

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.157 OF 2017

Mr.Sadanand Rangnath Kamerkar ... **Applicant**

V/s.

The State of Maharashtra ... **Respondent**

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Mr.Pankaj D. Kavale , Advocate for the Applicant.

Mr.S.S.Hulke, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATED : 9th OCTOBER 2017.

P.C. :

1 By this application, the applicant/accused in Crime No.133 of 2016 registered with Police Station, Padgha for offences punishable under Sections 376 and 313 of the Indian Penal Code at the instance of the prosecutrix, is seeking pre-arrest bail.

2 Heard the learned Advocate appearing for the applicant/accused. He argued that the applicant, who is Head Constable working with the Police Department is having meritorious career and he is a member of the police team which apprehended Sakib Nachan, who was the wanted accused. The learned Advocate further argued that entire text of the FIR goes to show that there was love relations with the present applicant as

well as the prosecutrix who is an adult female aged about 21 years. The learned Advocate further argued that the abortion was by consent of the prosecutrix, as seen from the Order of the learned Additional Sessions Judge. The prosecutrix was not even ready for her medical examination and therefore, ultimately, a case for commission of non-cognizable offence was requested to be registered against her for getting her medical examination done. The FIR is lodged belatedly and that too when the prosecutrix has already aborted the foetus. The FIR was lodged only because the applicant refused to marry with the prosecutrix. As such, as sexual relationship between the parties, even according to the prosecution case, were consensual, custodial interrogation of the applicant is not warranted.

3 The learned Additional Public Prosecutor opposed the application by contending that initially, some medicines were administered to the prosecutrix and then as bleeding started, she was taken to the hospital, where abortion of foetus was undertaken and that was against the consent of the prosecutrix.

4 I have carefully considered the rival submissions and also perused the entire case diary. It is seen that initially, the prosecutrix attempted to lodge report, but no cognizance thereof was taken. It appears that she has submitted written complaint application to the Senior Police Inspector of Nijampura Police

Station on 14/06/2016 also which was duly received by the said police officer. The case diary then shows that the prosecutrix was constrained to approach Bhiwandi Taluka Police Station of Thane Rural Police where under '0' number, her FIR came to be registered by Police Sub-Inspector Shri.S.B.Bamne. Thereafter, it appears that the same was sent to Padgha Police Station and accordingly, Crime No.133 of 2016 is registered. The complaint application dated 14/06/2016 addressed to Senior Police Inspector of Nijampura Police Station so also subsequently registered FIR dated 16/06/2016 by the prosecutrix shows that in the year 2012, brother of the prosecutrix died because of drowning in a river. She as well as her family members comprising of her father who was suffering from stroke and one brother apprehended that her brother Latif must have been murdered by somebody and, therefore, they approached Nijampura Police Station for redressal of their grievance. The prosecutrix reported that then the present applicant posed himself to be the officer who was conducting inquiry in respect of incident happened with Latif – deceased brother of the prosecutrix. He visited house of the prosecutrix. The prosecutrix alleged that by visiting her house, the applicant noticed that father of the prosecutrix is suffering from stroke and then he started communicating with the prosecutrix regularly. The prosecutrix further averred that the applicant used to visit her as well as her family members on the pretext of conducting inquiry in respect of

death of Latif and he used to assure then that he will arrest culprits in murder of Latif and developed trust of family members of prosecutrix.

5 The prosecutrix further alleged that then the applicant allured her with a promise of marriage and love relations between them developed. On assurance of marriage, as per version of the prosecution, the present applicant used to take her to Saidham lodge frequently and he used to commit sexual intercourse with her which resulted in her pregnancy.

6 The Investigator has recorded statements of employees of the Lodge including the Manager. Those statements reveal that despite protest from employees of the Lodge, by noting his name as Ashok Patil and misusing his post, the applicant used to take room in that Lodge in indulging in sexual relations with the prosecutrix.

7 The prosecutrix reported police that upon her protest in the matter, the applicant started threatening her and he used to send his worker as well as his driver for threatening and beating the prosecutrix.

8 Perusal of material gathered by the Investigator during the course of investigation of this crime, reveals that initially, no

heed was paid to the complaint of the prosecutrix and she was made to run from pillar to post for redressal of her grievance. It is seen that by telling her that he will marry her, the applicant started sexual relations with the prosecutrix. The applicant is a person, who is already married. *Prima facie*, it appears that consent of prosecutrix in developing sexual relations was obtained with an assurance that the applicant will marry her.

9 Perusal of Section 375 of the Indian Penal Code makes it clear that sexual intercourse by a man with a woman with or without her consent and against her will is rape. Perusal of Section 90 of the Indian Penal Code makes it clear that a consent obtained under misconception of fact and if a person doing the act knows and has reason to believe that the consent was given in consequence of misconception is not a consent recognized by law. In the case in hand, complaint and FIR lodged by the prosecutrix *prima facie* goes to show that her consent was obtained under misconception of the fact and as such, *prima facie*, it cannot be said that the case in hand is a case of consensual sex and not of a rape. In such situation, the delay, if any, is of no relevance at this stage.

10 In this view of the matter, no case for pre-arrest bail is made out. The application is, therefore, rejected.

(A.M.BADAR J.)