Reserved on: 27.06.2024
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HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Misc. Application No. 2697 of 2019

[redacted] .....Petitioner

Vs.

State of Uttarakhand and another ..... Respondents

Present : Mr. Aditya Singh, Advocate for the petitioner.
Mr. Saurabh Pandey, Advocate for the State/respondent no.1.
Mr. Navneet Kaushik, Advocate for respondent no.2.

JUDGMENT

Per: Hon'ble Ravindra Maithani, J.

The challenge in this petition is made to the charge-sheet and summoning order dated 08.04.2019, passed by the court of FTC/Additional Sessions Judge/Special Judge (POCSO) Haridwar, in Special Sessions Trial No.48 of 2019, State Vs. Dr. [redacted] ("the case"), under Section 377 IPC and Section 11/12 of the Protection Of Children From Sexual Offences Act, 2012 ("the POCSO Act"), which is based on FIR No.97 of 2017, under Section 377 IPC and Sections 11/12 of the POCSO Act, Police Station Kotwali Roorkee, District Haridwar.

2. Heard learned counsel for the parties and perused the record.

3. The case is based on an FIR, lodged by the respondent no.2 against the petitioner. According to the prosecution case, the petitioner and the respondent no.2 were married on 08.12.2010. But, after marriage, the petitioner continued committing carnal intercourse against the order of nature with the respondent no.2, due to which, she sustained serious internal injuries with bleedings. But, the petitioner continued anal sex with her. The respondent no.2 was to be admitted in one Harihar Hospital Balangir. Even thereafter, the petitioner did not stop doing it and continued anal sex with the respondent no.2. When the respondent no.2 received serious internal injuries, she was admitted in FORTIS Jindal Hospital, Raigarh, Chhattisgarh. Surgery was suggested, but it was not conducted by the petitioner and he continued with such an act. In fact, it is the case of the prosecution that after one month of marriage, the petitioner left for Germany, where he was working at the relevant time and three months thereafter, the respondent no.2 also joined his company. But, due to harassment, forcible anal sex, physical assault, etc., the respondent no.2 came back to

India in the month of October, 2013 and stayed in a house built by the petitioner in Chhattisgarh. In July, 2015, the petitioner was appointed in IIT Roorkee, District Haridwar.

4. It is the further case of the prosecution that in Germany, the respondent no.2 was much harassed by the petitioner. He had relations with many women. He would show bad scenes on his laptop to his child of 8 to 10 months, so that the respondent no.2 could succumb to his demands. The respondent no.2 suffered physically. She was beaten up. In Roorkee also, the harassment continued, sexual abuse became in abundance. The police was also reported. Quite often the petitioner would leave the house. He would behave in a very weird manner. He would throw things in the house. He would urinate in front of the room. He would show his private part to the young child. He continued anal sex with the respondent no.2, due to which, she again sustained injuries. She was shown to the doctor also at Roorkee. The FIR is quite in detail. It is this FIR, in which, after investigation charge-sheet has been submitted against the petitioner. On 08.04.2019, cognizance has been taken, which is impugned in the instant petition.

5. Learned counsel for the petitioner would submit that no offence, as such is made out against the petitioner; the cognizance order is bad in the eyes of law and deserves to be set aside. He would raise the following points in his submissions:-

a) Rape has been defined under Section 375 IPC. The amended definition of rape which came into force w.e.f. 03.02.2013 includes the act, which is otherwise offence under Section 377 IPC. But, being a husband the petitioner cannot be made liable for it in view of Exception 2 to Section 375 IPC.

b) In the case of Navtej Singh Johar and others vs. Union of India, (2018)10 SCC 1, the Hon'ble Supreme Court has held that under Section 377 IPC consensual acts of adults in private is not an offence; there is nothing like unnatural sex or intercourse against the order of nature. It is argued that in case of married couple the consent of sex is informed and it is not required on each occasion. Therefore, offence under Section 377 IPC is not made out against the petitioner, who happens to be a husband.

c) Prior to amendment came into effect under Section 375 IPC i.e. prior to 03.02.2013, no offences, as alleged took place within the jurisdiction of District Haridwar. Therefore, the court at Haridwar cannot take cognizance for want of jurisdiction.

d) In order to attract the provisions of 11 of the POCSO Act, there should be a sexual intent which is lacking in the instant case.

e) Whatever act has been attributed so as to attract the provisions of Section 11 to the POCSO Act, according to the learned counsel for the respondent no.2, they were committed with intent to pressurize the respondent no.2 to follow the commands of the petitioner. It is argued that it means the intention was not sexual towards the child of the parties. It is argued, in such situation, offence under Section 11 of the POCSO Act is not even made out.

f) In support of his contention, learned counsel for the petitioner has referred to various paragraphs of the judgment in the case of Navtej Singh Johar (*Supra*). They would be referred to at a later stage.

6. Learned counsel appearing for the respondent no.2 would submit that *prima facie* offence is made out and no interference is warranted in the instant petition. He would raise the following points in his submissions:-

a) There cannot be informed consent at the time of marriage for unnatural sex; no wife would consent for it.

b) The amendment in Section 375 IPC was incorporated in the year 2013, so as to alleviate

the agony of victim of sexual assault post Nirbhaya's case. These amendments were made keeping in view the plight of a victim.

c) The amendment in Section 375 IPC cannot make Section 377 IPC redundant.

d) Section 377 IPC is an independent Section, which provide for punishment for a distinct offence. It does not make any exception in favour of a husband. Therefore, by reading Section 375 IPC, an exception in favour of husband cannot be read in Section 377 IPC.

e) In Section 13(2)(ii) of the Hindu Marriage Act, 1955 sodomy is a ground for divorce. If Section 377 IPC is not made applicable to the husband, this provision of the Hindu Marriage Act, 1955 would become obsolete.

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 IPC for anal sex with his wife?

8. Section 375 IPC prior to amendment is as follows:-

> "**375. Rape**.– A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-
>
> *First.*– Against her will.
>
> *Secondly.*– Without her consent.
>
> *Thirdly.*– With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
>
> *Fourthly.*– With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> *Fifthly.*– With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substances, she is unable to understand the nature and consequences of that to which she gives consent.
>
> *Sixthly.*– With or without her consent, when she is under sixteen years of age.
>
> *Explanation.*– Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
>
> *Exception.*– Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

9. After amendment w.e.f. 03.02.2013, Section 375 IPC is as follows:-

> "**375. Rape**.— A man is said to commit "rape" if he—
>
> (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

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

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

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

First.—Against her will.

Secondly.—Without her consent.

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

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

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

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

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

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

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

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

10. Section 377 IPC reads as hereunder:-

> "**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."

11. Whether husband can be prosecuted under Section 377 IPC or not? On this aspect, there are divergent views.

12. In the case of Umang Singhar vs. State of Madhya Pradesh, Manu/MP/3705/2023. The issue was discussed by the Hon'ble Madhya Pradesh High Court and it was held that, "**in view of amended definition of Section 375 IPC, offence under Section 377 IPC between husband and wife has no place and, as such it is not made out**." The Hon'ble Madhya Pradesh High Court observed as follows:-

> "12. Indeed, the primary argument of the learned counsel for the petitioner was that when Section 375 IPC defines 'rape' and also by way of amendment in 2013, Exception- 2 has been provided which bespeaks that sexual intercourse or sexual acts by a man with his own wife is not a rape and therefore if any unnatural sex as defined under section 377 is committed by the husband with his wife, then it can also not be treated to be an offence……."

13. 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, 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……."
>
> "16. 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 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."

13. In the case of Manish Sahu vs. State and another, MCRC No.8388 of 2023, Hon'ble Madhya Pradesh High Court relied on the principle of law as laid

down in the case of Umang Singhar (*Supra*) and followed the same principle of law.

14. Similar view was taken by the Hon'ble Allahabad High Court in the case of Sanjeev Gupta vs. State of U.P. and another, 2023 SCC OnLine All 2644. In para 34 of the judgment, the Hon'ble Allahabad High Court observed as follows:-

> "**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."

15. In the case of Hrishikesh Sahoo vs. State of Karnataka and others, 2022 SCC OnLine Kar, 371, the Hon'ble Karnataka High Court, in fact, has not granted exception to Section 375 IPC in favour of a husband and observed as follows:-

"**32.** On a coalesce of all the afore-said and afore-quoted Articles of the Constitution, the provisions of the IPC and specific Acts promulgated, what would unmistakably emerge is the rights of women, protection of women and their equal status to that of a man without exception**.** Therefore, women are equal in its true sense factually and legally. The aforesaid provisions are quoted only as a metaphor to demonstrate equality without exception pervading through the entire spectrum of those provisions, the Constitution, the code and the enactments.

33. As observed hereinabove, the Constitution, a fountainhead of all statutes depicts equality. The Code practices discrimination. Under the Code every other man indulging in offences against woman is punished for those offences. But, when it comes to Section 375 of IPC the exception springs. In my considered view, the expression is not progressive but regressive, wherein a woman is treated as a subordinate to the husband, which concept abhors equality**.** It is for this reason that several countries have made such acts of the husband penal by terming it marital rape or spousal rape**.**

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."

16. In para 70 of the judgment in the case of Hrishikesh Sahoo (*Supra*), the Hon'ble Karnataka High Court summed up the conclusions as follows:-

> "**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.
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> Therefore, there is no warrant to interfere in the case at hand.
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> ***TO SUM UP:***
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> - **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.**"

17. Reference to the judgment in the case of Navtej Singh Johar (*Supra*) has extensively been made on behalf of the petitioner to argue that there is no act like carnal intercourse against the order of nature, there is no word like unnatural sex and if, there are two consenting adults which commit the act in private, no offence is made out.

18. In the case of Suresh Kumar Koushal and another vs. Naz Foundation and others, (2014)1 SCC 1, the constitutional validity of Section 377 IPC was challenged. The challenge was accepted by the Hon'ble Delhi High Court, but the matter was taken up to the Hon'ble Supreme Court. In that case, the Hon'ble Supreme Court traced the history of offence under Section 377 IPC in United Kingdom and in India. The Hon'ble Supreme Court found that Section 377 IPC does not suffer from the vice of arbitrariness and irrational classification. In para 65, the Hon'ble Supreme Court observed as hereunder:-

> "**65.** Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the particular offence and prescribes punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family the person is found guilty. Therefore, the High Court was not right in declaring Section 377 IPC ultra vires Articles 14 and 15 of the Constitution."

19. After the judgment in the case of Suresh Kumar Koushal (*Supra*), the issue pertaining to prosecution of husband under Section 377 IPC was discussed by the Hon'ble Gujarat High Court in the case of Nimeshbhai Bharatbhai Desai vs. State of Gujarat, 2018 SCC OnLine Gujarat 732. The Hon'ble Court observed as hereunder:-

> "**48.** Thus, the above referred decision of the Supreme Court makes it very clear that 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. Such a prohibition regulates the sexual conduct regardless of the gender identity orientation. What has been held by the Supreme Court is that consent is not the 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 thereby making it obvious that a

> wife can initiate proceedings against the husband under section 377 for unnatural sex. Thus, when the husband is alleged to have forced his wife for oral sex and actually indulges into the same, the same would constitute an offence under section 377 IPC. To put it in other words, having regard to the decision of the Supreme Court, referred to above, section 377 IPC would be applicable in case of heterosexual couples, wherein the husband has compelled the wife into carnal penetration of the orifice of the mouth. In fact, even those instances wherein the wife has consented to such an act will also squarely fall under this provision, as consent is not the key factor to determine the constitution of the offence."

20. In the case of Navtej Singh Johar (*Supra*), again challenge to Section 377 IPC was made on the ground that, "right to sexuality", "right to sexual autonomy" and "right to choice of a sexual partner" to be part of the right to life guaranteed under Article 21 of the Constitution of India. The reference has been quoted by the Hon'ble Supreme Court in para 12 of the judgment, which is as follows:-

> "**12.** Writ Petition (Criminal) No. 76 of 2016 was filed for declaring "right to sexuality", "right to sexual autonomy" and "right to choice of a sexual partner" to be part of the right to life guaranteed under Article 21 of the Constitution of India and further to declare Section 377 of the Penal Code (for short "IPC") to be unconstitutional. When the said writ petition was listed before a three-Judge Bench on 8-1-2018 [*Navtej Singh Johar* v. *Union of India*, (2018) 1 SCC 791 : (2018) 1 SCC (Cri) 499] , the Court referred to a two-Judge Bench decision rendered in *Suresh Koushal* [*Suresh*

Kumar Koushal v. *Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1] wherein this Court had overturned the decision rendered by the Division Bench of the Delhi High Court in *Naz Foundation*; *Naz Foundation* v. *Govt. (NCT of Delhi)*, 2009 SCC OnLine Del 1762 : (2009) 111 DRJ 1 "

21. The conclusion of the Hon'ble Court is at para 645 of the judgment is as follows:-

"**645.CONCLUSION**

645.1. In view of the aforesaid findings, it is declared that insofar as Section 377 criminalises consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, is violative of Articles 14, 15, 19, and 21 of the Constitution. It is, however, clarified that such consent must be free consent, which is completely voluntary in nature, and devoid of any duress or coercion.

645.2. The declaration of the aforesaid reading down of Section 377 shall not, however, lead to the re-opening of any concluded prosecutions, but can certainly be relied upon in all pending matters whether they are at the trial, appellate, or revisional stages.

645.3. The provisions of Section 377 will continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality.

645.4. The judgment in *Suresh Kumar Koushal* v. *Naz Foundation* (*Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1) is hereby overruled for the reasons stated in paras 642 and 643."

22. The Hon'ble Supreme Court in the case of Navtej Singh Johar (*Supra*) also observed as follows:-

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

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268.7. Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorised that an individual exerts little or no control over who he/she gets attracted to. Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right of freedom of expression.

268.8. After the privacy judgment in *Puttaswamy* [*K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1] , the right to privacy has been raised to the pedestal of a fundamental right. The reasoning in *Suresh Koushal* (*Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1), that only a minuscule fraction of the total population comprises of LGBT community and that the existence of Section 377 IPC abridges the fundamental rights of a very minuscule percentage of the total populace, is found to be a discordant note. The said reasoning in *Suresh Koushal* (*Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1) , in our opinion, is fallacious, for the Framers of our Constitution could have never intended that the fundamental rights shall be extended for the benefit of the majority only and that the courts ought to interfere only when the fundamental rights of a large percentage of the total populace is affected. In fact, the said view would be completely against the constitutional ethos, for the language employed in Part III of the Constitution as well as the intention of the Framers of our Constitution mandates that the courts must step in whenever there

is a violation of the fundamental rights, even if the right(s) of a single individual is/are in peril.

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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 (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".

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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.

268.18. The decision in *Suresh Koushal* (*Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1 : (2013) 4 SCC (Cri) 1), not being in consonance with what we have stated hereinabove, is overruled.

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366. After 2013, when Section 375 was amended so as to include anal and certain other kinds of sexual intercourse between a man and a woman, which would not be criminalised as rape if it was between consenting adults, it is clear that if Section 377 continues to penalise such sexual intercourse, an anomalous position would result. A man indulging in such sexual intercourse would not be liable to be prosecuted for rape but would be liable to be prosecuted under Section 377. Further, a woman who could, at no point of time, have been prosecuted for rape would, despite her consent, be prosecuted for indulging in anal or such other sexual intercourse with a man in private under Section 377. This would render Section 377, as applied to such consenting adults, as manifestly arbitrary as it would be wholly excessive and disproportionate to prosecute such persons under Section 377 when the legislature has amended one portion of the law in 2013, making it clear that consensual sex, as described in the amended provision, between two consenting adults, one a man and one a woman, would not be liable for prosecution. If, by having regard to what has been said above, Section 377 has to be read down as not applying to anal and such other sex by a male-female couple, then the section will

continue to apply only to homosexual sex. If this be the case, the section will offend Article 14 as it will discriminate between heterosexual and homosexual adults which is a distinction which has no rational relation to the object sought to be achieved by the section — namely, the criminalisation of *all* carnal sex between homosexual and/or heterosexual adults as being against the order of nature. An argument was made by the petitioners that Section 377, being vague and unintelligible, should be struck down on this ground as it is not clear as to what is meant by "against the order of nature". Since Section 377 applies down the line to carnal sex between human beings and animals as well, which is not the subject-matter of challenge here, it is unnecessary to go into this ground as the petitioners have succeeded on other grounds raised by them. Viewed either way, the section falls foul of Article 14.

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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. "**375. Rape**.—A man is said to commit "rape" if he—(*a*) .....

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." 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. John Sebastian, "The opposite of unnatural intercourse : understanding Section 377 through Section 375, Indian Law Review, Vol. 1 (2018), at pp. 232-49. 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 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**.

637.7. Section 375 defines the offence of rape. It provides for penetrative acts which if performed by a man against a woman without her consent, or by obtaining her consent under duress, would amount to rape. Penetrative acts (after the 2013 Amendment) include anal and oral sex.

The necessary implication which can be drawn from the amended provision is that if such penetrative acts are done with the consent of the woman they are not punishable under Section 375. While Section 375 permits consensual penetrative acts (the definition of

> "penetration" includes oral and anal sex), Section 377 makes the same acts of penetration punishable irrespective of consent. This creates a dichotomy in the law."
>
> (emphasis supplied)

23. After the brutal gang rape of a young woman in Delhi in the late evening of 16.12.2012, a Committee Chaired by Hon'ble Justice J.S. Verma ("the Committee") was formed regarding amendment to the criminal law.

24. The Committee had recommended for recognition of marital rape. In para 79 and 80 of the Report, the Committee observed as follows:-

> "79. We, therefore, recommend that:
>
> i. The exception for marital rape be removed.
>
> ii. The law ought to specify that:
>
> a. A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;
>
> b. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
>
> c. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.

> 80. We must, at this stage, rely upon Prof. Sandra Fredman of the University of Oxford, who has submitted to the Committee that that *"training and awareness programmes should be provided to ensure that all levels of the criminal justice system and ordinary people are aware that marriage should not be regarded as extinguishing the legal or sexual autonomy of the wife"."*

25. The definition of rape has been expanded to include other kinds of penetration also so as to protect a victim of sexual assault. **Committee's observations with regard to expansion of definition of rape is to be quoted hereunder:-**

> "67. We are of the considered opinion that in the Indian context it is important to keep a separate offence of 'rape'. This is a widely understood term which also expresses society's strong moral condemnation. In the current context, there is a risk that a move to a generic crime of 'sexual assault' might signal a dilution of the political and social commitment to respecting, protecting and promoting women's right to integrity, agency and autonomy. However, there should also be a criminal prohibition of other, non-penetrative forms of sexual assault, which currently is not found in the IPC, aside from the inappropriate references to 'outraging the modesty' of women in Sections 354 and 509. We recommended the enactment of Section 354 in another form while we have recommended the repeal of Section 509.
>
> 68. We have kept in mind that the offence of rape be retained but redefined to include all forms of

nonconsensual penetration of a sexual nature. Penetration should itself be widely defined as in the South African legislation to go beyond the vagina, mouth or anus.

71. By virtue of the Amendment, the legislature has sought to widen the scope of the offence under section 375 to 376D by substituting the expression rape with "sexual assault". While we feel that the proposed Bill (as placed before Parliament) proposes some welcome changes to the law, there is still much ground that needs to be covered. Accordingly, this Committee has recommended amendments (appended to this Report) to the Criminal Law Amendment Bill 2012, which should be considered and enacted by Parliament at the earliest possible, if not immediately. In any event, we feel that the same ought to be promulgated by the Government as an ordinance."

26. In Appendix 4 to this report, amendment has been suggested and Section 375 IPC was suggested to be amended as follows:-

" APPENDIX 4

.....

.....

.....

.....

CHAPTER 1 : PROPOSED AMENDMENTS TO THE INDIAN PENAL CODE

.....

.....

7. Section 375 shall be replaced as suggested below:

Section 375: Rape

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

(a) penetrates the vagina or anus or urethra of a person with—

(i) any part of his body including his penis or,

(ii) any object manipulated by him, except where such penetration is carried out for proper hygienic or medical purposes; or,

(b) manipulates any part of the body of a person so as to cause penetration of the vagina or anus or urethra of another person; or,

(c) engages in "cunnilingus" or "fellatio", under the circumstances falling under any of the following six descriptions:—

Firstly.—Against the person's will; or,

Secondly.— Without the person's consent; or,

Thirdly, With the person's consent, where such consent has been obtained by putting the person, or any other person in whom the person is interested, in fear of death or of hurt; or,

Fourthly.— With the person's consent, when the man induces the person to consent to the relevant act by impersonating another man to whom the victim would have otherwise knowingly consented to; or,

Fifthly, With the person's consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the man personally or through another of any stupefying or unwholesome substance, the person is unable to understand the nature and consequences of the action to which he/she gives consent; or,

Sixthly, When the person is unable to communicate consent either express or impliedly.

Explanation I.— For the purposes of this section, "penetration" means penetration of the vagina, anus or urethra to any extent.

Explanation II.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation III: Consent will not be presumed in the event of an existing marital relationship between the complainant and the accused.

Explanation IV. - Consent means an unequivocal voluntary agreement when the person by words, gestures or any form of non-verbal communication, communicates willingness to participate in the specific act.

Provided that, a person who does not offer actual physical resistance to the act of penetration is not by reason only of that fact, to be regarded as consenting to the sexual activity.

27. Subsequently, amendments were incorporated in Section 375 IPC, but Exception 2 has been retained with little more addition in it. Earlier Exception 2 was as follows:-

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

28. But post amendment, it also added the word "sexual acts" and now it reads as follows:-

> "*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."

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 statue should be read in a manner that all the provisions may be given life.

31. In the case of Navtej Singh Johar (*Supra*), the connection between Section 375 and 377 IPC has also been discussed in para 268.11, when the Court observed that Section 375 IPC has not used the word, "**subject to any other provision of the IPC**". This, according to the Hon'ble Supreme Court indicates that Section 375 IPC is not subject to Section 377 IPC. Deeper discussion on this aspect has been made in the following paragraphs:-

> "**233.** On the other hand, Section 377 IPC contains no such descriptions/exceptions embodying the absence of wilful and informed consent and criminalises even voluntary carnal intercourse both between homosexuals as well as between heterosexuals. While saying so, we gain strength and support from the fact that the legislature, in its wisdom, while enacting Section 375 IPC in its amended form after the Criminal Law (Amendment) Act, 2013, has not employed the words "subject to any other provision of the IPC". The implication of the absence of these words simply indicates that Section 375 IPC which does not criminalise consensual carnal intercourse between heterosexuals is not subject to Section 377 IPC.
>
> **234.** Section 377, so far as it criminalises carnal intercourse between heterosexuals is legally unsustainable in its present form for the simple reason that Section 375 IPC clearly stipulates that carnal intercourse between a man and a woman with the wilful and informed consent of the woman does not amount to rape and is not penal.
>
> **235.** Despite the Criminal Law (Amendment) Act, 2013 coming into force, by virtue of which Section 375 was

> amended, whereby the words "sexual intercourse" in Section 375 were replaced by four elaborate clauses from (*a*) to (*d*) giving a wide definition to the offence of rape, Section 377 IPC still remains in the statute book in the same form. Such an anomaly, if allowed to persist, may result in a situation wherein a heterosexual couple who indulges in carnal intercourse with the wilful and informed consent of each other may be held liable for the offence of unnatural sex under Section 377 IPC, despite the fact that such an act would not be rape within the definition as provided under Section 375 IPC.
>
> **236.** Drawing an analogy, if consensual carnal intercourse between a heterosexual couple does not amount to rape, it definitely should not be labelled and designated as unnatural offence under Section 377 IPC.
>
> If any proclivity amongst the heterosexual population towards consensual carnal intercourse has been allowed due to the Criminal Law (Amendment) Act, 2013, such kind of proclivity amongst any two persons including LGBT community cannot be treated as untenable so long as it is consensual and it is confined within their most private and intimate spaces."

32. It has also been observed by the Hon'ble Supreme Court in the case of Navtej Singh Johar (*Supra*) that while amending Section 375 IPC the legislation has not employed the words, ""subject to any provision of the IPC". The implication of the absence of these words simply indicates that Section 375 IPC which does not criminalize consensual carnal intercourse between heterosexuals is not subject to Section 377 IPC".

Accordingly, it was held that, **"**…… ……**If any proclivity amongst the heterosexual population towards consensual carnal intercourse has been allowed due to the Criminal Law (Amendment) Act, 2013, such kind of proclivity amongst any two persons including LGBT community cannot be treated as untenable so long as it is consensual and it is confined within their most private and intimate spaces.**"

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.

34. An argument has been advanced on behalf of the respondent no.2 that if Section 377 IPC is not made

applicable to the husband, the provisions of Section 13(2)(ii) of the Hindu Marriage Act, 1955 would become obsolete. This Section 13(2)(ii) of the Hindu Marriage Act, 1955 is as follows:-

> "**13. Divorce** .– (1) .....
> (2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—
> (i) .....
> (ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or"

35. A bare reading of above Section does not indicate that it would apply in the situation when the offence of sodomy was committed between husband and wife. If the husband is guilty of sodomy in some cases where the victim is not wife, this Section 13(2)(ii) of the Hindu Marriage Act, 1955 will definitely come into play. As stated, if an act between the husband and wife is not punishable under Section 375 IPC due to operation of Exception 2 to it, the same act may not be an offence under Section 377 IPC. Therefore, arguments advanced on this point have less merit for acceptance.

36. In the instant case, according to the prosecution the petitioner has committed anal sex with the respondent no.2 on multiple occasions. The petitioner

is husband of the respondent no.2. The act alleged also falls within Section 375 IPC and by operation of Exception 2 to it, a husband cannot be held guilty under Section 375 IPC for such an act. In such a situation the provisions of Section 377 IPC cannot be invoked against the husband. Therefore, this Court is of the view that Section 377 IPC is not *prima facie* made out against the petitioner.

37. The question for consideration now is with regard to applicability of Sections 11 and 12 of the POCSO Act. It is argued on behalf of the petitioner that the act allegedly done by the petitioner has no sexual intent *qua* the victim.

38. Section 29 and Section 30 of the POCSO Act provide for presumptions, which reads as follows:-

> "**29. Presumption as to certain offences.–** Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

> **30. Presumption of culpable mental state.–** (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.
>
> Explanation.– In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."

39. The sexual intent in cases under Section 11 shall be presumed under Section 30 of the POCSO Act. It is true that in her statement recorded under Section 164 of the Code, the victim has also stated that the petitioner would show bad scenes on his laptop to the child, so that the respondent no.2 could follow his commands with regard to anal sex or forceful oral sex. Here it is argued that the intention to show bad scenes on laptop was not sexual harassment of the child, but to pressurize his mother, the respondent no.2, so as to follow the commands of the petitioner. But, this is not the only statement which the respondent no.2 had given during investigation, she has stated little more than that. She

has also stated that the applicant would urinate in front of the room. He would show his private part to the child. She has also stated that the petitioner would commit oral sex forcibly in front of the child. The child has also been examined under Section 164 of the Code. The child has stated that his father does *Gandi Gandi Cheeze*. He would show dirty videos. Here intent can be presumed under Section 30 of the POCSO Act. Exhibition of private part to a child, showing him dirty films, as told by the child himself *prima facie* makes out an offence under Section 11 read with Section 12 of the POCSO Act.

40. In view of the foregoing discussion, this Court is of the view that the impugned summoning order requires interference to the extent that no offence under Section 377 IPC is made out against the revisionist. But, offence under Section 11 read with Section 12 of the Protection Of Children From Sexual Offences Act, 2012 is *prima facie* made out against the revisionist.

41. The impugned order is modified accordingly.

42. The trial of the revisionist shall proceed under Section 11 read with Section 12 of the POCSO Act.

43. The petition is accordingly partially allowed.

(Ravindra Maithani, J.)
19.07.2024

Sanjay