

The State (Gnct Of Delhi) vs Khan Mohd. @ Guddu on 16 October, 2024

Author: Prathiba M. Singh

Bench: Prathiba M. Singh, Amit Sharma

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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THE STATE (GNCT OF DELHI)

Through: Mr Ritesh Kumar B
State with Mr Lal
Divya Yadav Adv a
Kumar Adv

versus

KHAN MOHD. @ GUDDU

Through: Mr.Anurag Ahluwal
Verma and Mr. San
Advs. (M- 9810196

CORAM:

JUSTICE PRATHIBA M. SINGH

JUSTICE AMIT SHARMA

ORDER

% 16.10.2024

1. This hearing has been done through hybrid mode.

2. The present leave to appeal has been filed by the State challenging the impugned judgment dated 3rd February, 2020 passed by the Id. ASJ, East, North East & Shahdara Districts, Karkardooma Courts, Delhi, in SC No. 520/2017 arising out of FIR No. 26/2013 registered at P.S. Jafrabad under Sections 328 and 377 of IPC. Vide the said order the Respondent has been acquitted by the Trial Court.

Factual Background:

3. The brief facts leading to the present petition are that a complaint was filed by the wife of the Respondent i.e., Ms. 'H', on 4th February, 2013 at P.S. Jafrabad, North East Delhi, wherein it was alleged that she had been subjected to sexual violence by her husband on the intervening night of 3rd February, The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:23 2013 and 4th February, 2013. It was stated that Ms. H was found unconscious by her brother at the Respondent's home on 4th February, 2013. She was brought to the LNJP Hospital by her father and her medical examination was conducted thereafter.

4. The investigation had continued and the FIR No. 26/2013 was registered at P.S. Jafrabad under Sections 377 and 328 of the IPC on 4th February, 2024. On 25th July, 2013, charges under Sections 377 and 328 were framed. The prosecution had examined 17 witnesses. PW-1/Ms. H herself had given her testimony that she was married to the Respondent on 15th May, 2009 and there were allegations of dowry demand which were made by her. The Trial Court records that there was matrimonial discord even earlier between the parties and there was a complaint filed by Ms. H in the CAW Cell, Nand Nagri on 14th November, 2011. The Trial Court also records that there was an alleged compromise between the couple and just a few days before the incident, Ms. H had resumed residing with her husband. Ms. H is stated to have been administered some medicine on 4th February, 2015 by her husband. It is clear that Ms. H was unconscious after taking the medicine and it was in that condition that her father had taken her to the hospital.

5. The Trial Court, after analysing the entire evidence and the witnesses' testimony which was given during the trial, came to the conclusion that the case would be covered under Exception 2 of Section 375 of the IPC and, therefore, the Respondent deserves to be acquitted of charges under both Section 328 and Section 377 of IPC.

Submissions:

6. Mr. Ritesh Kr. Bahri, learned APP for the State submits that the detailed discussion on Section 377 IPC is contained in the decision of the Supreme The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:23 Court in Navtej Singh Johar and Ors. v. Union of India Thr. Secretary Ministry of Law and Justice, (2018) 10 SCC 1 where the Hon'ble Supreme Court observed as under:-

"422. The Naz judgment has been criticised on the ground that even though it removed private acts between consenting adults from the purview of Section 377, it still retained the section along with its problematic terminology regarding the "order of nature" :

"... even though the acts would not be criminal, they would still be categorized as "unnatural" in the law. This is not an idle terminological issue. As Durkheim noted over a hundred years ago, the law also works as a tool that expresses social relations. Hence, this expression itself is problematic from a dignitarian standpoint, otherwise so eloquently referred to by the judgment."

423. At this point, we look at some of the legislative changes that have taken place in India's criminal law since the enactment of the Penal Code. The Criminal Law (Amendment) Act, 2013 imported certain understandings of the concept of sexual intercourse into its expansive definition of "rape" in Section 375 of the Penal Code, which now goes beyond penile-vaginal penetrative intercourse. It has been argued that if "sexual intercourse" now includes many acts which were covered under Section 377, those acts are clearly not "against the order of nature" anymore. They are, in fact, part of the changed meaning of sexual intercourse itself. This means that much of

Section 377 has not only been rendered redundant but that the very word "unnatural" cannot have the meaning that was attributed to it before the 2013 Amendment. Section 375 defines the expression "rape" in an expansive sense, to include any one of several acts committed by a man in relation to a woman. The offence of rape is established. The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:24 if those acts are committed against her will or without the free consent of the woman. Section 375 is a clear indicator that in a heterosexual context, certain physical acts between a man and woman are excluded from the operation of penal law if they are consenting adults. Many of these acts which would have been within the purview of Section 377, stand excluded from criminal liability when they take place in the course of consensual heterosexual contact. Parliament has ruled against them being regarded against the "order of nature", in the context of Section 375. Yet those acts continue to be subject to criminal liability, if two adult men or women were to engage in consensual sexual contact. This is a violation of Article 14."

7. It is his submission that though the charge under Section 377 of the IPC may be covered by Exception 2 to Section 375 of IPC, insofar as Section 328 of the IPC is concerned, leave to appeal ought to be granted and the matter deserves examination. The relevant provisions are extracted herein under:

"328. Causing hurt by means of poison, etc., with intent to commit an offence.-- Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

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

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:24 if those acts are committed against her will or without the free consent of the woman. Section 375 is a clear indicator that in a heterosexual context, certain physical acts between a man and woman are excluded from the operation of penal law if they are consenting adults. Many of these acts which would have been within the purview of Section 377, stand excluded from criminal liability when they take place in the course of consensual heterosexual contact. Parliament has ruled against them being regarded against the "order of nature", in the context of Section 375. Yet those acts continue to be subject to criminal liability, if two adult men or women were to engage in consensual sexual contact. This is a violation of Article 14."

(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 The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:24 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.

377. Unnatural offences. --Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation. --Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

8. On the last date of hearing, i.e., 4th October, 2018, after hearing the ld. Counsels for the parties, the Court had noted that the short issue arising in the present leave petition relates to interpretation of Section 377 in light of Exception 2 of Section 375 of IPC. The Court had also requested the ld. Counsels to point out as to what would be the position in this regard under the prevalent code i.e., Bharatiya Nyaya Sanhita, 2023 ('BNS'). The relevant portion of the order dated 4th October, 2024 is reproduced hereinunder:

"2. The short issue that arises in this case is whether under Section 377 of the IPC the word 'whoever' would also include the husband, especially in the light of exception 2 under Section 375 of the IPC.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:24

3. Ld. Counsel for the parties may examine this issue and place on record the judgments which they wish to rely upon by the next date of hearing.

4. The prevalent code, i.e., the Bhartiya Nyaya Sanhita, 2023 (in short 'BNS') also be examined in this regard."

9. Today, Mr. Bahri has submitted that insofar as Section 63 of the BNS is concerned, which corresponds to Section 375 of IPC, the Exception 2 to Section 375 IPC continues to exist, except that there is a change in the age of the wife which has been increased to 18 years instead of 15 years under IPC. It is also submitted that no corresponding provision to Section 377 of IPC exists under the BNS. The relevant portion of Section 63 of BNS is reproduced herein under:

"63. Rape.-- A man is said to commit "rape" if he-- [...] Exception 2.-- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape."

10. Mr. Anurag Ahluwalia, ld. Counsel for the Respondent, submits that in the present case the medical evidence shows that there was no violence committed against Ms. H and the entire attempt was to implicate the Respondent in a criminal case.

Analysis:

11. The present case is one of allegations of unnatural sex by the wife against the husband. The incident is alleged to have taken place in the intervening night of 3rd and 4th February, 2013. Section 375 of IPC was also The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:24 amended by the Criminal Law (Amendment) Act, 2013 that (co-incidentally!) came into effect on 3rd February, 2013. As per the amended Section 375 of IPC, the act of penetration/ insertion of any object by a man into a woman's vagina, mouth, urethra or

anus was also covered as an offence in clauses a, b, c & d of the said section. Some of these offences would also be termed as unnatural offences under Section 377 of IPC. Section 375 of IPC provides for Exception 2, which precludes sexual intercourse or sexual acts by a man with his own wife, not being under fifteen years of age, from the offence of rape under Section 375.

12. It is noted that the age limit of 15 years in Exception 2 under Section 375 of IPC was increased by the Supreme Court in *Independent Thought v. Union of India*, (2017) 10 SCC 800, wherein it was directed that the age for consent cannot be different from the age when the girl attains majority, especially in view of the provisions of POCSO Act. The Supreme Court directed 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.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:24. 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."

13. As can be seen from the above, the age limit under Exception 2 to Section 375 was, therefore, directed to be read as 18 years, which has now been implemented in the BNS under Section 63. However, it is also observed that there is no equivalent provision to Section 377 under the BNS, which was considered by the Co-ordinate Bench of this Court in *Gantavya Gulati v. Union of India*, 2024 SCC OnLine Del 5990, wherein the Court observed and directed as under:

"1. Present public interest petition has been filed seeking issuance of directions to the respondent to restore legal protection against non-consensual sexual acts, equivalent to those provided under the now- repealed Section 377 of the Penal Code, 1860 ("IPC") to ensure the safety and dignity of individuals, particularly those from the LGBTQIA+ community, who are at risk of non-consensual sexual acts in the absence of such protection.

2. Petitioner, who appears in person, states that Section 377 IPC, prior to its repeal, criminalised non- consensual sexual acts with any man, woman or animal, thus providing a critical legal recourse for victims of such acts, regardless of their gender or sexual orientation. He states that after repeal of Section 377 IPC, the newly enacted Bharatiya Nyaya Sanhita, 2023 ("BNS") excludes any provision The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:24 equivalent to Section 377 of the IPC for providing protection against non-consensual sexual acts. He states that such legislative gap poses a significant threat to the safety and dignity of individuals, particularly those from the LGBTQIA+ community, who are now left without adequate legal protection against such acts.

3. He submits that this omission undermines the progressive jurisprudence established by the Supreme Court in Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, which decriminalised consensual same-sex relationships and emphasised the protection of the dignity and autonomy of LGBTQIA+ individuals.

4. Mr. Anurag Ahluwalia, learned CGSC for Union of India/respondent nos. 1 and 2 prays that the present writ petition be directed to be treated as a representation to the respondent as the Government is in the process of receiving observations/inputs on the new Criminal laws from various stakeholders. He states that the Government will take a holistic view on all such observations/inputs received. He has also handed over a copy of letter dated 27th August, 2024 written by him to the Joint Secretary to the Government of India. The relevant portion of the said letter reads as under:

"I am directed to refer to the above mentioned subject wherein the petitioner has requested the Hon'ble Court to direct the UOI to restore legal protections against non-consensual sexual acts, equivalent to those provided under the now-repealed Section 377 of the Penal Code, 1860 to ensure the safety and dignity of individuals, particularly those from the LGBTQ+ community, who are at risk of non-

consensual sexual acts in the absence of such protections.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:24

2. In regard to the instant Writ Petition, it is stated that the new Criminal laws i.e., the Bharatiya Nagrik Suraksha Sanhita, 2023, the Bharatiya Nyaya Sanhita, 2023 and the Bharatiya Sakshya Adhinyam, 2023 have come into force w.e.f. 1.7.2024.

The Government is receiving observations/inputs on these new Criminal laws from various stakeholders.

Government will take a holistic view on all such observations/inputs received....."

5. Keeping in view the aforesaid, this Court disposes of the present writ petition and the application with a direction to the Union of India to treat the present writ petition as a representation and decide the same as expeditiously as possible. In the event, there is inordinate delay in considering the petitioner's representation, the petitioner shall be at liberty to seek revival of the present writ petition."

14. The Department-Related Parliamentary Standing Committee on Home Affairs vide its '246th Report on the Bharatiya Nyaya Sanhita, 2023' (November, 2023) has also observed the absence of a corresponding provision to Section 377 of IPC under the BNS. The said Standing Committee after noting the comments and objections of several stakeholders on the said absence, has recommended the following:

"Observations/Recommendations 1.16 The Committee observes that in Navtej Singh Johar v. Union of India (2018) case, five-judge bench of the Supreme Court unanimously held that section 377 of IPC is in violation of Articles 14, 15, 19, and 21 of the Constitution of India. Provisions of section 377, The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:24 however, remain applicable in cases of non- consensual carnal intercourse with adults, all acts of carnal intercourse with minors, and acts of bestiality. However, now, in the Bharatiya Byaya Sanhita, 2023, no provision for non-consensual sexual offence against male, female, transgender and for bestiality has been made.

1.17 The Committee feels that to align with the objectives stated in the BNS's Statement of Objects and Reasons, which inter-alia highlights the move towards gender-neutral offences, it is mandatory to reintroduce and retain the section 377 of the IPC. The Committee therefore recommends the Governement to include section 377 of IPC, in the proposed law."

15. In Navtej Singh Johar (supra) having analysed the constitutional validity of Section 377 of IPC vis-à-vis consensual sex between homosexual couples, or heterosexual couples that may be categorised as unnatural offence, the majority opinion of the Supreme Court concluded as under:

"Q. Conclusions

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

XXXX 268.11. A cursory reading of both Sections 375 and 377 IPC reveals that although the former section gives due recognition to the absence of "wilful and informed consent" for an act to be termed as rape, per contra, Section 377 does not contain any such qualification embodying in itself the absence of "wilful and informed consent" to criminalise carnal intercourse which consequently results in

criminalising even voluntary carnal intercourse between homosexuals, heterosexuals, bisexuals and transgenders. Section 375 IPC, after the coming into force of the Criminal Law The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above.

The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:24 (Amendment) Act, 2013, has not used the words "subject to any other provision of the IPC". This indicates that Section 375 IPC is not subject to Section 377 IPC.

268.12. The expression "against the order of nature"

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

xxx xxx xxx 268.14. An examination of Section 377 IPC on the anvil of Article 14 of the Constitution reveals that the classification adopted under the said section has no reasonable nexus with its object as other penal provisions such as Section 375 IPC and the Pocso Act already penalise non-consensual carnal intercourse. Per contra, Section 377 IPC in its present form has resulted in an unwanted collateral effect whereby even "consensual sexual acts", which are neither harmful to children nor women, by the LGBTs have been woefully targeted thereby resulting in discrimination and unequal treatment to the LGBT community and is, thus, violative of Article 14 of the Constitution.

268.15. Section 377 IPC, so far as it criminalises even consensual sexual acts between competent adults, fails to make a distinction between non-consensual and consensual sexual acts of competent adults in private space which are neither harmful nor contagious to the society. Section 377 IPC subjects the LGBT community to societal pariah and dereliction and is, therefore, manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBT community by The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:24 subjecting them to discrimination and unequal treatment. Therefore, in view of the law laid down in Shayara Bano [Shayara Bano v. Union of India, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277] , Section 377 IPC is liable to be partially struck down for being violative of Article 14 of the Constitution.

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

Consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality.

Therefore, Section 377 IPC in its present form violates Article 19(1)(a) of the Constitution.

268.17. Ergo, Section 377 IPC, so far as it penalises any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of Section 377 is constitutional and it shall remain a penal offence under Section 377 IPC. Any act of the description covered under Section 377 IPC done between two individuals without the consent of any one of them would invite penal liability under Section 377 IPC."

(emphasis supplied)

16. The amended Section 375 and Section 377 of IPC have been the subject matter of various decisions of the High Courts. In Nimeshbhai Bharatbhai The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25 Desai v. State of Gujarat, 2018 SCC OnLine Guj 732,1 the dispute was between husband and wife. The wife alleged sexual perversion by the husband including allegations of forced oral sex. In the context of this case, issues relating to marital rape were also considered. The amended Section 375 was also considered and the Court came to the conclusion as under:

"161. The husband cannot be prosecuted for the offence of rape punishable under section 376 of the IPC at the instance of his wife as the marital rape is not covered under section 375 of the IPC. The husband cannot be prosecuted for the offence of rape at the instance of his wife in view of Exception-II in section 375 of the IPC, which provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under 18 years of age, is not rape.

162. A wife can initiate proceedings against her husband for unnatural sex under section 377 of the IPC. Section 377 IPC does not criminalize a particular class of people or identity or orientation. It merely identifies certain acts, which if committed, would constitute an offence. Consent is not a determining criterion in the case of unnatural offences and rather any offence which is against the order of nature and can be described as carnal penetration would constitute an offence under section 377 of the IPC. "

17. The Id. Single Judge of Gujarat High Court quashed the FIR against the in-laws and also quashed the FIR qua allegations under Section 376 & 377 of IPC. However, the Court directed that the investigation ought to continue The observations in Nimeshbhai qua charges under Section 377 of IPC against the husband have been relied upon with acceptance by the High Court of Judicature, at Allahabad, in Mohammad Mustafa v. State of Uttar Pradesh & Anr., (2019:AHC:192816).

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25 under Section 354 of IPC relating to the assault or criminal force on a woman with intention to outrage her modesty.

18. In the case of *Hrishikesh Sahoo v. State of Karnataka*, 2022 SCC OnLine Kar 371, the allegations by the wife were of brutal sexual acts by the husband against her including unnatural anal and oral sex, including in front of her daughter. In this case, the Id. Single Judge of the Karnataka High Court refused to quash the FIR against the husband under Section 376 IPC. Further, considering the facts of the case the Id. Single Judge directed framing of charges under Section 377 of IPC. The observations of the Id. Single Judge are as under:

"59. The finding that when the allegations made against the husband attracts Section 376 of the IPC and a charge is also framed in respect of the said offences, question of considering the request to frame a charge under Section 377 of the IPC does not arise, is erroneous. The allegations clearly make out an offence punishable under Section 377 of the Code which deals with unnatural sex. Therefore, the order under challenge is to be set aside allowing the application filed by the prosecution under Section 216 of the Cr.P.C. with a direction to the trial Court to frame the charge for the offence punishable under Section 377 of the IPC as well. The point that has arisen for consideration is accordingly answered.

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70. The order impugned rejecting the discharge application of the petitioner is not even called in question in the case at hand. What is called in question is quashing of entire proceedings in Special C.C. No. 41 of 2017 under the Act. Therefore, there is no warrant to interfere in the case at hand.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25 TO SUM UP:

- Charge framed against the husband for alleged offence punishable under Section 376 of the IPC for alleged rape of his wife, in the peculiar facts of this case, does not warrant any interference. It is a matter of trial.
- Other offences alleged against the petitioner, the ones punishable under Sections 498A, 354, 506 of the IPC are clearly brought out in the complaint and in the charge sheet. This is again a matter of trial.
- The prosecution, notwithstanding presumption against the accused under Sections 29 and 30 of the POCSO Act, has to prove foundational facts beyond all reasonable doubt.

- The charge framed by the Sessions Court is to be altered by inclusion of offence punishable under Section 377 of the IPC owing to peculiar facts of this case.
- The designated Court hearing cases relating to offences under the POCSO Act can try the offences under the IPC as well, in the facts of the case.
- Allegations against the petitioner-husband for offences punishable under the POCSO Act for alleged sexual acts on the daughter cannot be interfered with. It is yet again a matter of trial."

19. The aforesaid decision has been challenged before the Supreme Court in *Hrishikesh Sahoo v. The State of Karnataka & Ors.*, SLP (Crl.) 4063- 4064/2022, and the same is pending before the Court. In the said appeal, along with connected matters, the Supreme Court is considering inter alia issues relating to marital rape including the validity of Exception 2 under Section The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25 375 of IPC.

20. In *Dilip Pandey and Ors. v. State of Chhattisgarh*, 2021 SCC OnLine Chh 3964, the High Court of Chhattisgarh at Bilaspur was again considering a case where the wife made allegations of unnatural sexual relations being forced by the husband. The Id. Single Judge discharged the husband from the charge under Section 376 of IPC considering Exception 2 under Section 375 of IPC. However, the Court did not interfere with the charges under Section 377 of IPC. The relevant portion of the order is set out below:

"12. In the instant case, the complainant has reported that the applicant No.1/husband has many times, without her consent, made unnatural physical relation with her and even he inserted his finger and radish also in her private part. Although, except insertion of finger and radish in her private part, what other unnatural physical relation he made with the complainant, she has not stated, which is a matter of evidence, but, only on that ground, charge framed under Section 377 of the I.P.C. cannot be said to be erroneous at the stage of framing of charge, especially, in terms of Section 377 of the I.P.C. where dominant intention of the offender is to derive unnatural sexual satisfaction, repeatedly insert any object in the sex organ of the victim and consequently derives sexual pleasure, such act would constitute as a carnal intercourse against the order of nature and such act would attract the ingredient of offence under Section 377 of the I.P.C. In view of above, judgment of Nimeshbhai Bharatbhai Desai (supra) is of no help to the applicant No. 1/husband with regard to charge under Section 377, of the I.P.C.

13. Therefore, I do not find any infirmity or illegality committed by learned trial Court in framing the charge under Section 377 of the I.P.C. against the applicant No. 1/husband."

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25

21. The High Court of Madhya Pradesh in Umang Singhar v. State of Madhya Pradesh, 2023 SCC OnLine MP 3221, was also dealing with a case wherein the wife had raised allegations of sexual abuse, including unnatural sex, against her husband and accordingly the charges framed under Sections 375 and 377 of IPC were challenged before the Court in the said case. The question framed by the Madhya Pradesh High Court is as under:

"16. Juxtaposing the rival submissions, the documentary material available on record and the law relatable to the issue in hand, the core question which is drifted towards the surface is "Whether the offence of Section 377 IPC between husband and wife can be weighed parallel to the offence of rape as defined under section 375 IPC".

22. The MP High Court came to the conclusion that any offence alleged under Section 377 of IPC would not be an offence if covered by Exception 2 under Section 375 of IPC. Further, the Id. Single Judge has also interpreted the decision in Navtej Singh Johar (supra) to analyse the applicability of charges under Section 377 of IPC against the husband. The FIR against the husband was then quashed by the Id. Single Judge. The relevant observations of the Id. Single Judge are reproduced herein under:

"18. To fathom the depth of submissions made by the learned counsel for the petitioner, it is imperative to go-through the definition of 'rape', in that, for committing rape, as per Section 375(a), an offender is a 'man' who uses the part of the body - (a) Penis, as per Section 375(b) body-parts other than penis and 375(c) any other object. Simultaneously, the said definition describes - at the receiving end the body parts are (a) Vagina, (b) Urethra, (c) Anus, (d) Mouth and (e) other body parts. Considering the offence of Section 377 i.e. unnatural, The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25 although it is not well-equipped and offender is not defined therein but body parts are well defined, which are also included in Section 375 i.e. carnal intercourse against the order of nature. At this juncture, it is indispensable to see what is unnatural. The Supreme Court in a petition challenging the constitutionality of Section 377 IPC criminalizes 'carnal intercourse against the order of nature' which among other things has been interpreted to include oral and anal sex. Obviously, I find that Section 377 of IPC is not well- equipped. Unnatural offence has also not been defined anywhere. The five-judge bench of the Supreme Court in re Navtej Singh Johar (supra) testing the constitutionality of said provision although held that some parts of Section 377 are unconstitutional and finally held if unnatural offence is done with consent then offence of Section 377 IPC is not made out. The view of the Supreme Court if considered in the light of amended definition of Section 375 and the relationship for which exception provided for not taking consent i.e. between husband & wife and not making offence of Section 376, the definition of rape as

provided under Section 375 includes penetration of penis in the parts of the body i.e. vagina, urethra or anus of a woman, even though, the consent is not required then as to how between husband and wife any unnatural offence is made out. Apparently, there is repugnancy in these two situations in the light of definition of Section 375 and unnatural offence of Section 377. It is a settled principle of law that if the provisions of latter enactment are so inconsistent or repugnant to the provisions of an earlier one that the two cannot stand together the earlier is abrogated by the latter. The Supreme Court in *re Dharangadhra Chemical Works (supra)* has observed as under:--

"10. It is true that repeal by implication is not ordinarily favoured by the courts but the authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25 principle on which the rule of implied repeal rests has been stated in *Maxwell on Interpretation of Statutes (Twelfth Edition)* at p.193 thus:

"If, however, the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together the earlier is abrogated by the later (*vide Kutner v. Phillips*)."

In *Zaverbhai Amaldas v. State of Bombay [AIR 1954 SC 752]* this Court has approved the above principle in the context of two pieces of legislation, namely, The Essential Supplies (Temporary Powers) Act, 1946 as amended by Act LTI of 1950 (a Central Act) and Bombay Act XXXVI of 1947 the provisions whereof in the context of enhanced punishment were repugnant to each other. The Court held that the question of punishment for contravention of orders under the Essential Supplies (Temporary Powers) Act both under the Bombay Act and the Central Act constituted a single subject matter and in view of Article 254(1) of the Constitution Act LTI of 1950 (Central enactment) must prevail."

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21. At this point, if the amended definition of Section 375 is seen, it is clear that two things are common in the offence of Section 375 and Section 377 firstly the relationship between whom offence is committed i.e. husband and wife and secondly consent between the offender and victim. As per the amended definition, if offender and victim are husband and wife then consent is immaterial and no offence under Section 375 is made out and as such there is no punishment under Section 376 of IPC. For offence of 377, as has been laid The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25 down by the Supreme Court in *re Navtej Singh Johar (supra)*, if consent is there offence of Section 377 is not made out. At the same time, as per the definition of Section 375, the offender is classified as a 'man'. here in the present case is a 'husband' and victim is a 'woman' and here she is a 'wife' and parts of the body which are used for carnal intercourse are also common. The offence between husband and wife is not made out under Section

375 as per the repeal made by way of amendment and there is repugnancy in the situation when everything is repealed under Section 375 then how offence under Section 377 would be attracted if it is committed between husband and wife.

22. In other way, the unnatural offence has not been defined anywhere, but as has been considered by the Supreme Court in the case of Navtej Singh Johar (supra) that any intercourse, not for the purpose of procreation, is unnatural. But respectfully I find that when same act as per the definition of Section 375 is not an offence, then how it can be treated to be an offence under Section 377 IPC. In my opinion, the relationship between the husband and wife cannot be confined to their sexual relationship only for the purpose of procreation, but if anything is done between them apart from the deemed natural sexual intercourse should not be defined as 'unnatural'. Normally, sexual relationship between the husband and wife is the key to a happy connubial life and that cannot be restricted to the extent of sheer procreation. If anything raises their longing towards each other giving them pleasure and ascends their pleasure then it is nothing uncustomary and it can also not be considered to be unnatural that too when Section 375 IPC includes all possible parts of penetration of penis by a husband to his wife."

23. In Sanjeev Gupta v. State of U.P. and Anr., 2023 SCC OnLine All 2644, the ld. Single Judge of the Allahabad High Court has followed the The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25 decision in Umang Singhar (supra). The Court took the view that there was no medical evidence of the prosecutrix to support the charges under Section 377 of IPC. The ld. Single Judge also considered the fact that the allegation of unnatural sex was not taken initially in FIR, but only thereafter in the divorce petition and under the Domestic Violence Act. The ld. Single Judge has observed as under:

"34. Thus, on perusal of aforesaid judgment also it appears that protection of a person from marital rape still continues in the case where wife is of 18 years of age or more than that. Ingredients of unnatural sex, comprised under Section 377 IPC are included in Section 375 (a) IPC as observed by the High Court of Madhya Pradesh in above case. In proposed Bhartiya Nyay Sanhita which is likely to replace I.P.C., no provision like Section 377 IPC is included therein. The charge of committing matrimonial cruelty against the revisionist is proved in this case and same is corroborated by findings of family court while decreeing the divorce petition and this court in appeal while affirming decree of divorce against the revisionist.

35. On the basis of foregoing discussion, totality of facts and circumstances of the case, evidence on record and judgment of Madhya Pradesh High Court, revisionist is liable to be acquitted of charge under section 377 IPC. However, his conviction and sentence for charge under section 498-A, 323 IPC as recorded by the courts below is affirmed. Consequently, his conviction and sentence as recorded by the courts below for charge under section 377 IPC is set aside. He is acquitted of charge under section 377 IPC."

24. Similarly, the Madhya Pradesh High Court in *Manish Sahu v. State of Madhya Pradesh*, 2024 SCC OnLine MP 2603, also relies upon Umang The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25 Singhar (supra) where it is held that sexual intercourse or sexual acts by a man with his own wife, not below the age of 15 years, will not be rape. The observations of the Court are reproduced herein under:

"17. Thus the consent of both the parties is necessary for taking the act out of the purview of Section 377 of IPC. However, this Court after considering the amended definition of "rape" as defined under Section 375 of IPC has already come to a conclusion that if a wife is residing with her husband during the subsistence of a valid marriage, then any sexual intercourse or sexual act by a man with his own wife not below the age of fifteen years will not be rape. Therefore, in view of the amended definition of "rape"

under Section 375 of IPC by which the insertion of penis in the anus of a woman has also been included in the definition of "rape" and any sexual intercourse or sexual act by the husband with her wife not below the age of fifteen years is not a rape, then under these circumstances, absence of consent of wife for unnatural act loses its importance. Marital rape has not been recognized so far.

18. Under these circumstances, this Court is of considered opinion that the allegations made in the FIR would not make out an offence under Section 377 of IPC. My view is fortified by a judgment passed by Co- ordinate Bench of this Court in the case of *Umang Singhar v. State of Madhya Pradesh*, Through Station House Officer, 2023 SCC Online MP 3221."

25. Further, in *Dr. Kirti Bhushan Mishra v. State of Uttarakhand and Anr.*, 2024 SCC OnLine Utt 2023, the Id. Single Judge of Uttarakhand High Court while dealing with a challenge to charges framed under Section 377 of the IPC pursuant to allegations of physical and sexual abuse, including unnatural sex, made by the wife against her husband. There were also The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25 allegations of offences under the POCSO Act. The Id. Single Judge while framing the issue for consideration observed as under:

"7. The issue involved in the instant case has a wide ramification. It touches upon the aspect of marital rape as well as effect of amendment incorporated in Section 375 IPC on Section 377 IPC. The question that requires answer is, as to whether a husband can be prosecuted under Section 377 for anal sex with his wife?"

26. The Id. Single Judge observed that there were divergent views on the said issue taken by various High Courts, and having considered the decisions as discussed hereinabove, the Court observed as under:

"29. It is true that anal sex which may otherwise be an offence under Section 377 IPC is also an act covered under Section 375 IPC. The question that fall for consideration

is, as to whether merely because the act falls under Section 375 IPC, to that extent Section 377 IPC would become redundant. This is especially when the persons involved are husband and wife.

30. In view of the principle of law, as laid down in the case of Navtej Singh Johar (Supra), if a man and a woman indulged in anal sex with their free consent in private, no offence under Section 377 IPC is made out. What is being argued is that in case of husband and wife, who are major, the consent is informed and explicit. No further consent is required. Therefore, no offence under Section 377 IPC is made out, such act is exempted under Exception 2 to Section 375 IPC. The principle of interpretation requires that statute should be read in a manner that all the provisions may be given life.

xxx xxx xxx The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25

33. From the perusal of above observation made in the case of Navtej Singh Johar (Supra), it is clear that it was considered, in that case by the Hon'ble Supreme Court that what is not an offence under Section 375 IPC cannot be an offence under Section 377 IPC (two consenting adults for acts in private, as specified under Section 375 IPC). Exception 2 to Section 375 IPC cannot be taken out from it while reading Section 377 IPC in relation to husband and wife. If an act between husband and wife is not punishable due to operation of Exception 2 to Section 375 IPC, the same act may not be an offence under Section 377 IPC."

27. The Id. Single Judge of Uttarakhand High Court, in light of the aforesaid observations, also concluded that the act of anal sex now falls within Section 375 of IPC, and in light of the Exception 2 under the said provision, the husband cannot be charged under Section 377 of IPC. Accordingly, the Court set aside the charge under Section 377 against the husband, while not interfering with the charges under the POCSO Act.

28. Therefore, it is clear from the aforesaid discussion that post the amendment to Section 375 of IPC in 2013 there is divergence of opinion between various High Courts as to whether certain sexual acts such as anal sex between a man and a woman, that earlier fell within the scope of unnatural offences under Section 377 of IPC, would now be covered within the ambit of offences under Section 375 of IPC and would thus attract Exception 2.

29. Coming to the facts of the present case, the Court has considered the medical evidence on record especially Ex.PW-8/A, which is the medical examination report dated 4th February, 2013 regarding the alleged sexual The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25 assault of Ms. H, prepared by the concerned doctor at LNJP Hospital. As per the said report, the only injury sustained by Ms. H is as under:-

"11. Examination for injuries (Look for Bruises, Systemic Physical torture injuries, Nail Abrasions, Teeth bite marks, Cuts, lacerations, head-injury, any other injury) Injury Site Size Colour Swelling Simple/Grievous"

Bite
marks

Cheeks & 1X1 cm Reddish
Neck all small
old
healed
type

30. The Court has also perused Ex.PW3/A i.e., the MLC of Ms. H dated 4th February, 2013 which does not disclose any other injuries on Ms. H. The only injuries appear to be old and healed. The medical examination reports therefore does not support the allegations made against the Respondent.

31. It is not in dispute that Ms. H is the wife of the Respondent. It is a matter of record, that Ms. 'H' had filed a complaint case bearing CC No. 1070/1/13 dated 30th November, 2012 before the Id. ACMM (Ex.PW1/DA) under Section 376/377/506 of the IPC against Respondent-husband. In the said complaint it was alleged by her that the Respondent-husband in a proceeding under Section 125 of Cr.P.C. had claimed that he had divorced Ms. H on 06th October, 2011 but continued to have physical relationship with Ms. H as husband and wife on various occasions including that of unnatural sex. It was also admitted by Ms. H in her cross-examination in the present case that she did not disclose the said fact to the police during investigation in the present FIR. In effect therefore Ms. H, did not pursue the previous complaint. There The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25 was also matrimonial discord between the parties. There is also no medical evidence to support the allegation that there was any poison in the body of Ms. H. The relevant extract from the impugned judgment is set out below:-

"50. Even if I take testimony of PW1/prosecutrix, PW4, PW10 and PW II as gospel truth it is evident from the testimony of PW3 that she does not know what was the medicine sent by the accused. But merely because she lost consciousness after taking medicine by accused it cannot be presume that it contain poison. In the MLC of the prosecutrix EXPW3/A except alleged history of drug found nothing is mention that prosecutrix was having any symptom of poisoning. IO has not examined the Doctor who told to PW 4 that case of her daughter is of suspected poisoning. No Doctor has been examined by the prosecution to prove that prosecutrix become unconscious due to poisoning. No treatment record of the prosecutrix has been produce to prove that Doctor has opined that there was poison in the body of prosecutrix due to which she lost her consciousness and she was given treatment for poisoning. There is no

medical record that any poison was found either in the blood or stomach or the prosecutrix. Hence merely because prosecutrix lost consciousness after taking medicine allegedly sent by the accused it cannot be presume that said medicine contain poison.

51. In view of the above said discussion I held that prosecution has miserably failed to prove that accused had sent medicine to the prosecutrix which contain any poison. Accordingly, accused Khan Mohd.@Guddu is acquitted of the charge of having committed the offences punishable under Sections of 377/328 IPC."

32. Thus, it is also clear that the allegation of poisoning Ms. H made against the Respondent is not supported by medical reports placed on record by the The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25 prosecution. Accordingly, no case is made out under Section 328 of IPC against the Respondent.

Conclusion:

33. Under these circumstances, this Court is of the opinion that the impugned judgement merits no interference and that this is not a fit case to grant leave to appeal.

34. In view of the above, the leave petition is disposed of.

35. Pending applications, if any, are also disposed of.

PRATHIBA M. SINGH, J.

AMIT SHARMA, J.

OCTOBER 16, 2024/nk/sc/ms (corrected & released on 23rd October, 2024) The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 17/11/2024 at 14:58:25