

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

**CRIMINAL APPLICATION NO. 3457 OF 2017
IN APEAL/300/2017 WITH CRIMINAL APPEAL/300/2017**

Santosh s/o Raising Chavan,
Age 31 years, Occupation: Private Service,
r/o Rani Unchegaon, Taluka Ghansavangi
District Jalna, at present in
Harsul Central Jail, Aurangabad.

**...APPLICANT
(Orig.Accused No.1)**

VERSUS

The State of Maharashtra,
Through Police Station Incharge
Begumpura Taluka and
District Aurangabad.

AND ANOTHER.

...RESPONDENTS

...
Advocate for Applicant : Mr.Kakade N.K.
APP for Respondent State: Mr. P.N.Kutti

...
CORAM : P.R. BORA, J.
Dated: October 03, 2017
...

PER COURT :-

1. By filing the present application, the applicant has sought his release on bail. The applicant has been convicted under Section 376 of IPC by the learned Additional Sessions Judge at Aurangabad in Sessions Case No.308/2011 and he is sentenced to suffer rigorous imprisonment for ten years with fine of Rs.2,000/-; in default, to suffer simple imprisonment for one month. The applicant has also been punished for the

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offense under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, and is sentenced to suffer rigorous imprisonment for six months with fine of Rs.1,000/-.

2. Shri N.K.Kakade, learned Counsel appearing for the applicant, submitted that on some pre-conceived wrong notions, the learned Sessions Judge has held the applicant guilty for the offense punishable under Section 376 of IPC as well as under the Atrocities Act. The learned Counsel submitted that, as is revealing from the case of the prosecution, and more particularly, the report lodged by the prosecutrix, apparently, there appears no element of force or deceit, or any misrepresentation on the part of the applicant. Learned Counsel submitted that the prosecutrix is aged about 24 years and she has indulged in establishing physical relationship with the accused voluntarily without any application of force by the applicant. Learned Counsel, relying on certain judgments, submitted that the learned Sessions Judge has misconstrued the provisions under Section 90 of the Indian Penal Code and has recorded an erroneous conclusion that the consent was under misconception and, as such, would amount to no consent, and the acts which were committed by the applicant would amount to rape as defined under Section 376 of the I.P.C.

3. Learned Counsel submitted that the applicant was on bail during the course of the trial and nothing is reported that he had committed any breach of liberty granted to him. Learned Counsel submitted that applicant has raised substantial
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grounds challenging the impugned judgment and is hopeful that he would be acquitted of all the charges levelled against him. Learned Counsel submitted that in the circumstances, the applicant shall be released on bail during pendency of the present appeal. Learned Counsel submitted that the applicant will abide by any condition which may be imposed by this Court.

4. Learned A.P.P. Shri P.N.Kutti has opposed for granting bail. Learned A.P.P., reading out few paragraphs in the judgment, urged that no case is made out for release of the applicant on bail during pendency of the present appeal. Learned A.P.P. submitted that the interpretation made by the Sessions Court of Section 90 of IPC is the correct interpretation and, as such, no case is made out for release of the applicant on bail. He, therefore, prayed for rejecting the application.

5. I have carefully considered the submissions made on behalf of the learned Counsel appearing for the applicant as well as by the learned A.P.P. I have perused the impugned judgment and the evidence on record. I have also gone through the judgments relied upon by the parties. From the material on record, it appears that at the very first instance, as is quoted by the prosecutrix before establishing any physical relationship with the prosecutrix, a promise was made by the applicant that he will marry the prosecutrix. The contents of the FIR as well as the testimony of the prosecutrix reveal that, thereafter, on many occasions, she had requested the applicant to marry with her, however, the marriage could not take place. It has also come on record that after it was revealed that she

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had remained pregnant from the accused, she and her mother approached the applicant and requested the applicant as well as his father to perform the marriage of the prosecutrix with the applicant. It has also come on record that the request so made was refused by the applicant and his father on the ground that the prosecutrix belongs to a lower caste i.e. MANG and, hence, the marriage of the prosecutrix and the accused could not be performed. Of course, the case of the prosecution has not been accepted by the accused. The material on record further reveals that D.N.A.test was conducted and the report of the D.N.A. test reveals that the applicant is the biological father of the child begotten by the prosecutrix. Having considered all these facts, the learned Sessions Judge has recorded a finding that the consent initially obtained of the prosecutrix cannot be said to be a free consent and would amount to misconception as defined under Section 90 of the Indian Penal Code. The learned Sessions Judge has elaborately discussed the evidence in paragraph no.21 onwards and has also relied upon the judgment of the Honourable Apex Court. While arguing the matter, learned Counsel for the applicant has also placed his reliance on the said judgments of the Honourable Apex Court as well as by this Court. I do not find it necessary to elaborately discuss all these judgments at this stage.

6. After having gone through the evidence on record and the analysis of the said evidence made by the learned Sessions Judge, apparently, it does not appear to me that the learned Sessions Judge has committed any error in interpreting Section 90 of Indian Penal Code. In the case of **State of U.P. Vs. Naushad** (Criminal Appeal No.1949 of 2013 dated agp/-

November 19th, 2013) the Honourable Apex Court has made the following observations:

" Thus, if consent is given by the prosecutrix under a misconception of fact, it is vitiated. In the present case, the accused had sexual intercourse with the prosecutrix by giving false assurance to the prosecutrix that he would marry her. After she got pregnant, he refused to do so. From this, it is evident that he never intended to marry her and procured her consent only for the reason of having sexual relations with her, which act of the accused falls squarely under the definition of rape as he had sexual intercourse with her consent which was consent obtained under a misconception of fact as defined under Section 90 of the IPC. Thus, the alleged consent said to have (been) obtained by the accused was not voluntary consent and this Court is of the view that the accused indulged in sexual intercourse with the prosecutrix by misconstruing to her his true intentions. It is apparent from the evidence that the accused only wanted to indulge in sexual intercourse with her and was under no intention of actually marrying the prosecutrix. He made a false promise to her and he never aimed to marry her.

The facts in the present case are similar to the facts as were involved in the case before the Apex Court. At this juncture, it is not possible to record any final conclusion that there is no breach of promise. Prima facie, however, it reveals that the very first intercourse was made by the accused by giving promise of marriage to the prosecutrix. In the circumstances, it does not appear to me that the applicant has made out any case for his release on bail. Having regard to the serious nature of the offense and the punishment imposed on the applicant, I am not inclined to accept his request. Hence, the following order:

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ORDER

1. Criminal Application (No.3457 of 2017) is rejected.
2. Learned Counsel for the applicant has prayed for expediting hearing of the appeal. The request deserves to be accepted. The hearing of the Criminal Appeal is expedited.

(P.R. BORA, J.)