

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

ANTICIPATOR BAIL APPLICATION NO.308 OF 2016

Mr. Anshul Ramesh Makhija ... Applicant

vs.

The State of Maharashtra & Anr. ... Respondents

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Mr. A. H. Ponda i/b. H. H. Ponda for the Applicant.

Ms. S. S. Kaushik, APP for the State.

Mr. G. Gole i/b. M. A. Gawalani for Respondent No.2 .

Mr. A. R. Rajane, PI, Oshiwara Police Station, present.

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CORAM : A. S. GADKARI, J.

DATE : 30.09.2016.

P.C.:

1. The Applicant has been granted interim relief by order dated 18th February 2016 and in pursuance to the said order the original complainant is impleaded as Respondent No.2.

2. Heard the learned counsel for the Applicant, the learned counsel for the Respondent No. 2-Original Complainant and the learned APP. Also perused the documents annexed to the application.

3. The learned counsel for the Applicant submitted that a bare perusal of the First Information Report would reveal that the alleged act as contemplated under Section 376 (2) is a consensual act between two adults. He further submitted that the application of Section 354 of the Indian Penal Code is misplaced in view of the facts of the present case. He further submitted that the prosecution has now applied Section 377 of the Indian Penal Code after the supplementary statement dated 31st January 2016 of the Complainant recorded by the police. He therefore

submitted that after the alleged breach of promise of marriage, the applicant got married on 16th January 2016 and the present crime is registered on 18th February 2016. That the alleged relationship between the Applicant and the Respondent No. 2 was continuing for a period of approximately 2 years preceding the date of lodgment of FIR. He further submitted that the alleged act as contemplated under Section 377 of Indian Penal Code is a clear afterthought as the said vital and important fact is not mentioned in first information report dated 18th January 2016 and is reported to the police after a gap of about 12 days. He submitted that the supplementary statement recorded by the complainant creates strong suspicion about its bonafide. He therefore submitted that in view of the facts of the present case the Applicant may be granted pre-arrest bail.

4. Mr. Gole the learned counsel appearing for the Respondent No.2, original complainant vehemently opposed the Application. He submitted that in view of the amendment to explanation 2, to Section 375 thereby adding the proviso to the said explanation, even the breach of promise of marriage would itself constitute an offence under Section 376 of Indian Penal Code. He further submitted that in view of the said proviso, the women who does not physically resist to the act of penetration shall not by the reason only of the fact, be regarded as consenting party to the said sexual activity. He further submitted that after the supplementary statement of the respondent No. 2 is recorded

on 18th January 2016, she was immediately examined by the medical officer and as per the medical report, the version of the first informant/respondent No. 2 is duly corroborated. He submitted that taking into consideration the application of Section 376 (2) (n), 354 and 313 of the Indian Penal Code, the custodial interrogation of the Applicant is necessary. He therefore prayed that the present application may be dismissed.

The learned APP supported the arguments of Mr. Gole and submitted that the custodial interrogation of the Applicant is necessary.

5. After perusing the First Information Report and other documents annexed to the Application, it *prima facie* reveals that alleged act as contemplated under Section 376 of the Indian Penal Code was a consensual act between two adult persons. That the said alleged act as per the informant herself was continued for a period of approximately 2 years. As far as the other offence under Section 313 is concerned, it further *prima facie* appears that the Respondent No. 2 had consented for the said abortion. The police have already seized the necessary and relevant documents from the concerned hospital. As far as the alleged offence under Section 377 of the Indian Penal Code is concerned, *prima facie* it appears that the Applicant did not mention the said very important and vital aspect of the alleged crime in her first information report before the police on 18th January 2016 and therefore, I find substance in the argument advanced by the learned counsel for the

Applicant as recorded herein above.

6. In view of the above the Applicant has made out a case for grant of pre-arrest bail. Hence the following order.

ORDER

a) The interim relief granted by order dated 18th February 2016 is hereby confirmed.

b) The Applicant is directed to attend the investigating officer as and when call for between 11.00 am to 2.00 pm till the filing of charge sheet.

It is needless to mention that before calling to the Applicant to the police station the investigating officer shall issue a notice under Section 160 of Cr. P. C.

c) The application is allowed in the aforesaid terms.

(A. S. GADKARI, J.)