

Sajith vs State Of Kerala on 3 September, 2024

2024:KER:67663

CrI.Rev.Pet No. 879 of 2024

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

TUESDAY, THE 3RD DAY OF SEPTEMBER 2024 / 12TH BHADRA, 1946

CRL.REV.PET NO. 879 OF 2024

CRIME NO.321/2023 OF PARIPPALLY POLICE STATION, KOLLAM

AGAINST THE ORDER DATED 24.07.2024 IN CRL.M.P.NO.292/2024
SC NO.1236 OF 2023 OF FAST TRACK SPECIAL COURT, KOLLAM
REVISION PETITIONER/PETITIONER/ACCUSED:

SAJITH,
AGED 23 YEARS, S/O. SAJEEV,
SAJITH BHAVAN, ILAMKULAM THAZHATHU,
ILAMKULAM CHERI, KALLUVATHUKKAL VILLAGE,
KOLLAM DISTRICT, PIN-691574

BY ADVS.BIJU .C. ABRAHAM
THOMAS C.ABRAHAM
BASIL MATHEW

RESPONDENT/RESPONDENT/STATE AND COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM, PIN - 682031

SRI.M.P.PRASANTH, PUBLIC PROSECUTOR

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR
ADMISSION ON 23.08.2024, THE COURT ON 03.09.2024 DELIVERED
THE FOLLOWING:

2024:KER:67663

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'C.R.'

ORDER

Dated this the 3rd day of September, 2024 This Criminal Revision Petition has been filed under Sections 438 and 442 of the Bharatiya Nagarik Suraksha Sanhita, 2023 ('BNSS' for short hereinafter) by the petitioner/sole accused in S.C No.1236/2023 on the files of the Fast Track Special Court Court, Kollam, challenging the order in CrI.M.P.No.292/2024 dated 24.07.2024, whereby the application for discharge moved by the petitioner was dismissed by the learned Special Judge.

2. Heard the learned counsel for the petitioner and the learned Public Prosecutor on admission. Perused the order impugned.

3. The prosecution allegation herein is that the accused offered to marry the victim after maintaining a love 2024:KER:67663 affair. Thereafter, the accused took the victim at a rental house at Vavakunnu, Parippally and subjected her to sexual intercourse on 21.03.2023 promising to marry her. Again, she was subjected to sexual intercourse on 05.03.2023, repeating the promise of marriage. On this premise, prosecution alleges commission of offence punishable under Section 376(2)(n) of the Indian Penal Code ('IPC' for short hereinafter).

4. In this matter, FIR was registered vide Crime No.321/2023 of Parippally Police Station. On investigation, final report filed justifying the allegation and now the matter has been pending as S.C.No.1236/2023 on the files of the Fast Track Special Court, Kollam. Before start of trial, the petitioner filed an application under Section 227 of the Code of Criminal Procedure ('Cr.P.C.' for short hereinafter) seeking discharge. The learned Special Judge, after analysing the prosecution materials, found that going by the statements 2024:KER:67663 given by the victim as CW1, the house owner as CW2 and other witnesses cited in the final report filed under Section 173(2) of Cr.P.C., there are materials to go for trial and accordingly, the discharge petition was dismissed.

5. While assailing the order, the learned counsel for the petitioner/accused reiterated the contention before the trial court affirming that no materials prima facie available to find commission of offence punishable under Section 376(2)(n) by the accused and therefore, the order impugned would require reversal.

6. The learned Public Prosecutor fervently opposed the prayer, pointing out prosecution materials, which would prima facie suggest offence under Section 376(2)(n) of IPC, warranting trial of the accused.

7. The materials to be considered at the time of discharge have been stated in Section 227 of Cr.P.C. The same 2024:KER:67663 reads as under;

227. Discharge - If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall

discharge the accused and record his reasons for so doing.

8. Section 250(2) is the pari materia provision in the BNSS corresponding to Section 227 of Cr.P.C. Section 250(1) is a new provision introduced in the BNSS. Sections 250(1) and (2) read as under;

250. Discharge - (1) The accused may prefer an application for discharge within a period of sixty days from the date of commitment of the case under section 232.

(2) If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the 2024:KER:67663 prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

9. It is discernible that in Section 250 of BNSS, Sub-section (1) provides that the accused may prefer an application for discharge within a period of sixty days from the date of commitment of the case under Section 232. Sub-section (1) of Section 250 of BNSS is a new provision which prescribes a period of sixty days to prefer an application by the accused for discharge from the date of committal of the case. In fact, no such time limit fixed in Section 227 of Cr.P.C. But it is noticed that there is lack of clarity or legislative vacuum in the matter of starting point of sixty days in Section 250(1) of BNSS. It is true that in cases where the procedure of committal is necessary, the statutory wordings in Section 250(1) of BNSS regarding the starting point of sixty days, is so 2024:KER:67663 clear. But, now a days many Special Courts, viz., Special Court under the Narcotic Drugs and Psychotropic Substances Act, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Special Court under the Protection of Children from Sexual Offences Act, etc., proceedings are going before the Special Court during the crime stage itself where committal doesn't arise. In relation to such cases, the starting point to count sixty days period to file discharge petition as provided in Section 250(1) of BNSS lacks clarity or the same is a legislative vacuum. In this context, it is relevant to refer Section 330 of BNSS, a pari materia provision to Section 294 of Cr.P.C. Section 330(1) provides that where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused or the advocate for the prosecution or the accused, if any, shall be called upon to admit or deny the 2024:KER:67663 genuineness of each such document soon after supply of such documents and in no case later than thirty days after such supply. First proviso to Section 330(1) stipulates that the Court may, in its discretion, relax the time limit with reasons to be recorded in writing. The notable distinction is that in Section 330(1) of BNSS, the time limit is preceded by the word 'shall' and in Section 250(1) of BNSS, the time limit is preceded by the word 'may'. Thus, it is perceivable that when the legislature uses the word 'shall', the same is mandatory and when the word 'may' is used, the same is discretionary. The First proviso to Section 330(1) of BNSS has been engrafted by the legislature and the time limit of thirty days is preceded by the word 'shall' makes the provision mandatory. Thus proviso to relax time also was incorporated. In Section 250(1) of BNSS, the legislature used the word 'may' which gives discretion to the court to relax the time limit and therefore, no proviso to relax 2024:KER:67663 the time limit was engrafted by the legislature. Therefore, even after expiry of sixty days, a petition for discharge can be considered by the court since the time limit is not mandatory and is only directory. If so, the intent of the legislature to avoid

filing of discharge petition even at a belated stage in the strict sense could not be achieved.

10. But the crucial aspect is lack of clarity or legislative vacuum with regard to the starting point of sixty days to file discharge petition as per Section 250(1) of BNSS, in sessions cases where no committal is possible. In this connection, it is apropos to refer Section 262(2) of BNSS, deals with discharge of an accused in warrant trial cases which is *pari materia* to Section 239 of Cr.P.C. Section 262(1) is a new provision equivalent to Section 250(1) of BNSS. As per Section 262(1) of BNSS, the accused in a warrant trial case may prefer an application for discharge within a period of sixty days from 2024:KER:67663 the date of supply of copies of documents under Section 230. Be it so, in sessions cases where committal doesn't arise, because of the original jurisdiction conferred upon the Special Courts referred herein above, the principle in Section 262(1) of BNSS can be followed till the legislature makes the starting point in such cases with clarity and certainty, by appropriate amendment to Section 250(1) of BNSS. Thus in such cases, the starting point of sixty days can be counted from the date of supply of copies of documents.

11. In so far as Section 250(2) of BNSS is concerned, the wordings in Section 227 Cr.P.C. is copied in Section 250(2) of BNSS. Thus, under Section 227 of Cr.P.C. as well as under Section 250(2) of BNSS, in order to discharge an accused, the Judge after considering the materials, should find that there is no sufficient ground for proceeding against the accused. The necessary corollary is that if the Judge finds 2024:KER:67663 sufficient grounds for proceeding against the accused, discharge cannot be considered and plea of discharge must fail. Thus crucial aspect to be considered when considering discharge under Section 227 of Cr.P.C. as well as under Section 250(2) of BNSS indubitably is nothing but as to whether sufficient ground to proceed against the accused is made out from prosecution records. If sufficient materials are available to go for trial, discharge cannot be considered.

12. In the instant case, the specific case of the prosecution is that the accused herein maintained a love affair with the victim on the promise of marriage and he subjected her to sexual intercourse twice repeating the said promise. Thus, *prima facie*, the prosecution materials would show that the offence under Section 376(2)(n) of IPC is made out warranting trial of the matter with liberty to the prosecution to adduce evidence. Whether the sexual intercourse is the 2024:KER:67663 outcome of consent or the same is vitiated by misconception of fact is matter of evidence and the same can only be addressed after trial. Therefore, dismissal of the plea of discharge raised by the petitioner, as per the order impugned, is perfectly justifiable and accordingly, this revision must fail.

13. In the result, this Criminal Revision Petition stands dismissed.

14. Registry is directed to forward a copy of this order to the Secretary, Department of Home Affairs and Department of Law and Justice to consider the legislative vacuum for application of Section 250(1) of BNSS pointed out herein above in sessions cases where committal is not possible.

Registry also is directed to forward a copy of this order to the Subordinate Criminal Courts for information.

Sd/-

A. BADHARUDEEN JUDGE bpr 2024:KER:67663 APPENDIX OF CRL.REV.PET 879/2024
PETITIONER'S ANNEXURES Annexure 1 FREE COPY OF THE ORDER DATED 24/07/2024
PASSED BY THE COURT OF FAST TRACK SPECIAL COURT, KOLLAM IN CRIMINAL M.P. NO.
292/2024 IN S.C. NO. 1236/2023