

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

CRIMINAL APPLICATION NO. 5889 OF 2017

Ankush Ramnath Pathare
Age: 32 years, Occu.: Agri.,
R/o Koregaon, Tq. Shrirampur,
Dist. Ahmednagar

..APPLICANT

VERSUS

State of Maharashtra
Through Police Station officer
Newasa Police Station,
Tq. Newasa, Dist. Ahmednagar.

..RESPONDENT

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Mr. N.V. Gaware, Advocate h/f Mr. S.P. Salgar, Advocate for applicant.
Mr. A.D. Namde, A.P.P. for respondent – State.
Mr. R.P. Phatale, Advocate for Assist to P.P.

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**CORAM : V.L. ACHLIYA, J.
DATED : 16th NOVEMBER, 2017**

ORDER :

1. The applicant apprehending arrest in connection with the offence u/s 376, 107 of I.P.C. and u/s 17 of POCSO Act registered vide C.R. No. I-219 of 2017 with Shevgaon Police Station, Dist. Ahmednagar, has preferred this application seeking anticipatory bail.

2. Heard the learned Counsel for the applicant, the learned A.P.P. for

State and the learned Counsel representing the informant in C.R. No. 196 of 2015 registered u/s 420 r/w 34 of I.P.C. and u/s 2B, 4, 5, 6 of Prohibition of Child Marriage Act, 2006 registered pursuant to orders passed u/s 156(3) of Cr.P.C.

3. The learned Counsel for the applicant strenuously contended that F.I.R. bearing C.R. No. I-219 of 2017 spell out no offence u/s 376 of I.P.C. being committed on the part of the applicant. He submits that registration of offence is wholly based upon the order dated 03rd April, 2017 passed in Criminal Writ Petition No. 1557 of 2016 which in fact stayed by the Hon'ble Apex Court vide order dated 21st July, 2017 passed in S.L.P. (Criminal) No. 4753 of 2017. He submits that neither the prosecutrix nor mother of the prosecutrix lodged any complaint to register offence u/s 376 of I.P.C. He submits that on the basis of the F.I.R. lodged against the applicant, the applicant apprehending arrest for no offence committed on his part.

4. On the other hand, the learned A.P.P. has fairly conceded that offence has been registered pursuant to the order dated 03rd April, 2017 passed in Criminal Writ Petition No. 1557 of 2016. He submits that during the course of investigation, statement of the prosecutrix has been recorded. She has not uttered a single word against the applicant. She has stated that she is not

knowing the person named Ankush. She further submits that prosecutrix was referred to medical examination. Report of the medical examination rules out prosecutrix was subjected to sexual intercourse.

5. On due consideration of the submissions advanced in the light of the F.I.R. and papers of investigation, I am of the view that strong case has been made out to grant anticipatory bail to the applicant. Perusal of the case diary reveals that P.S.I. of the Newasa Police Station has lodged report pursuant to the order dated 03rd April, 2017 passed by this Court (Coram : T.V. Nalawade, J.) in Criminal Application No. 1271 of 2017 in Criminal Writ Petition No. 1557 of 2016 which was stayed by the Hon'ble Apex Court. Perusal of the order dated 03rd April, 2017 passed in Criminal Application No. 1271 of 2017 in Criminal Writ Petition No. 1557 of 2016 reveals that while deciding the application moved by one Sulbha Ankush Pathare who claims to be legally wedded wife of the applicant seeking recalling of order passed in Criminal Writ Petition No. 1557 of 2016, the said order came to be passed. In the application filed, the applicant alleged the breach of undertaking given by the mother of the prosecutrix that she will keep the prosecutrix in her custody. It is alleged that the mother of the prosecutrix has handed over the custody of the prosecutrix to the present applicant. During the course of hearing the Court has passed the order dated 03rd April, 2017 which reads as under :-

“3. Today, Officer of Newasa Police Station is present and initially the crime was registered in Newasa Police Station. In view of this, Newasa Police Station has jurisdiction over the matter. It will be open to the Police Officer of Newasa Police Station to visit the residential house of said Ankush Patare any time to ascertain whether the minor girl is present in his house. If the said minor girl is found to be present in the house of said Ankush Patare, crime can be registered against said Ankush Patare and mother of the minor girl i.e. non-applicant no.02 Nanda for offences punishable under Sections 376 and 107 of the Indian Penal Code and also under the provisions of Protection of Children from Sexual Offences Act, 2012. In that event, said Ankush Patare and non-applicant no.02 Nanda, mother of the minor girl, can be taken in custody and the minor girl can be shifted to remand home.”

6. The order dated 03rd April, 2017 passed by this Court challenged by S.L.P. (Criminal) No. 4753 of 2017 wherein the Hon'ble Apex Court has stayed the operation of the order dated 03rd April, 2017. Perusal of the F.I.R. reveals that pursuant to the order referred above, raid was conducted at the house of the applicant. The applicant was not found at his house. Thereafter the police have conducted raid at the house of Nanda Chede – mother of the prosecutrix. They found the prosecutrix present in the house of her mother. On the basis of the inference drawn, the applicant was residing with the prosecutrix as husband in contravention of the Prohibition of Child Marriage Act, F.I.R. in

question came to be registered. In the background of the facts of the case itself no offence u/s 376 of I.P.C. attracted against the applicant. In my view, even if the allegations made in F.I.R. are taken to its face value make out no offence u/s 376 of I.P.C. against the applicant. Even presuming that the applicant was residing with the prosecutrix at the house of mother of the prosecutrix, still it is not sufficient to attract offence u/s 376 of I.P.C.

7. Meaning of 'rape' has been defined u/s 375 of I.P.C. which reads as under :-

“375. Rape. - A man is said to commit “rape” if he -

(a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

First.- Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under eighteen years of age.

Seventhly.- When she is unable to communicate consent.”

8. Thus, if we consider the allegations made in F.I.R. in the light of the definition of 'rape', then there are no allegations as such that applicant had committed any act amounting to rape u/s 375 of I.P.C. In absence of such allegations, no offence u/s 376 of I.P.C. can be attracted against the applicant. Perusal of the papers of investigation reveals that during the course of

investigation, statement of prosecutrix, Jayashree @ Manisha aged about 17 years was recorded on 27th June, 2017. She has categorically stated that she had no relationship with the applicant. The prosecutrix was referred for medical examination to Rural Hospital, Ahmednagar. She was examined by medical officer on 27th June, 2017 pursuant to the requisition received in that behalf. The prosecutrix has stated before the Medical Officer that she has no sexual intercourse till the date of her medical examination. Two injuries were found on her body. Injury was found to be absent on hymen. No bleeding, no oedema, no position of tears were noticed during the medical examination of the prosecutrix. So also no perineal tear noticed. Pregnancy test was also found to be negative. Thus, the report of the medical examination rules out the prosecutrix was subjected to sexual intercourse as well as sexual assault. Thus, there is no material as such to prima facie attract offence u/s 376 of I.P.C. Only for the reason that vide order dated 03rd April, 2017 certain direction was given, offence u/s 376 of I.P.C. cannot be registered. Moreover, the direction of the High Court was to register the offence if prosecutrix found in the house of the applicant. In the F.I.R. itself it is mentioned that when the house of the applicant was raided, the prosecutrix was not found there. She was found in the house of her mother. In this view, it cannot be said that offence has been registered pursuant to the order dated 03rd April, 2017. Said order has been stayed by the Hon'ble Apex Court.

9. Thus, considering the overall facts and circumstances of the case, nature of allegations made in the F.I.R. and the statement of the prosecutrix as well as report of her medical examination, I am of the view that strong case has been made out to grant anticipatory bail to the applicant.

10. It is clarified that the observations made above are for the limited purpose of deciding the present application and same shall not be treated as observation made as to the merit of the case. In the result, following order is passed :-

ORDER

(i) Application is allowed.

(ii) In the event of arrest of the applicant in connection with the offence u/s 376, 107 of I.P.C. and u/s 17 of POCSO Act registered vide C.R. No. I-219 of 2017 with Shevgaon Police Station, the applicant be released on bail on his furnishing bail in the sum of Rs.25,000/- with one surety in like amount on the condition that the application shall appear before the Investigating Officer on 21st November, 2017 at 11 a.m. onwards till 24th November, 2017 and

thereafter as and when directed by the Investigating Officer and cooperate in investigation.

(iii) Application stands disposed of in view of the above.

(V. L. ACHLIYA, J.)

SSD