

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.**

CRIMINAL APPLICATION NO. 7035 OF 2014

THE STATE OF MAHARASHTRA. **..APPLICANT.**

VERSUS

BHIMRAJ SOPAN SHINGADE. **..RESPONDENT.**

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APP for Applicant/State : Mr.S.D. Kaldate.:
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CORAM : S.S. SHINDE & A.M. BADAR, JJ.

Dated: 17th Feb., 2015.

PER COURT :-

1. By this application, State is praying for leave to appeal challenging the judgment and order dated 5.11.2014 passed by the learned Additional Sessions Judge, Ahmednagar in Sessions Case No.396 of 2012, thereby acquitting the respondent - accused of the offences punishable under Section 376 and 109 of the Indian Penal Code.
2. Heard learned APP appearing for the State. He vehemently argued that as the consent given by the

prosecutrix for sexual relations with the respondent – accused was not a free consent, and as the same was given under misconception of fact, the act amounts to rape and the evidence of the prosecutrix shows that by promising her to marry, the respondent – accused had committed rape on her. He further argued that the prosecutrix consumed poison and attempted to commit suicide as the respondent – accused informed her that he would not marry her and, therefore, it is proved by the prosecution that the respondent – accused had committed the offence of abetment to commit suicide.

3. With the assistance of the learned APP, we have gone through the entire record & proceedings including the evidence of the prosecutrix and other documents. The respondent – accused was charged for the offence of committing rape on the prosecutrix and for abetting her to commit suicide. In order to bring home the guilt to respondent – accused, the prosecution has examined in all seven witnesses. We find that material witnesses are P.W.1 Tai Baban Pawar – the prosecutrix and P.W.2 Shilpa Baban Pawar – sister of prosecutrix. Rest of the witnesses are

either Investigating Officer or Nodal Officer of the Cellular Company.

4. The prosecutrix deposed in tune with the FIR lodged by her on 25.6.2012. This FIR (Exh.15) shows that the prosecutrix has alleged that she was having love affair with the respondent – accused since prior to two years of lodging FIR. The FIR further shows that thereafter, since prior to one year after lodging FIR, prosecutrix was having physical relations with the respondent – accused. The FIR further shows that thereafter respondent – accused promised to marry her and they were behaving as husband and wife in the society. Then according to the prosecutrix, it was on 22.6.2012, the respondent – accused telephonically informed her that as he got job, he will not now marry with her. Then the prosecutrix, in a state of shock, consumed insecticide 'Rogor' in the field of her father and attempted to commit suicide. Her sister P.W.2 Shilpa brought her back in the house and then she was admitted to the hospital at Karjat. The slight deviation which the prosecutrix made while deposing before the Court is to the effect that she had physical relations with the accused since prior to two years

of lodging FIR. The evidence of the prosecutrix as well as FIR lodged by her, nowhere show that the accused initially promised to marry her and acting on that promise, prosecutrix submitted her chastity at the disposal of the respondent – accused.

5. At this juncture, it is apposite to note that the prosecution has relied on the birth certificate of the prosecutrix. This certificate at Exh.43 shows that date of birth of the prosecutrix is 13.6.1994. As such, at the time of lodging FIR, prosecutrix was more than 18 years of age. If the averments in the FIR are considered, then she had physical relations with the accused from 17 years of her age. If her version is relied, then also the accused was having physical relations with her after she attained 16 years of age. This is the consenting age. The learned trial Court had an opportunity to observe the demeanour of the prosecutrix and the learned trial Court had observed that the prosecutrix was found to be a mature girl, having sufficient understanding and knowledge of the consequence of sexual act.

6. Relying on section 90 of the Indian Penal Code, learned APP is attempting to demonstrate that the consent given by the prosecutrix was under misconception of fact and, therefore, it is not a free consent. Hence, according to the learned APP, the act amounts to rape. Section 375 of the Indian Penal Code apart from other contingencies defines rape as an act of sexual intercourse with a woman against her will. Will as understood, is one's own voluntary act, wish or desire. Consent means an active will in the mind of a person to permit the doing of the act complained of. In the case in hand, the prosecutrix was more than 16 years of age. It can well be conceived that a girl who has crossed 16 years of age, is capable enough to understand the things, what is good for her and what is bad for her. She is supposed to develop reasonable mental faculty and capacity to know consequences of her act. In the case in hand, evidence of the prosecutrix shows that she was having initially love affair with the respondent – accused and then, after about a year, that love affair culminated in physical relationship. Continuance of such physical relationship with the accused by the prosecutrix shows that she was not only willing but was desirous of involving

herself in physical relationship with the respondent – accused. Such conduct on the part of the prosecutrix does not allow us to conclude that the consent given by her was under misconception of the fact that respondent – accused would marry her. Section 90 of the Indian Penal Code cannot be invoked in such a case. As such, we are of the considered view that the prosecution has failed to prove that the respondent – accused had committed rape on the prosecutrix.

7. The next charge levelled against the respondent – accused is that of abetment. Section 107 of the Indian Penal Code defines abetment. Abetment does not involve actual commission of crime; but, it is crime apart. Abetment involves actual complicity of the accused / abettor at a point of commission of offence or before commission of offence. The offence of abetment is complete when any other is instigated to commit the act of offence. In the case in hand, evidence of the prosecutrix shows that after the accused informed her telephonically that he will not marry her, she attempted to commit suicide by consumption of *Rogor* poison. The evidence on record does not show that

the accused desired that prosecutrix should end her life by consuming poison. There is no element of instigation, provocation or incitement on the part of the respondent – accused prompting the prosecutrix to consume poison. Moreover, the attempt on the part of the prosecutrix to commit suicide failed. In such circumstances, it cannot be said that the prosecution has proved that the respondent – accused had abetted the prosecutrix to commit suicide.

8. In the light of foregoing discussion, we conclude that the view taken by the learned trial Court is a possible view, based on the evidence on record.

9. Hence, the order:

:ORDER:

Application is rejected.

(**A.M. BADAR, J.**)

(**S.S. SHINDE, J.**)