

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

ANTICIPATORY BAIL APPLICATION NO. 937 OF 2016

Mr. Kaivalya Kiran Potdar ... Applicant.

V/s.

The State of Maharashtra ... Respondent.

Mr. A. P. Mundargi, Senor Advocate i/by Abhishek Yende for
the Applicant.

Mr. Y. M. Nakhwa, A.P.P. for the Respondent – State.

CORAM : A. M. BADAR, J.

DATE : 16th JUNE, 2016

P.C. :

1 Issue notice to the Respondent-State. Learned APP waives notice. Learned APP insists for final hearing of the application today itself by stating that the investigation officer is present with the case diary. Hence, taken up this application for final hearing.

2 By this application under section 438 of the Criminal Procedure Code, the Applicant/ accused in Crime No. 0044 of 2016 for the offences punishable under sections 376 and 313 of the Indian Penal Code, registered with Hupari Police Station, Kolhapur at the instance of the prosecutrix is praying for releasing him on bail in the event of his arrest.

3 Heard the learned senior counsel appearing for the Applicant/accused as well as the learned APP for the State. By pointing out the FIR lodged by the prosecutrix against the present applicant on 22nd April, 2016, the learned counsel for the applicant/accused argued that the prosecutrix was having love affair with the applicant since college days and that affair continued for years together. He further argued that the averment so far as section 313 of the IPC is concerned to the effect that on insistence of the applicant, the prosecutrix had consumed some pills, causing her abortion. Therefore, according to the learned senior counsel even the offence under section 313 is also not made out.

4 Learned counsel further argued that in order to bolster her case, the prosecutrix had added spice to her allegations by giving the supplementary statement. Therefore, the averments made in the supplementary statement are for making the crime in question serious one.

5 As against this, learned APP argued that the FIR shows that the applicant/accused had committed the offence under sections 376 and 313 of the Indian Penal Code. During the course of the investigation, the investigating officer has collected evidence to show that the applicant was taking the prosecutrix to several lodges where he used to commit rape

on the prosecutrix. The learned APP further argued that statement of the doctor recorded by the investigating officer makes out offence under section 313 of the IPC and, therefore, considering the nature of the offence, the applicant is not entitled for bail.

6 During the course of hearing, the learned senior counsel has placed on record the *whatsapp* messages exchanged between the applicant and the prosecutrix and those are taken on record. Perusal of the FIR goes to show that when the applicant and the prosecutrix were taking education, love affair developed between them. It is seen from the averments made in the FIR that the prosecutrix is an adult woman of 24 years of age. The averments made in the FIR goes to show that the applicant as well as the prosecutrix were major when the love affair between them had developed. The averments in the FIR further show that the applicant insisted the prosecutrix to submit herself to him in order to prove her love towards the applicant and as the applicant promises to marry her, she accepted the proposal. The papers of investigation shows that the couple visited several lodges during this period of five years of their affair.

7 Sexual intercourse by a man with a woman against her will and without her consent, constitutes offence of rape. One may argue that in the case in hand, consent given by the

prosecutrix was under mis-conception of facts and, therefore, it cannot be said to be the consent within the definition of the term “consent” defined under section 90 of the Indian Penal Code. However, prima facie, it is seen that the prosecutrix as well as the applicant were adult and both have declared to each other that they are in love. Consent is an act of reason, accompanied with deliberation, the mind weighing as in balance, what is good and what is bad for oneself. In the case in hand, prima facie, it is seen that the prosecutrix was an adult girl, having attained consenting age. Therefore, prima facie, it cannot be said that she was not knowing what was good and what was bad for her and still she submitted herself to the applicant with whom she had love relationship. As such prima facie, it cannot be said that sexual relations by the prosecutrix with the applicant were under a mis-conception of fact and, therefore, without her consent. Similarly, prima facie, it cannot be said that said relations were against her active will or desire as the material collected during the investigation, prima facie, shows that she was accompanying the applicant to various lodges.

8 So far as the averment regarding the offence punishable under section 313 is concerned, recitals in the FIR itself go to show that it was the informant, who had purchased some pills from medicine shops and consumed it for the purpose of aborting foetus. The statement of the doctor

recorded during the course investigation so also medical case papers does not show that the informant was required to be admitted in the hospital for the purpose of abortion.

9 In the supplementary statement recorded after about 8 days of lodging the FIR, the informant/prosecutrix made vague allegations that the applicant had shown knife to her and took out her obscene photographs in nude by video recording. The nature of this alleged incident is not disclosed and particulars thereof are not given in the supplementary statement. This supplementary statement appears to have been given after the liberty of the applicant was protected by the Sessions Judge. This fact is finding place in the supplementary statement.

10 It was argued that brother of the applicant had threatened the prosecutrix. If that is so, it cannot be said prima facie, that such threatening was at the instance of the present applicant. Considering the nature of the evidence and the charged atmosphere, no other bearing importance can be given to such aspects, particularly when at the same time liberty of the applicant was already protected by the learned Sessions Judge.

11 In the result, considering the nature of the allegations against the present applicant, reflecting from the

FIR as well as papers of investigation, though the offence is stated to be punishable under sections 376 and 313 of the India Penal Code, I am of the opinion that custodial interrogation of the applicant is not warranted and his liberty gets precedence over his custodial interrogation. Hence, the following order :-

ORDER

- i. This application is allowed.
- ii. In the event of arrest of the Applicant/accused in Crime No. 0044 of 2016 for the offences punishable under sections 376 and 313 of the Indian Penal Code, registered against him with Hupari Police Station, Kolhapur at the instance of the prosecutrix, the Applicant be released on bail on his executing P.R. Bond in the sum of Rs. 5000/- and on furnishing solvent surety in the like amount.
- iii. As a condition of this order, the Applicant should attend the Hupari Police Station, Kolhapur on every Saturday in between 11 a.m. to 1 p.m. and he should co-operate the investigating officer till filing of the chargesheet.
- iv. In addition, the Applicant/accused is directed that he shall not directly or indirectly make any

inducement, threat or promise to any person acquainted with the facts of accusation against him so as to dissuade such person from disclosing such facts either to the Court or to any police officer and that applicant shall not tamper with the prosecution evidence in any manner.

- v. The applicant should co-operate the trial court in expeditious disposal of the trial, in the event of filing the chargesheet.
- vi. The applicant should not commit offence of similar nature in future.
- vii. This anticipatory bail application is disposed of accordingly.

(A. M. BADAR, J.)

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