



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

HON'BLE SHRI JUSTICE G. S. AHLUWALIA

ON THE 9th OF MAY, 2025

MISC. CRIMINAL CASE No. 32576 of 2024



Versus

THE STATE OF MADHYA PRADESH AND OTHERS

Appearance:

Dr. Jitendra Singh Kushwah, Advocate for applicant.

Shri Mohit Shivhare, Public Prosecutor for respondent No.1/State.

Shri Vinod Kumar Dhakad, Advocate for respondent No.2.

ORDER

This application, under Section 482 of CrPC, has been filed for quashment of FIR in Crime No.11 of 2024 registered at Police Station Sirol, District Gwalior for offence under Sections 377, 323 and 498A of IPC and criminal proceedings in ST No. 227 of 2024.

2. It is submitted by counsel for applicant that although charge sheet has been filed, but charges have not been framed. Therefore, this application is being decided under the impression that charges have not been framed.

3. Shri Vinod Kumar Dhakad has appeared for complainant/respondent No. 2 and written objection was also filed by respondent No. 2 in which she has repeatedly stated that in spite of undertaking given by applicant, the offence



was repeated by him.

4. According to prosecution case, respondent No. 2 lodged an FIR alleging that she got married to applicant on 2.5.2023 in accordance with Hindu rites and rituals. An amount of Rs. 5 lakhs, household articles and one Bullet motorcycle were given by her parents in the marriage. Right from the date of marriage, applicant is committing unnatural sex with her after consuming liquor and whenever she refused to indulge in such activity, then she is being assaulted and treated with cruelty. When she narrated this incident to her parents, then they also tried to persuade her husband but he did not improve, and he always does wrong act (गलत हरकत) with her, as well as, treat her with cruelty by assaulting her. She had complained to *Mahila Paramarsh Kendra* on number of occasions. Her husband was also summoned by the police but he did not agree, and he has not stopped committing the bad activity (गलत हरकत) and also did not stop treating her with cruelty, and accordingly, the FIR was lodged.

5. Challenging the FIR, it is submitted by counsel for applicant that undisputedly respondent No. 2 is legally wedded wife of applicant. In the light of judgment passed by this Court in the case of **Manish Sahu vs. State of Madhya Pradesh and another** decided on **1.5.2024** in **MCRC No. 8388 of 2023** (Principal Seat), it is clear that unnatural sex with wife is not a rape as per amended definition of rape under Section 375 of IPC, and thus it is submitted that when the basic allegation of committing unnatural sex is not an offence, then no offence under Section 498A of IPC is made out.

6. Heard learned counsel for the applicant.

7. This Court in the case of **Manish Sahu (Supra)** has held as under:

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 LGBTcommunities 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 SCC1 : (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 **UmangSinghar Vs. State of Madhya Pradesh, Through Station House Officer and Another** reported in **2023 SCCOnLine MP 3221**.

8. In the case of **Independent Thought v. Union of India** reported in



(2017) 10 SCC 800 , the Supreme Court has held as under:

“197. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC insofar as it relates to a girl child below 18 years is liable to be struck down on the following grounds:

- (i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Articles 14, 15 and 21 of the Constitution of India;
- (ii) it is discriminatory and violative of Article 14 of the Constitution of India; and
- (iii) it is inconsistent with the provisions of the Pocso Act, which must prevail.

Therefore, Exception 2 to Section 375 IPC is read down as follows:

“Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape.”

It is, however, made clear that this judgment will have prospective effect.

198. It is also clarified that Section 198(6) of the Code will apply to cases of rape of “wives” below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code.”

9. Therefore, it is clear that unnatural sex with wife would not be an offence under Section 376 or 377 of IPC. Therefore, the FIR, so far as it relates to commission of unnatural sex under Section 377 of IPC, is hereby quashed.

10. Now, the only question for consideration is as to whether offence under Section 498A of IPC would be made out or not ?

11. It is submitted by counsel for applicant that since respondent No. 2 has not alleged that any demand of dowry was ever made, therefore no offence



would be made out.

12. Considered the submission made by counsel for applicant.

13. Section 498A of IPC reads as under:

498A. Husband or relative of husband of a woman subjecting her to cruelty.—

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.— For the purpose of this section, “cruelty” means—

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

14. From a plain reading of Section 498A of IPC, it is clear that any willful conduct which is of such nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb, or health, whether mental or physical, to the woman, would amount to cruelty under Section 498A of IPC.

15. Committing unnatural sex with wife against her wishes and on her resistance, assaulting and treating her with physical cruelty will certainly fall within the definition of cruelty. It is not out of place to mention here that demand of dowry is not *sine qua non* for cruelty.



16. Under these circumstances, this Court is of considered opinion that since there are specific allegations that whenever respondent No. 2 resisted to the unnatural conduct of applicant, then she was assaulted and was treated with physical cruelty, this Court is of considered opinion that offence under Section 498A of IPC is made out.

17. Accordingly, this application is partially allowed. Offence under Section 377 is hereby quashed. However, FIR in relation to offence under Section 498A and 323 of IPC is upheld.

(G.S. Ahluwalia)
Judge

(and)