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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
ANTICIPATORY BAIL APPLICATION NO.738 OF 2016

Santosh Dattatraya Shewale	..Applicant.
V/s.	
State of Maharashtra	..Respondent.

Mr.Priyal G. Sarda for the applicant.

Mr.Arfa Sait, APP for respondent-State.

CORAM : AM.BADAR, J.

DATED : 9TH JUNE, 2016

P.C. :-

1. Applicant / accused in crime No.189/2016 for offences punishable under section 376(2)(n), 504 and 506 of the Indian Penal Code and under section 3(1)(r), 3(1)(s), 3(1)(w)(i) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 by this application is seeking pre-arrest bail. The record of investigation shows that on 27th March, 2016 prosecutrix lodged report with police station Mukrabad Police Station, Taluka Mukhed, District Nande after registering the crime as 0/2016, the same was transferred to the Hadapsar Police Station, Pune for

investigation and accordingly the crime in question came to be registered against the applicant / accused.

2. Learned counsel for the applicant argued that prosecutrix is stated to be 28 years of age and as such has attained the age of consent. She is a married woman having children. The F.I.R. reflects consensual sex. The learned counsel further argued that the provisions of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act are not attracted because the alleged incident of humiliation occurred in four walls of the house. He, therefore, submits that the bar of section 18 is not applicable to the case in hand.

3. As against this, by referring to the case diary extensively, the learned APP submits that the applicant / accused knowing fully well that prosecutrix belongs to Schedule Caste has committed offence of rape on her, apart from her intentional humiliation and hurling of abuses and castiest remarks to her. By contending that offence under section 376(2)(n) of the Indian Penal Code is punishable with imprisonment for ten years, the learned APP submits that the applicant is liable for penal consequences of the provisions of

section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The learned APP further argued that section 90 of the Indian Penal Code defines the term consent and the as the consent of prosecutrix is due to misconception of fact, it cannot be termed as valid consent. He, therefore, prayed for rejection of the application.

4. Perused the case diary, including the F.I.R. lodged by prosecutrix as well as supplementary statement recorded by the Investigating Officer. It is the case of the prosecution that prosecutrix became acquainted with the applicant who was her neighbour. The acquaintance turned into love affair between prosecutor and the applicant. According to the prosecution case, the applicant then extended promise to marry prosecutrix and thereafter started having sexual intercourse with her. The F.I.R. shows that the applicant used to visit the house of prosecutrix in night hours for this act. The F.I.R. submitted on 27th March, 2016 contained an averment that prosecutrix became pregnant and when she insisted for marriage, the applicant refused by telling her that she is from lower caste and his family members will not accept daughter-in-law from *Mahar* caste. The applicant is

stated to have assaulted prosecutrix for forcing her to abort herself.

5. In her supplementary statement, prosecutrix has stated that the applicant had taken her to some lodge for indulging in sexual act.

6. At this juncture, it would be appropriate to note that in her F.I.R. prosecutrix has stated her age as 28 years. It is the case of the prosecution that love relations between the applicant and prosecutrix ultimately culminated in sexual intimacy. Prosecutrix had already attained consenting age and she appears to be fully grown-up woman. It is seen that prosecutrix is able to know what is good and what is bad for her on attaining sufficient maturity and still, she had chosen to submit her chastity at the disposal of the applicant. In this view of the matter, at least prima facie, it cannot be said that the consent of prosecutrix was as a result of misconception of fact and, therefore, not free consent.

7. Now, let us examine whether in the instant case, bar of section 18 of the Scheduled Castes and Scheduled

Tribes (Prevention of Atrocities) Act, 1989 is applicable. Let us, therefore, make a responsible judicial examination of the material before this Court in order to ascertain whether the record of investigation prima facie make out an offence under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The prosecution is invoking the provisions of sections 3(1)(r), 3(1)(s), 3(1)(w)(i) and 3(2)(v) thereof. These provisions read as under:-

“4. Amendment to Section 3 – In section 3 of the Principal Act, in sub-section (i), the following sub-section will be substituted, namely :-

(1) Whoever, not being a member of a Scheduled Caste or Scheduled Tribe, -

(r) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or Scheduled Tribe in any place within public view;

(s) abuses any member of a Scheduled Caste or Scheduled Tribe by caste name in any place within public view;

(w) (i) intentionally touches a woman belonging to a Scheduled Caste or Scheduled Tribe, knowing that she belongs to a Scheduled Caste or Scheduled Tribe,

when such act of touching is of a sexual nature and is without the recipients consent;

- 3(2) (v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste and Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine."

8. The allegations against the applicant as reflected from the case diary are to the effect that the applicant informed the prosecutrix that she is from the lower Castes and his family members will not accept her as she is belonging to *Mahar* caste. There is no averment to the effect that these utterances were in public view, leave apart the question whether it amounts to humiliation or abuse to a member of the Scheduled Caste. As both the parties were having love affair, prima facie it cannot be said that the act of sexual intercourse with the prosecutrix by the applicant was without her consent. The evidence regarding application of section 376 of the Indian Penal Code is sketchy and as such, the provisions of section 3(2) (v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 will have

to be viewed from that angle. In the result, the material collected during the course of investigation reflected from the case diary does not prima facie make out an offence punishable under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

9. For these reasons, the balance tilts in favour of the personal liberty of the applicant instead of custodial interrogation. Custodial interrogation of the applicant is not at all required because the act of alleged offence had happened in the past. There is one more angle to be viewed. There is statement of witness on record to show that the prosecutrix is a married woman who is deserted by her husband. In this view of the matter, it cannot be said that the prosecutrix was in position to marry the applicant by accepting his so called offer. The application, therefore, deserves to be allowed. Hence the order:-

- (i) The application is allowed;
- (ii) The order granting ad-interim anticipatory bail by order dated 25th April, 2016 is confirmed on the same terms and conditions;

- (iii) In addition, the applicant / accused shall attend Hadapsar Police Station, Pune on every Sunday in between 11.00 a.m. to 1.00 p.m. till the filing of the charge-sheet;
- (iv) The applicant / accused shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of accusation against applicant so as to dissuade him from disclosing such facts either to the Court or to any police officer and that he shall not tamper with the evidence;
- (v) The applicant / accused shall co-operate for expeditious disposal of the trial;
- (vi) The applicant / accused shall not commit an offence similar to the offence of which he is accused or suspected of the commission;
- (vii) The application is disposed of accordingly.

(A.M.BADAR, J.)