

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CRIMINAL APPLICATION (BA) NO.46 OF 2017.

Rodhinand Namdeorao Pothare

..VS..

The State of Mah, thr. PSO,P.S. Wardha (City), Distt.Wardha.

Office Notes, Office Memoranda of
 Coram, appearances, Court's orders Court's or Judge's orders
 or directions and Registrar's orders.

Mr.R.M.Daga, Adv. for the applicant.

Ms.K.Deshpande, APP for the State.

CORAM : P.N. DESHMUKH, J.

DATE : 16th FEBRUARY, 2017.

1. This application is filed for grant of bail by accused involved in Crime No.496 of 2015, registered at Police Station Wardha City, for the offence punishable under Section 376(d) of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act.

2. Heard learned counsel for the applicant and learned Additional Public Prosecutor for the State.

3. It is submitted on behalf of applicant that offence is registered on the basis of statement of prosecutrix, aged 17 years, wherein she has alleged to have committed rape upon her by applicant on 5th September, 2015. The statement is recorded on 14th October, 2015, on which day victim was admitted in the

hospital having immolated herself by pouring kerosene on her person and setting herself on fire. It is submitted that no report is lodged by the victim girl in respect of alleged rape upon her by applicant on 5th September, 2015 i.e. about one month and ten days before, however had involved him, as such, in her statement dated 14th October, 2015 on the strength of which offence is registered on 18th October, 2015. It is submitted that initially, offence under Section 376 of the Indian Penal Code was registered wherein, on death of deceased on 21st October, 2015, offence punishable under Section 305 of the Indian Penal Code came to be added.

4. Learned counsel for the applicant has referred to three Dying Declarations of deceased, out of which Dying declarations dated 14th October, 2015 and 18th October, 2015 are recorded by police while third Dying Declaration is recorded on 19th October, 2015 by Child Welfare Officer and has contended that there are material inconsistencies in the same and has submitted that there is no endorsement on these documents about its contents having been read over to its maker and deceased admitting the same to be correctly recorded as per her say. It is therefore submitted that it does not comply with the requirement of law as laid down in the case of **Shaikh Bakshu and ors. ..vs.. State of Mah. reported in (2008)1 SCC (Cri.) 679**, wherein it is held that whether, in fact, dying declaration was read over and explained to its maker cannot be presumed and this fact must be clearly mentioned in the dying declaration. It is therefore prayed that, since from the contents of Dying

Declaration dated 14th October, 2015, which is admittedly first in the point of time, involvement of applicant alone is stated and in her subsequent statement deceased has also involved co-accused Nikhil, Sachin and Suraj, there being material inconsistencies in it and as there is no compliance of requirement as aforesaid, application be allowed as co-accused are released on bail by this Court.

5. Learned Additional Public Prosecutor opposed the application as per reply filed on record and has submitted that as per instructions received, trial is to be commenced from 20th February, 2017 and has thus, submitted that by rejecting application, trial be expedited.

6. In the background of submissions advanced as aforesaid, it is found that in the first dying declaration dated 14th October, 2015, applicant is stated to have indulged into sexual act with the deceased on 5th September, 2015. Admittedly, according to its contents there were love relations between deceased and the applicant. It is found that deceased while at Wardha to attend some marriage, accompanied applicant to the room of applicant's friend, where co-accused Sachin along with co-accused Nikhil were also present where she is stated to be gang raped by them after showing her some vulgar clippings on mobile phone. It is also stated that thereafter applicant was continuously forcing her to continue physical relations, due to which she committed suicide.

7. In her subsequent statement dated 18th October, 2015 applicant alone is involved to have indulged into sexual act with her on 5th September, 2015 in the room of Sachin, as according to its contents though applicant along with Sachin, Nikhil and Suraj are stated to have accompanied to said room, it is stated that they left the room and thereafter applicant committed sexual intercourse with her throughout the night. It is material to note that to substantiate the incident in question of alleged rape upon deceased on 5th September, 2015 and therefore she committing suicide on 14th October, 2015, there is nothing on record to establish said facts, except for statement of deceased as afore said, which prima facie does not appear to be convincing.

8. Law on the point of abetment to commit suicide is by now well settled. The concept of abetment in the context of abetment of suicide, which is punishable under Section 306 of the Indian Penal Code, is discussed by the Apex Court in the case of **Sanju @ Sanjay Singh Sengar ..vs.. State of Madhya Pradesh, (2002 Cr.L.J.2796)**. While allowing the said appeal, Their Lordships of the Supreme Court, inter alia, observed as follows :

“ Even if we accept the prosecution story that the appellant did tell the deceased ‘to go and die’, that itself does not constitute the ingredient of ‘instigation’. The word ‘instigate’ denotes incitement or urging to do some drastic or unadvisable action or

to stimulate or incite. Presence of mens rea, therefore, is the necessary concomitant of instigation.” (Para 13 of the reported Judgment).

9. In the light of above facts and settled legal position, it is noted that even if a person would commit suicide because of certain acts of the accused, the accused cannot be said to have committed abetment of suicide by the deceased unless the accused would intend, while causing such acts to the victim, that he/she should commit suicide. As such, it is necessary for the prosecution to establish that by his acts, the accused could reasonably foresee that because of his conduct, the victim was almost certain or at least, quite likely to commit suicide. Unless this is established, a person cannot be charged of having abetted commission of suicide, even if, suicide has been committed as a result of some of the acts committed by the accused.

In the case of *Sanju (supra)*, it is seen that even in the case where the accused had uttered words such as “go and die” in abusive and humiliating language which, allegedly, led to committing of suicide, it was held that it would not amount to instigation and consequently, there would be no offence of abetment of suicide.

10. In the application in hand, there is absolutely no evidence to establish that on the day of incident or immediately prior to death of deceased, applicant has instigated or abetted

the deceased to commit suicide.

11. Similarly, on the Dying Declarations there is no endorsement about contents thereof having been read over to its maker and deceased admitting the same to be recorded correctly as per her say. In view of ratio laid down in the case of *Shaikh Bakshu* cited supra, nor contents of multiple dying declarations are consistent thus, application is liable to be allowed even if trial is likely to commence from 20th February, 2017 as the fact by itself cannot be an impediment in deciding the application as other co-accused are already released on bail. In that view of the matter, following order is passed.

Applicant Bodhinand Namdeorao Pothare shall be released on bail in Crime No.496 of 2015, registered at Police Station Wardha City, on his executing P.R. bond in the sum of Rs.50,000/- with one surety in the like amount.

Applicant shall mark his presence with Wardha City Police Station on first day of each month pending trial. Needless to say that applicant shall attend learned Sessions Court without fail.

Applicant shall produce proof of his residence to Police Station Wardha City and shall update the same in the event of change of his address in future.

Learned trial Court shall not get influenced with the observations as above and shall independently evaluate the evidence on record, at the time of trial.

Application stands disposed of accordingly.

In view of disposal of Criminal Application (BA)

No.46 of 2017, Criminal Application (APPP) No.73 of 2017
stands dismissed as infructuous.

JUDGE

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