



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL WRIT PETITION NO.4470 OF 2012**

Daniel Crasto ... Petitioner

Vs.

The State of Maharashtra ... Respondent

Mr.Kranti L.C. with Mr.Gaurav Bhawnani for the Petitioner

Ms.Veera Shinde, APP, for the Respondent – State

**CORAM: Mrs.MRIDULA BHATKAR, J.**

**DATED: JANUARY 30, 2019**

**JUDGEMENT:**

1. In this petition, the petitioner is challenging the order dated 23.10.2012 thereby confirming the order dated 5.1.2012 passed by the learned Metropolitan Magistrate, 40<sup>th</sup> Court, Girgaon, Mumbai, rejecting the discharge of the petitioner under section 377 of the Indian Penal Code. The petitioner is a co-accused who was initially prosecuted under sections 498A, 377, 323, 504 r/w section 34 of the Indian Penal Code along with the co-accused.

2. The facts of this case in brief are as under:

One married woman filed complaint on 26.2.2019 against her husband and the present applicant/accused and her husband got married on 6.12.1994. In 2009, the couple had a son aged 6 to 7 years old. After 4 to 5 years of their marriage, she realised that her husband is a gay and she opposed the parallel relationship of her husband. However, he ill treated her and hence, she left the house and started living with her father. Thereafter, again she came back. However, though assured, she found that her husband continued to keep his gay relationship with different males. In early 2007, she found that her husband was having sexual relationship with the petitioner accused and she also came across her husband viewing a pornographic film of those two whenever, he used to remember the petitioner/accused. She found that her husband was not ready to stop his relationship with the petitioner/accused but he ill treated her on a number of occasions and therefore, she lodged the FIR on 26.2.2009 and the offence was registered at C.R. No.59 of 2009 with Gamdevi police station and pursuant to the same, the petitioner/accused alongwith the husband of the complainant was prosecuted for a number of offences. He moved an application for discharge before the learned Metropolitan Magistrate, 40<sup>th</sup> Court, Girgaum. However,



the said Court rejected the said application. So, he moved Revision application No.286 of 2012. The learned Adhoc Additional Sessions Judge, Greater Mumbai by order dated 23.11.2012 partly allowed the said revision application by discharging the accused from section 323, 504 r/w section 34 of the Indian Penal Code but maintained the charge under section 377 of the Indian Penal Code. Hence, this petition.

3. Heard submissions and perused the FIR and other documents. The complainant has grievance against her husband, who is a gay and kept sexual relations with male friends i.e., the petitioner. The Supreme court in the case of Navtej Singh Johar & Ors. vs. Union of India<sup>1</sup> has held section 377 of the Indian Penal Code insofar as it criminalises consensual sexual conduct between the adult of same sex, as unconstitutional. In the present case, both were having an extra marital consensual sexual relationship. Though it may be a ground for divorce on the ground of cruelty to the complainant, it does not constitute offence under section 377 because both are adults and had sexual relationship by consent. In this case, there is no victim. The complainant wife is an aggrieved person but she cannot be called as a victim under section 377 of

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1 W.P. (Cri.) Nbo.76 of 2016 & Others decided on 6.9.2018

the Indian Penal Code. There are allegations against the husband having unnatural sexual intercourse with her.

4. Under such circumstances, the order passed by the learned Adhoc Additional Sessions Judge, Greater Mumbai dated 23.11.2012 refusing to discharge the petitioner/accused from the offence punishable under section 377 of the Indian Penal Code is hereby quashed and set aside. Accordingly, the petitioner/accused is hereby discharged from section 377 of the Indian Penal Code.

5. Rule made absolute accordingly.

**(MRIDULA BHATKAR, J.)**