner was examined by a Medical Board of eleven Doctors at S.S.K.M. Hospital. Sri Grover strenuously points to the preliminary report of the Medical Board which indicates that the petitioner "showed features suggestive of disorder of sexual development, male pseudohermaphroditism". The preliminary medical report also showed that the petitioner "was incapable of performing sexual intercourse like that of an adult male in ordinary course of nature because of rudimentary phallus with very small corpora cavernosa and corpora spongiosum and presence of perineal hypospadias".

On the 10th of July, 2012 the preliminary findings were confirmed in a final report of the S.S.K.M. Hospital which opined that "the person examined is incapable of performing sexual intercourse like that of an adult male in ordinary course of nature."

On 27th August, 2012 one Professor (Doctor) B.N. Kahali, Head of the Department of Forensic and State Medicine, S.S.K.M. Hospital agreed with the findings of the Medical Board that "no proper erection of penis (phallus) is possible in this particular case because of the reasons cited in the report of the Medical Board dated 10th of July, 2012 of S.S.K.M. Hospital."

vi) Sri Grover asserts that in spite of the above materials prima facie ruling out the offence of rape against the petitioner, on 10th November, 2012 the Baguihati Police Station filed charge sheet being charge sheet no. 384/2012 in the Court of the Id. C.J.M. Barasat and subsequently charges were directed to be framed vide the Order impugned dated 18th June, 2013.

Urging a point of law before this Court Sri Grover submits that the application filed by the petitioner u/s. 227 Cr.P.C. is a beneficial provision enabling the accused to protect herself from wrongful prosecution. It is the duty of the Court called upon to frame charge to apply its mind to the particular facts of the case for determining whether grounds for trial have been made out.

In support of the above proposition Sri Grover relies upon the following decisions:- P. Vijayan Vs. State of Kerala & Anr. reported in MANU/SC/0058/2010 : 2010(2) SCC, pg. 39 (paras-10 to 15); Union of India Vs. Prafulla Kr. Shamal reported in MANU/SC/0414/1978 : 1979(3) SCC pg. 4, (para-10); Niranjan Singh Karan Singh Punjabi Vs. Jitendra Bhimraj Bijaya and Ors. reported in 1990(4) SCC (paras-4 to 7).

vii) Sri Grover also argues that no prima facie case has been made out against the petitioner in respect of the offences embodied in the charge sheet. The Ld. 2nd Additional Sessions Court was wrong in relying on the solitary aspect of the final medical opinion dated 10th of July, 2012 which states that the petitioner was not a female 'in the ordinary sense of the term.' He argues that having regard to the definition of rape in Section 375 IPC it is palpably on record that the petitioner is not capable of penetrative penile-vaginal intercourse with a woman. According to him, the observation of the Ld. 2nd Additional Sessions Court to the effect that the report does not term the accused as a man within the meaning of the IPC is by itself indicative of the fact that no grave suspicion lay against the petitioner.

Sri Grover points out that the Ld. Additional Sessions Court was wrong in ignoring crucial parts of the medical report which were in favour of the petitioner. The crux of the issue, wrongly not noticed by the Ld. 2nd Additional Sessions Court, was that the petitioner was incapable of performing sexual intercourse like that of an adult male in the ordinary course of nature and such significant fact has been mentioned in the medical report. A penal statute must be construed strictly and if there is no prima facie evidence against the petitioner of rape then the petitioner should have been discharged u/s. 227 Cr.P.C.

In this connection Sri Grover relies upon the decision in P. Vijayan (supra) and Prafulla Kr. Sharma (supra) for the point that if two views are possible and one of them give rise to suspicion only as distinguished from grave suspicion, the Ld. Trial Court will be empowered to discharge the accused without exhausting the outcome of a trial.

viii) Relying heavily on the medical report which mentions disorder of sexual

development (for short DSD) and male pseudohermaphroditism (for short MPH), Sri Grover points out that the petitioner is a victim of intersex variation in which the petitioner has under-developed features of both male and female genitalia. The offence of rape being connected to sexual intercourse in the ordinary course of nature, the petitioner being incapable of performing such sexual intercourse cannot be fastened with the charge of rape.

In order to qualify for the offence of rape to be completed Sri Grover argues that the following three conditions must be satisfied:- a) The accused can only be a man and the word male human being is defined u/s. 10 IPC; b) To complete the offence of rape the act must be one of ordinary sexual intercourse against the consent or will of the victim or where the victim is under 18 years of age; and c) the penetration has to be one by the penis into the vagina.

ix) In the absence of any of the above conditions being satisfied no offence of rape can be made out against the accused and in support of his argument he relies upon the following decisions:- Tarkeshwar Sahu Vs. State of Bihar reported in MANU/SC/4421/2006 : 2006(8) SCC, pg. 560 (para-22). Even assuming but not admitting that the accused petitioner is a man the allegations of violence qua the petitioner would, according to Shri Grover, at the highest amount to domestic violence in support of which no complaint has been made out. Such violence, if at all in an otherwise consensual sexual relationship, would not make the same an offence of rape. The mere statement of the child of the OP2 calling the present petitioner as 'Pinki Papa' does not lead to the conclusion that rape was committed.

x) On the complaint of false promise to marry Sri Grover argues that such a charge is absurd inasmuch as under the criminal law of the country no woman could promise marriage to another woman and same sex marriages are not legally recognised. The complainant entered into a relationship with the petitioner on her own volition and any promise to marry is not rape unless it can be shown that the promise was malafide and there was no intention of keeping such promise.

In this connection, Sri Grover relies on the decision of Jayanta Rani Panda Vs. State of West Bengal and Anr. reported in MANU/WB/0299/1983 : 1984 CLJ pg. 1535 (Cal); Uday Vs. State of Karnataka reported in MANU/SC/0162/2003 : 2003(4) SCC, pg. 46 (para-21); Dipak Gulati Vs. State of Haryana reported in MANU/SC/0546/2013 : 2013(7) SCC pg. 675 (para-21). The allegation of false promise to marry per se cannot be a ground for making out an offence u/s. 376 and when such promise was allegedly made by the petitioner to the complainant, the latter was already a married woman.

xi) On the charge of cheating, Sri Grover relies upon the decision in Medchl Chemicals and Pharma Pvt. Ltd. Vs. Ms. Biological E and Ors. reported in MANU/SC/0128/2000 : 2000(3) SCC 269 (para-10). According to Sri Grover, the essential ingredients of the offence of cheating which contain fraudulent or dishonest inducement at the threshold of a person so deceived and thereby causing harm to the body, mind and reputation or property of such person, are absent in the facts of the case. Sri Grover argues that mens rea is an essential ingredient of the offence of cheating. Such mens rea requires the element of misrepresentation by the petitioner at the threshold. However, the offence of cheating has been alleged by the de facto complainant in respect of the

Government of West Bengal whereas, the Government of West Bengal has not brought any charge of cheating or misrepresentation against the petitioner. Sri Grover therefore argues that the de facto complainant does not have the locus standi to bring a charge of cheating against the petitioner when in her complaint she does not allege to have been cheated herself.

In support of his above arguments on mens rea and locus standi Sri Grover relies upon the decision in *Md. Ibrahim and Ors. Vs. State of Bihar* reported in MANU/SC/1604/2009 : 2009(8) SCC 751 (para-19); *State of Kerala Vs. A. Pareed Pillai* reported in MANU/SC/0263/1972 : 1972(3) SCC 661 (para-16); *Hriday Ranjan Prasad Verma Vs. State of Bihar* reported in MANU/SC/0223/2000 : 2000(4) SCC 168 (para-15).

It is further pointed out by Sri Grover that admittedly the petitioner is born with an intersex anatomy and has lived as a woman throughout. The State Government has always considered the petitioner to be a woman and therefore the allegation of cheating levelled by a third party is baseless and malafide. The petitioner therefore deserves to be discharged in respect of the above offences.

xii) On the charge of Section 493 IPC Sri Grover argues that such charge is gender specific where the accused is a man and the victim is a woman. In view of the medical report showing the petitioner to be living with a condition of DSD, no charge u/s. 493 can be made out inasmuch as such a charge can be made out only against a man. Relying on the decision in *Ram Chandra Bhagat Vs. State of Jharkhand* reported in MANU/SC/1024/2012 : 2013(1) SCC 562 (para-7), Sri Grover submits that Section 493 IPC should involve deceitfully inducing a woman by a representation of lawful marriage resulting in cohabitation or sexual intercourse as a result of such deception. Such deception cannot be alleged to have been carried out by the petitioner qua the complainant inducing the complainant to believe that she was lawfully married to the petitioner resulting in their co-habitation.

Sri Grover asserts that the complainant all along knew that she was a married woman with a husband and child and therefore could not be under any illusion that she was the lawful wife of the petitioner. It is further argued that the charge of Section 493 IPC and Section 376 are incongruous to each other and being mutually exclusive cannot be held to exist in a same situation. It is improbable that the de facto complainant could have been influenced to co-habit lawfully believing that she is married to the petitioner and thereby attract the provisions of Section 493 IPC and, at the same time allege rape by the petitioner on the promise to marry her punishable under u/s. 376 IPC.

xiii) On the offence under Section 325 IPC Sri Grover argues that before the Court comes to a conclusion that a charge u/s. 325 exists, one of the injuries as defined under Section 320 of the IPC, viz. emasculation; permanent privation of the sight of either eye; permanent privation of the hearing the either ear; privation of any member or joint; destruction or permanent impairing of the powers of any member or joint; permanent disfiguration of the head or face; fracture or dislocation of a bone or teeth; and any injury which endangers life or which causes the sufferer to be during the space of 20 days in severe bodily pain or unable to follow his ordinary pursuits.

Relying on the decision in *Mathai Vs. State of Kerala* reported in

MANU/SC/0035/2005 : 2005(3) SCC 260 (para-15) and Ram Baran Mahato Vs. The State reported in MANU/BH/0145/1958 : AIR 1958 Patna 452 (para-7), Sri Grover argues that none of the injuries specified in Section 320 IPC having been alleged to have been inflicted on the complainant/OP2 by the petitioner, the charge of Section 325 IPC is baseless. The de facto complainant/OP2 has been unable to furnish any medical evidence in support of Section 325 IPC and, at the highest, assuming but not admitting that any violence was suffered by the OP/complainant the same would be in the nature of a domestic violence.

xiv) On the offence charged under u/s. 506 IPC, Sri Grover has argued that the charge of criminal intimidation is in two parts:- i) It refers to an act of threatening another with injury to such persons' reputation or property; and ii) It refers to the intent with which such threat is executed. In this connection Sri Grover relies upon the decision in Ramesh Chandra Arora Vs. The State reported in MANU/SC/0034/1959 : 1960(1) SCR 924 (para-6).

Sri Grover argues that in view of the fabricated nature of the threat alleged by the complainant/OP2 against the petitioner, it cannot be presumed as to which of the charge under Part 1 or Part 2 of Section 506 IPC can be said to be made out.

xv) On the platform of the above points Sri Grover urges this Court to exercise its powers under Section 482 Cr.P.C. to act ex-debito justitiae by quashing the present proceedings. In this connection he relies upon the following decision:- State of Haryana and Ors. Vs. Chowdhury Bhajan Lal and Ors. reported in MANU/SC/0115/1992 : 1992 Suppl. 1 SCC 335 (para-102); State of Karnataka Vs. M. Devendrappa and Anr. reported in MANU/SC/0027/2002 : 2002(2) SCC 89; Gyan Singh Vs. State of Punjab and Anr. reported in MANU/SC/0781/2012 : 2012(10) SCC 303; Ravinder Singh Vs. Sukhbir Singh and Ors. reported in MANU/SC/0026/2013 : 2013(9) SCC 245.

6. Sri Grover argues that the petitioner is a victim of vexatious and malafide charges. Nothing substantive has been produced against the petitioner in the charge sheet except the medical report. The Id. 2nd Additional Sessions Court passed the Order directing framing of charge mechanically and the same deserves to be set aside.

7. Per contra, the Ld. Counsel for the State-OP1, Sri Amartya Ghosh supporting the Order of the Ld. 2nd Additional Sessions Court argues that the application for discharge was correctly dismissed on a proper appreciation of facts and law.

8. Drawing the attention of this Court to the complex nature of medical evidence which describes the petitioner as not a female in the ordinary sense of the term, Sri Ghosh argues that the Investigating Officer has named the examining doctor, Dr. Biswanath Kahali as a witness in the charge sheet.

9. Relying heavily on the statement of the said Dr. Biswanath Kahali to the effect "mere attempt of friction-penetration like that of a minor (with no proper erection) cannot be ruled out which may not be detectable at the time of medical examination" appearing at page 182 of the Case Diary, Sri Ghosh submits that these facts are liable to be proved at trial.

10. Sri Ghosh also relies on the statements of the daughter of the de facto complainant u/s. 164 Cr.P.C. to the effect that the daughter used to call the petitioner as "papa". This nomenclature is indicative of the fact that the relationship between the parties was

based on a promise of marriage and this fact is corroborated by the statement of the complainant herself.

11. Having regard to the medical evidence that the petitioner is genetically a male having 46 XY Chromosomes with a phallus anatomically consistent with that of a man supported by the statement of Dr. Kahali that penetration in the nature of a friction cannot be ruled out, such facts, according to Sri Ghosh, deserve to be tested at trial. Sri Ghosh asserts that the revisional Court ought not to venture in an area involving appreciation of evidence. The Order of the Ld. 2nd Additional Sessions Court being based on cogent materials on record, the truth should only emerge at the end of a full-fledged trial.

12. Sri Rajdeep Majumder, Ld. Counsel appearing for the OP2/complainant also places emphasis on the medical report of the petitioner which, inter alia, states that the petitioner is not a female in the ordinary sense. Supporting the order impugned dated 18th of June, 2013, Sri Majumder argues that the Ld. 2nd Additional Sessions Court was correct in observing that the medical evidence is of probative value and requires to be appreciated with other evidence at the time of trial. According to Sri Majumder, the duty of the Ld. Trial Court at the stage of considering the discharge application and therefore proceeding to the stage of framing of charge is limited to considering whether a prima facie case has been made out against the petitioner and not to dwell on the success or otherwise of the petitioner in the trial.

13. Sri Majumder further submits that a positive prima facie case with regard to the gender of the petitioner having not been established at this stage, the revisional jurisdiction of this Court cannot be expanded to consider the evidence which otherwise needs to be either approved or disapproved in the trial. He relies on a decision of the Hon'ble Apex Court in this regard reported in MANU/SC/0104/2004 : 2004 SCC (CRI) 1266 in the matter of Aman Kumar and Anr. Vs. State of Haryana. He also relies upon Amit Kapoor Vs. Ramesh Chander reported in MANU/SC/0746/2012 : 2013(1) SCC (CRI) 986 to make the point that at the stage of Section 228 Cr.P.C., the Ld. Trial Court must be guided by the consideration of existence of a strong suspicion that the accused has committed the offence.

14. He further submits that the stage of framing of charge pertains to an exclusive exercise of jurisdiction by the Ld. Trial Court and the Ld. Trial Court has rightly exercised its jurisdiction on perusal of the available materials on record by deciding to proceed with the trial. Sri Majumder distinguishes the judgment relied upon on behalf of the petitioner pertaining to the allegation of promise to marry on the ground that the said cannot apply in circumstances where the evidence of witnesses is yet to be recorded.

15. Heard the parties. Considered the materials on record.

16. It is a settled principle of law that this Court in exercise of its inherent and revisional jurisdiction under Section 482 read with Sections 397 and 401 of the Code of Criminal Procedure (for short Cr.P.C.) is required to examine whether the proceedings against the present petitioner can be sustained from a plain reading of the complaint itself. A copy of the complaint is annexed to CRR 2848 of 2013. From a plain reading of the complaint the following facts emerge:-

- a) That the complainant came to reside at the address where the petitioner was also a resident in the year 2009;

b) That the complaint was filed on 13th June, 2012 i.e. after a gap of nearly three years. During the said period of nearly three years, the complainant continued to be well-acquainted with the petitioner and even claims to have cohabited with her;

c) That when the complainant came into contact with the petitioner she was a married woman. Her husband, who shifted to the said address along with the complainant also came into contact with the petitioner;

d) The petitioner, by the complainant's own admission in the complaint, became "increasingly close to me and my husband";

e) When the complainant's husband left her and her daughter she was asked by the petitioner to live at the latter's place and she therefore started living there. During this stage of living with the petitioner at the latter's house, the complainant realized that the petitioner "although introducing herself as a woman, is not a woman";

f) After realizing that the petitioner is not a woman, the complainant alleges that the petitioner "taking advantage of my helpless situation", repeatedly engaged in physical relations with her.

g) The complainant further states that while promising to marry her "(the petitioner) cohabited (sahobas) with me day after day". The complainant also alleges that she "believed in (the petitioner) false promises and started living with (the petitioner) as a wife". It is alleged that the petitioner indulged in sexual assault.

h) Another allegation pertains to the petitioner having represented to the State Government that she is a woman when she is actually a man and as a renowned female athlete she has obtained several privileges from the Government. Therefore, the complainant alleges that the petitioner has played fraud on the Government;

i) The complainant further states that for the past 3-4 days, i.e. 3-4 days prior to filing of the complaint on 13th June, 2012 the petitioner "has left their residence and is constantly threatening the complainant". The complainant seeks redressal of her grievances on the counts of being falsely promised marriage and sexual relations indulged by the petitioner with her including incidents of sexual assault. The complainant also seeks redress on the count of alleged representation made by the petitioner falsely describing herself to be a female athlete and thereby acquiring job, medals and land from the Government.

17. The complaint culminated into a routine charge sheet. The charge sheet, inter alia, takes note of the complaint that the petitioner being not a woman but a man has indulged in sexual relations with the complainant with a promise to marry her. The charge sheet also takes note of the fact that the complainant used to live with the petitioner as a couple and she was being sexually harassed since long. The charge sheet further notes that the complainant kept quiet on her allegations "because she believed that Pinki Pramanik would marry her".

18. The charge sheet further takes note of the allegation that the petitioner misrepresented the Government regarding her sex and obtained several benefits as a

successful female athlete. During the course of investigation statements were recorded u/s. 161 Cr.P.C. and the petitioner was sent for medical examination under order of court.

19. The petitioner was arrested on 14th June, 2012 and thereafter on the strength of court order she was referred to SSKM Hospital, Kolkata for medical examination. Such medical examination report has been made part of the Case Diary.

20. The charge sheet opines that "in course of investigation the charge could be substantiated as alleged in the complaint". After taking the opinion of the Deputy Commissioner, Detective Department, Bidhannagar Police and the Ld. Public Prosecutor, Barasat, it was decided to add Section 493 IPC to the charge sheet. Charge sheet was then submitted under Sections 417/376/325/493/420/506 of IPC against the present petitioner.

21. The petitioner filed an application Section 227 Cr.P.C. dated 2nd April, 2013 for discharge. The prayer for discharge was resisted by the Ld. Public Prosecutor-in-charge.

22. The Ld. Trial Court was pleased to reject the prayer for discharge primarily on a consideration of the medical opinion obtained in respect of the sexual status of the petitioner. The Ld. Trial Court was of the view that at the present stage of the proceedings, no final opinion can be given in respect of the sexual status of the petitioner and the opinion of the experts on this count cannot be stated to be conclusive.

23. According to the Ld. Trial Court, the opinion of the experts is only a piece of evidence which is required to be appreciated at trial and, at the stage of framing of charge it is difficult to state that the allegations are not sustainable. The Ld. Trial Court therefore came to the finding that a prima facie case has been made out against the petitioner for which charges must be framed for offences under Sections 376 and 493 of the IPC. The application of the petitioner for discharge made under Section 227 Cr.P.C. was dismissed.

24. Hence the present CRR 2848 of 2013.

25. Heard the parties. Considered the materials on record.

26. Section 376 IPC provides for punishment for the offence of rape. Rape is defined under the sub-chapter heading 'Sexual Offences' vide Section 375 IPC. Section 375 Cr.P.C. provides as follows:-

Sexual offences

Rape- A man is said to commit 'rape' if he-

- a) penetrates his penis, to any extent, into the vagina, mouth 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.

27. From a reading of Section 375 IPC it is apparent that the offence of rape can be said to have been committed in respect of any sexual act committed by a 'man' against a 'woman' falling within the mischief of 375(a) to (d). To constitute the offence of rape the seven circumstances enumerated under Section 375 are required to be fulfilled. Out of the seven circumstances in the facts of this case, it is important to notice circumstances (i) to (iv). In other words, rape would be said to have been committed if such act was committed (i) against the will of the complainant; (ii) without the consent of the complainant; (iii) by obtaining her consent by instilling fear in the complainant and (iv) obtaining her consent by making her believe that she is lawfully married to the

offender.

28. It is also important to notice Explanation No. 2 to Section 375 IPC which defines consent as an unequivocal voluntary agreement expressed by a woman, communicating her willingness to participate in a sexual act. It is equally important to notice that a woman who does not physically resist the act of penetration shall not only by that reason be regarded as having given her consent to the sexual activity.

29. This Court, in the backdrop of the above discussion, notices that the complainant became well-acquainted with the petitioner after she moved in with her husband as a neighbour in the year 2009. Such acquaintance ripened into a friendship between the petitioner and the family of the complainant including her husband. Such friendship, as evident from the complaint itself, further ripened into a relationship between complainant and the petitioner.

30. This Court also notices from the complaint that on the basis of such relationship the complainant on her own volition shifted with her minor child to the residence of the petitioner. At around the same time the husband of the complainant left her. This Court again notices that on shifting to the residence of the petitioner the complainant continued to share joint mess and cohabitation with the petitioner till a few days prior to filing the complaint in June, 2012. During the period of joint mess and cohabitation the complainant did not report of any sexual violence or other offence by the petitioner.

31. It is also noticed by this Court that during this long period of live-in relationship the complainant realized that the petitioner is not a woman but a man. Therefore, the complainant has demanded medical tests of the petitioner to establish her allegation that the petitioner is a man.

32. This Court further notices that the complainant while seeking medical tests to determine the sexual identity of the petitioner has, in the same breath, alleged that petitioner was cohabiting with her. The complainant believes in the alleged promise of marriage made by the petitioner in spite of the fact that she continues to be the legally married wife of her husband. The Hon'ble Apex Court in MANU/SC/0546/2013 : AIR 2013 Volume 7 SCC Page 675 in the matter of Deepak Gulati Vs. State of Haryana has, inter alia, held as follows:-

16. Admittedly, the prosecutrix has never raised any grievance before any person at any stage. In fact, she seems to have submitted to the will of the appellant, possibly in lieu of his promise to marry her. Thus, a question arises with respect to whether, in light of the facts and circumstances of the present case, the appellant had an intention to deceive her from the very beginning when he had asked the prosecutrix to leave for Kurukshetra with him from Karnal.

17. The undisputed facts of the case are as under:

I. The prosecutrix was 19 years of age at the time of the said incident.

II. She had inclination towards the appellant, and had willingly gone with him to Kurukshetra to get married.

III. The appellant had been giving her assurance of the fact that he would get married to her.

IV. The physical relationship between the parties had clearly developed with the consent of the prosecutrix, as there was neither a case of any resistance, nor had she raised any complaint anywhere at any time despite the fact that she had been living with the appellant for several days, and had travelled with him from one place to another.

V. Even after leaving the hostel of Kurukshetra University, she agreed and proceeded to go with the appellant to Ambala, to get married to him there.

18. Section 114-A of the Indian Evidence Act, 1872 (hereinafter referred to as the 1872 Act) provides, that if the prosecutrix deposes that she did not give her consent, then the Court shall presume that she did not in fact, give such consent. The facts of the instant case do not warrant that the provisions of Section 114-A of the Act 1872 be pressed into service. Hence, the sole question involved herein is whether her consent had been obtained on the false promise of marriage. Thus, the provisions of Sections 417, 375 and 376 IPC have to be taken into consideration, along with the provisions of Section 90 of the Act 1872. Section 90 of the 90 IPC provides, that any consent given under a misconception of fact, would not be considered as valid consent, so far as the provisions of Section 375 IPC are concerned, and thus, such a physical relationship would tantamount to committing rape.

19. This Court considered the issue involved herein at length in the case of Uday v. State of Karnataka, MANU/SC/0162/2003 : AIR 2003 SC 1639; Deelip Singh @ Dilip Kumar v. State of Bihar, MANU/SC/0948/2004 : AIR 2005 SC 203; Yedla Srinivasa Rao v. State of A.P., MANU/SC/8531/2006 : (2006) 11 SCC 615; and Pradeep Kumar Verma v. State of Bihar & Anr., MANU/SC/3266/2007 : AIR 2007 SC 3059, and came to the conclusion that in the event that the accused's promise is not false and has not been made with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act(s) would not amount to rape. Thus, the same would only hold that where the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned.

20. Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamounts to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks.

21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case

like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

22. In Deelip Singh (supra), it has been observed as under: (SCC p. 99, para 19)

"99. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology."

23. This Court, while deciding Pradeep Kumar Verma (Supra), placed reliance upon the judgment of the Madras High Court delivered in N. Jaladu, Re MANU/TN/0288/1911 : ILR (1913) 36 Mad 453, wherein it has been observed: (Pradeep Kumar case, SCC pp. 418-19, para 11)

""11. '26.... "...We are of opinion that the expression 'under a misconception of fact' is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) states that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married... thus.... if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person Although in cases of contracts a consent obtained by coercion or fraud

is only voidable by the party affected by it, the effect of Section 90 IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence."

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance." Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.

25. The instant case is factually very similar to the case of Uday (Supra), wherein the following facts were found to exist:

I. The prosecutrix was 19 years of age and had adequate intelligence and maturity to understand the significance and morality associated with the act she was consenting to.

II. She was conscious of the fact that her marriage may not take place owing to various considerations, including the caste factor.

III. It was difficult to impute to the accused, knowledge of the fact that the prosecutrix had consented as a consequence of a misconception of fact that had arisen from his promise to marry her.

IV. There was no evidence to prove conclusively, that the appellant had never intended to marry the prosecutrix.

26. To conclude, the prosecutrix had left her home voluntarily, of her own free will to get married to the appellant. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant. According to the version of events provided by her, the prosecutrix had called the appellant on a number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time, and when he finally arrived she went with him to the Karna lake where they indulged in sexual intercourse. She did not raise any objection at this stage and made no complaints to anyone. Thereafter, she also went to Kurukshetra with the appellant, where she lived with his relatives. Here to, the prosecutrix voluntarily became intimate with the appellant. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the appellant at the Birla Mandir. Thereafter, she even proceeded with the appellant to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married in court at Ambala. However, here they were apprehended by the police.

27. If the prosecutrix was in fact going to Ambala to marry the appellant, as

stands fully established from the evidence on record, we fail to understand on what basis the allegation of "false promise of marriage" has been raised by the prosecutrix. We also fail to comprehend the circumstances in which a charge of deceit/rape can be leveled against the appellant, in light of the afore-mentioned fact situation.

28. In view of the above, we are of the considered opinion that the appellant, who has already served more than 3 years sentence, is entitled to the benefit of doubt. Therefore, the appeal succeeds and is allowed. His conviction and sentences awarded by the courts below are set aside. The appellant is on bail. His bail bonds stand discharged.

33. This Court finds that the ratio of decision in Deepak Gulati's case (supra) is apposite to the facts of this case. As noticed by the Hon'ble Apex Court in Deepak Gulati (supra), even the present complainant, being a married lady must be presumed to possess the intelligence and maturity to understand the ramifications and maturity of the act of commencing a consensual live-in relationship with the petitioner and continuing the relationship for a good length of time.

34. This Court is also required to examine whether the complainant could suffer from any misconception of fact regarding the alleged inducement of marriage given by the petitioner qua the admitted status of the complainant as a married lady who cannot legally marry for the second time during the subsistence of her first marriage. On the touchstone of such reasoning this Court must examine whether the complainant could be a victim of deception arising out of an alleged promise of marriage.

35. In the facts of Deepak Gulati's case (supra) the Hon'ble Apex Court found that the physical relationship between the parties had developed with the consent of the prosecutrix as there was neither any resistance nor did she raise any complaint anywhere at any time despite the fact that she was living with the appellant for several days and had even travelled with him from one place to another. The Hon'ble Apex Court also found that the prosecutrix in Deepak Gulati's case (supra) was conscious of the complications and issues surrounding her marriage to the appellant. Therefore, the Hon'ble Apex Court noted that it was difficult to impute that the prosecutrix had consented as a consequence of a mis-conception of fact.

36. In the facts of the present case this Court cannot be unmindful of the situation when the complainant moved into the house of the petitioner. This Court also cannot be unmindful of the fact that both the complainant and the petitioner started to know each other in the year 2009 and gradually due to a developing relationship the complainant moved into a live-in relationship with the petitioner.

37. This Court cannot be further unmindful of the fact that the husband of the complainant left her and although there was no divorce formalized between them, till such divorce there could be no second marriage. Therefore, even assuming but not admitting that the petitioner was "not a female in the ordinary sense of the term", the complainant, as an adult married graduate lady, could not be under a mis-conception of fact that the petitioner could have married her during the subsistence of her first marriage. Nothing has been furnished before this Court or before the Ld. Trial Court to show that the complainant and her husband had formalized a divorce which would cause the belief that the petitioner was legally capable of marrying her.

38. Being aware of such facts and circumstances the complainant decided to move in with the petitioner at the latter's residence. She continued to stay and cohabit with the

petitioner for a long period during which she did not complain of any ill-treatment or made any other accusation against the petitioner. Nothing has been produced before this Court or furnished before the Ld. Trial Court to show that during this long period of cohabitation the petitioner lodged a single complaint with the police or wrote a single letter to her family, relatives and well-wishers that she was ill-treated and coerced to do or to perform any illegal act by the petitioner. Such chain of facts and circumstances leave the indelible impression that cohabitation between the complainant and the petitioner was consensual.

39. Therefore, even before assessing the medical evidence qua the petitioner, this Court is of the considered view that the cumulative inter se conduct between the parties fails to justify the tests of the offence of rape under Section 375 IPC. This Court further notices that not only the complainant but also her child lived with the petitioner and there is no complaint whatsoever made by the complainant during the period when the parties lived together to show that the petitioner misbehaved or ill-treated either the complainant or her child. In fact the evidence on record goes to show that the child of the complainant used to call the petitioner as ""Pinki Papa".

40. Therefore, this Court is of the considered opinion that the nature of their inter se consensual relationship cannot point the needle of suspicion to the gravest charge of rape. At the same time the allegation of rape on the platform of a promise to marry a married lady is neither factually nor legally sustainable.

41. Under the landscape of the above discussion this Court is now required to notice the reasoning of the Ld. Trial Court persuading it to reject the petition under Section 227 Cr.P.C. To the mind of this Court the Ld. Trial Court was heavily persuaded by the medical evidence connected to the sex of the petitioner while considering the application for discharge. This Court finds that only by taking into account the evidence of the Medical Board, the Ld. Trial Court framed the opinion that since no final view can be given in respect of the sex of the petitioner, a prima facie case has been made out for trial.

42. However, to the mind of this Court in addition to the medical evidence on record which may not conclusively point to the sex of the petitioner in order to constitute rape under Section 375 IPC, it is essential that the ingredients connected thereto are satisfied prior to committing a case for trial. From the facts and circumstances of the relationship between the parties, even independent of the medical evidence, it does not emerge that the allegations under Section 375 IPC and Section 417 IPC can survive.

43. This Court is also not unmindful of the proviso under Section 375 IPC which, inter alia, states that a woman who may not physically resist the act of penetration can be shown by the reason only of that fact to have consented to the sexual activity.

44. In the considered opinion of this Court the proviso to Section 375 must be read in the context of the factual matrix of the present case indicating a consensual relationship between the parties. In the considered view of this Court the long period of live-in relationship shared between the parties prior to the sudden act of filing the complaint on 13th June, 2012 demonstrates an exception to the application of the proviso (supra) under Section 375 IPC.

45. This Court is therefore also of the considered view that the Ld. Trial Court did not notice that there were factors over and beyond and/or surrounding the medical evidence for coming to a conclusion on the invalidity of the charge of rape. In the opinion of this Court the Ld. Trial Court was purely guided by a consideration of the medical evidence

on record and erroneously so. Taking the ratio in Deepak Gulati's Case (supra) this court finds that even apart from the medical evidence the circumstances surrounding the relationship of the parties do not show the ingredients of the offence under Section 375 IPC and Section 417 IPC.

46. Now, from the medical evidence on record this Court finds that the Ld. Trial Court relied upon a final medical opinion dated 10th July, 2012 given by the SSKM Hospital. The said medical report opined that the petitioner was not a "female" in the ordinary sense of the term. The medical report also stated that "the petitioner was incapable of performing sexual intercourse like that an adult male in the ordinary course of nature". The petitioner was shown to possess a medical condition described as 'disorder of sexual development' (for short DSD) and, specifically is a specimen of 'male pseudo hermaphroditism'.

47. The Wikipedia describes a 'male pseudo hermaphrodite' as an intersex individual possessing a testis. The term 'female pseudo hermaphrodite' is used when an ovary is present. The term 'pseudo hermaphroditism' was coined by Edwin Klebs in the year 1876.

48. Pseudo hermaphroditism is described as a condition in which an organism is born with primary sex characteristics of one sex but develops the secondary sex characteristics of the other sex. Such sexual disorder is a result of such organism not containing the usual distinct chromosomes at conception from the mother and from the father. Normally human cells usually contain two sex chromosomes- one from the mother and one from the father. However, due to the dissonance of the sex chromosomes obtained from the mother and father, the condition of pseudo hermaphroditism arises.

49. Etymologically pseudohermaphroditism ascribes its origin from joining the names of the Greek god of male sexuality, Hermes, with Aphrodite, the goddess of female sexuality, love and beauty.

50. The medical evidence before the Ld. Trial Court describes the sexual status of the petitioner as a "male pseudo-hermaphrodite". It mentions the phallus of the petitioner to be present in "ill-defined rudimentary form". It shows that the petitioner shows features of DSD. It also points to the fact that the petitioner "is not a female in the ordinary sense of the term".

51. The preliminary medical report states that the petitioner "is incapable of performing sexual intercourse like that of an adult male in ordinary course of nature because of rudimentary phallus with very small corpora cavernosa and corpora spongiosa and presence of perinical hypospadias". The final medical examination report based on chromosome analysis and karyotyping describes the petitioner as a male pseudo hermaphrodite with 46 XY chromosome disorder of sexual development. The said final medical report also adds "there is nothing to add or delete to our already expressed opinion in the preliminary report which stands as it is".

52. From the medical evidence it is clear that the petitioner is a pseudo hermaphrodite or an intersex individual. It is also evident that the petitioner is unable to perform ordinary sexual intercourse. It has been argued by Shri Grover that for the offence of rape under Section 375 IPC, penetration by a man of a woman is the sine qua non. From the medical evidence which shows the petitioner to be incapable of sexual activity like a man, it is not possible to conclude that the sexual activity allegedly committed by the petitioner on the complainant would amount to rape.

53. Shri Grover has further argued that for the offence of rape defined under Section 375 IPC to be completed, three ingredients must be satisfied:-

- a) that the accused must be a man;
- b) there must be sexual intercourse with a woman against her will or without her consent;
- c) the penetration in the sexual act has to be of the penis into the vagina.

54. Shri Grover points out that from the medical opinion-both preliminary and final - it is noticed that the ingredients necessary for an offence under Section 375 to be completed are not satisfied in the facts of the present case. Hence the offence of rape cannot be imputed.

55. This Court notices that the medical opinion states that the petitioner suffers from an intersex variation where she possesses both the primary and secondary characteristics of the two sexes. The medical opinion does not call the petitioner a female in the ordinary sense of the term but also stops short of calling the petitioner a man. This Court cannot be also oblivious to the fact that the petitioner, according to the medical opinion is incapable of performing sexual intercourse. This Court therefore finds substance in the submission of Shri Grover that to push the petitioner to trial on the specified charges qua the petitioner's ambivalent, amorphous sexual identity shall be an act of perversity.

56. However on the issue, notwithstanding the incapacity of the petitioner to perform sexual intercourse like an ordinary male, whether the petitioner is capable of sexual activity which can result in the penetration of the vagina, useful reference may be drawn to the observations of the Hon'ble Apex Court in Aman Kumar & Anr. Vs. State of Haryana reported in MANU/SC/0104/2004 : AIR 2004 Volume 4 SCC Page 379. A paragraph 7 in Aman Kumar's Judgment (supra) the Hon'ble Apex Court held as follows:-

"Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see Joseph Lines, EC&K 893). It is well known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any

significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora, are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.

57. Further the Hon'ble Apex Court was pleased to come to the view in Aman Kumar's Case (Supra) that there is a distinction between rape punishable under Section 376 IPC and an attempt to commit rape punishable under Section 376 read with Section 511 IPC.

58. In the facts of Aman Kumar's Case (Supra) the Hon'ble Apex Court was of the view that there is no material to show that the offence cannot be termed as an offence under the provisions of Sections 375 read with Section 511 IPC. However, the capability of the petitioner to perform the act of penetration necessary to qualify for rape under Section 375 IPC in the facts of this case does not only hit against the wall of medical evidence on record but also, more significantly, hits against the wall of the relationship between the parties between the year 2009 till June, 2012. As noticed hereinabove that the medical evidence is ambivalent with regard to the capacity of the petitioner to achieve an erection of the phallus and perform sexual intercourse like an ordinary male. The Ld. Trial Court, in its anxiety to determine whether any penetration of the rudimentary phallus of the petitioner can qualify to be rape at the trial, failed to appreciate the facts and circumstances in their totality.

59. With regard to the charge under Section 493 IPC this Court also finds substance in the submission of Shri Grover that the said charge provides for punishment for cohabitation caused by a man deceitfully inducing the woman to believe that she is in lawful wedlock with him. This Court is persuaded by Shri Grover's further argument that Section 493 IPC is a gender specific offence where the accused is a man and the victim is a woman. In view of the fact that the petitioner is suffering from DSD or male pseudo hermaphroditism, the gender specificity of an offence under Section 493 IPC is not made out in the facts of the case.

60. As also noticed above by this Court in this judgment that at the time of cohabitation with the petitioner the complainant was a married woman and therefore could not lawfully believe herself to be in a conjugal relationship. In such respect this Court finds merit in Shri Grover's argument that the charge under Section 493 IPC is contradictory to the charge of rape under Section 376 IPC based on false promise to marry. This Court finds that there is inconsistency in the stand of the complainant when, on the one

hand she alleges that the petitioner made a false promise to marry in order to enjoy sexual intercourse with her and, on the other hand deceitfully induced the complainant to believe that she was lawfully married to the petitioner.

61. On the above reasoning this Court finds merit in Shri Grover's submission that the two charges under Section 493 IPC and under Section 376 IPC are incongruous to each other, mutually exclusive and therefore cannot be sustained in the same complaint. In other words, the petitioner could either make a false promise of marriage or, alternatively, could induce the belief that the complainant was in lawful marriage with her but not both at the same time. Therefore, on the basis of the above reasoning this Court finds the order impugned passed by the Ld. Trial Court directing trial under Section 493 IPC to be unsustainable.

62. With regard to the offence under Section 325 of the Indian Penal Code this Court also finds merit in the argument that in order to arrive at the conclusion that an offence under Section 325 IPC is made out, one of the injuries defined under Section 320 IPC must be strictly proved. It has been persuasively argued on behalf of the petitioner that no specific injury prescribed under Section 320 IPC has been made out to attract the penalty under Section 375 IPC. In spite of the copious of medical evidence on record with respect to the sexual identity of the petitioner, there is no medical evidence of any grievous injury allegedly suffered by the complainant during her long live-in relationship with the petitioner.

63. This Court is therefore of the further considered opinion that the complaint has failed to show the ingredients of the offence alleged under Section 325 IPC.

64. With reference to the charge of criminal intimidation under Section 506 IPC this Court, for the same reasons as discussed above, does not find any whisper of criminal intimidation excepting a bald statement of violence/assault which may require the petitioner to be subjected to a trial. On the other hand, this Court again notices that the complainant of her under accord decided to stay with the petitioner for a long period till filing the complaint on 13th June, 2012. In this connection this Court notices that the provocation for filing the complaint was that the petitioner had left the joint residence of the parties three days prior to filing of the complaint and has been abusing the complainant over the telephone. To the mind of this Court the alleged sudden provocative behaviour of the petitioner qua the complainant is more indicative of the strain in their interpersonal relationship than the criminality alleged necessitating the rigours of a trial.

65. The following statement of the complainant as recorded by the Ld. Magistrate is indicative of the strained relationship between the parties leading to the filing of the complaint. Such statement is reproduced below:-

"Avtar Singh (Jyotirmoyee Sikdar's husband) has told me and Pinky that instead of fighting, we should settle it amongst ourselves. Pinky did not agree."

66. This Court respectfully notices in this connection the observations of the Hon'ble Apex Court in Jayanti Rani Panda Vs. State of West Bengal and Anr. reported in MANU/WB/0299/1983 : 1984 Criminal Law Journal Page 1535 and in MANU/SC/0162/2003 : 2003 Volume 4 SCC Page 46.

"The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of

misconception of fact, the fact must have an immediate relevance...If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very that from the very inception the accused never really intended to marry her."

"It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in live on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view,... In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent,....It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."

67. This Court is further of the considered view that the element of cheating of the complainant by a false promise to marry cannot be sustained in the facts and circumstances of the present case. This Court also does not find substance in the charge of the complainant to the effect that she has the locus standi to charge the petitioner with the offence of cheating the Government. The argument of Shri Grover is acceptable on the count that as a third party the complainant does not have the locus to charge that the petitioner has cheated the Government when, the Government itself has not come forward with such a charge.

68. This Court finds that the sole argument by the OP1 viz. the State of West Bengal and OP2 the de facto complainant, is based on the medical evidence. On the basis of the medical evidence both the OPs have argued that the petitioner is not a female in the ordinary sense of the term and hence should be relegated to trial.

69. However, in the backdrop of the above discussion this Court is not convinced that the medical evidence of an ambivalent amorphous sexual identity read with the surrounding circumstances of the relationship enjoyed between the parties can be persuasive enough for demanding a full-fledged trial.

70. This Court is of the view that perpetuation of vexatious criminal proceedings is not warranted in the facts and circumstances of this case and in exercise of its inherent and revisional powers, this Court is entitled to pass orders ex debito justitiae. The above position has been approved by the Hon'ble Apex Court in Ravinder Singh Vs. Sukhbir Singh & Ors. reported in MANU/SC/0026/2013 : AIR 2013 9 SCC 245 as follows:-

"It is a judicial obligation on the Court to undo a wrong in course of administration of justice and to prevent continuation of unnecessary judicial process. It may be so necessary to curb the menace of criminal prosecution as an instrument of operation of needless harassment. A person cannot be permitted to unleash vendetta to harass any person needlessly. Ex debito justitiae is inbuilt in the inherent power of the court and the whole idea is to do real, complete and substantial justice for which the court exists. Thus, it becomes the paramount duty of the Court to protect an apparently innocent

person, not to be subjected to prosecution on the basis of wholly untenable complaint."

71. In the back drop of the above discussion the order impugned dated 18th June, 2013 passed by the Ld. 2nd Additional District Court, Barasat in Sessions Case No. 02(03) 2013 arising out of Baguihati P.S. Case No. 449/2012 dated 13th June, 2012 under Sections 413/417/376/375/506 IPC is set aside and all proceedings pending against the petitioner including the charge sheet No. 384 dated 10th November, 2012 is quashed.

72. CRR 2848 of 2013 is accordingly allowed.

73. There will be, however, no order as to costs.

74. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.

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