

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 7038 OF 2016

Ashok Dhondiba Kale,
Age : 22 Years, Occu. Private
Service,
R/o Digras, Barsale, Tq. Sailu,
Dist. Parbhani, presently residing at
Near Hotel Seven Hawel,
Pathardi Phata, Tq. & Dist. Nashik. ...Applicant.

Versus

- 1] State of Maharashtra
Through the Investigation Officer,
Police Station Sailu,
Tq. Sailu, Dist. Parbhani.
- 2] Santaji s/o Dhondiba Khupse,
Age : 49 years, Occu. Service,
R/o Vidyanagar, Sailu,
Tq. Sailu, Dist. Parbhani.
- 3] Rohini d/o Santaji Khupse @
Rohini w/o Ashok Kale,
Age : 18 years, Occu. Housewife,
R/o Digras-Barsale, Tq. Sailu,
Dist. Parbhani, presently residing
at Near Hotel Seven Hawel,
Pathardi Phata, Tq. & Dist.
Nashik. ...Respondents.

Mr. M. P. Tripathi, Advocate for Applicant.
Mr. S. D. Ghayal, Addl. Public Prosecutor, for
Respondent / State.
Mr. P. B. Gapat, Advocate for Respondent No. 2.
Mr. N. S. Kadam, Advocate for Respondent No. 3.

CORAM : PRASANNA B. VARALE &

SMT.VIBHA KANKANWADI. JJ.

RESERVED ON : 09-04-2018.

PRONOUNCED ON : 16-07-2018.

JUDGMENT : [Per Smt. Vibha Kankanwadi, J]

01. By this criminal application under Section 482 of Criminal Procedure Code, the petitioner is seeking quashment of the first information report and the proceedings in Special Sessions Case No. 32 of 2014 pending before Sessions Court, Parbhani.

02. The respondent No. 2 is a resident of Sailu. Respondent No. 3 is his daughter. Respondent No. 2 had lodged report with Sailu Police Station, Tq. Sailu, Dist. Parbhani regarding missing of the respondent No. 3 on 4.7.2013. It was contended in the said report that the daughter is missing since 9 AM of 3.7.2013. The daughter had left the house under the pretext to go to school. However, did not

return. Thereafter, the informant respondent No. 2 had gone to Pune on 8.8.2013 and he received the information that the present applicant accused had taken respondent No. 3 at Pune. Respondent No. 2 had talked with the applicant on mobile. But, thereafter the informant lodged the report saying that the applicant has taken away his minor daughter on the false assurance of marriage. The said report came to be registered as CR No. 117/2013 for the offences punishable under Sections 363, 366A of Indian Penal Code during the course of investigation, the accused was arrested on 19.9.2014 and the charge-sheet came to be filed for the under Sections 363, 366-A, 376 of Indian Penal Code and Section 6 of Protection of Children from Sexual Offences Act, 2012. In the statement before the Investigating Officer, the daughter had stated that she had developed love for the accused and out of said love and affection she left her house and guardianship of her father on 3.7.2013 and joined the applicant at Parbhani. Thereafter they went to Pune from Parbhani. Accused and the daughter performed marriage on 25.7.2013 in Ganpati Mandir, Alandi, Dist. Pune and thereafter

there was sexual relationship between the accused and her. At the time of her statement she was pregnant. The applicant further says that when bail application was filed by the accused, at that time, the respondent No. 2 and 3 had appeared and given consent to the release of applicant. It was reiterated that the accused and the daughter had solemnized marriage. Thereafter the bail was granted. In spite of that the charge-sheet was filed. Thereafter the respondent No. 3 has delivered a female child from the said wedlock. In view of exception to Section 375 of Indian Penal Code offence punishable under Section 376 is not maintainable. Further invoking of POCSO which is newly enacted it does not include "wife below 18 years" under the definition of "child". Other offences are also not made out and therefore, the applicant has prayed that the first information report in the said matter to quash and set aside so also the entire proceedings.

03. Respondent No. 2 and 3 have filed their affidavits. They both have reiterated the fact that there was marriage between the applicant and

respondent No. 3, child has been delivered by respondent No. 3 on 2.12.2014. The applicant accused is taking care and maintaining mother and the child satisfactorily and therefore, the respondent No. 2 has stated that he has no grievance against the petitioner.

04. Rejoinder has been filed by the applicant stating that respondent No. 3 has initially taken education in one Savitribai Badrinarayan Nutan Prathamik School, Sailu and as per the school report her birth date is 2.1.1998. She was more than 15 years and 7 months on the day of alleged offence and therefore, the proviso to Section 375 of Indian Penal Code is applicable.

05. Heard learned Advocate Mr. M. P. Tripathi for applicant, learned Addl. Public Prosecutor Mr. S. D. Ghayal for State and Mr. P. B. Gapat and Mr. N. S. Kadam Advocates for respondent No. 2 and 3. In order to cut short we would like to say that it has been submitted on behalf of the applicant and the respondent No. 2 and 3 that though the first

information report was lodge and at that time respondent No. 3 was minor; but, taking into consideration the fact that though she had left the house it was the voluntary act. Thereafter marriage was performed between the applicant and the respondent No. 3 and thereafter they had sexual relationship. Therefore, proviso to Section 375 of Indian Penal Code is applicable. Reliance has been placed on the decision in **Independent Thought V/s Union of India and Anr., (AIR 2017 Supreme Court 4904)** wherein it has been observed that though the said proviso is struck down as arbitrary, capricious, whimsical and violative of rights of girl child; the effect of the said Judgment is prospective. The Judgment was pronounced on 11.10.2017. In this case though observation is made that the cases may be governed under POCSO as it is a special enactment. However, the word 'child' defined under POCSO does not cover a minor wife. Further reliance has been placed on decision of this Court on principle laid down in **Writ Petition No. 4168/2013 decided on 16th April 2015.** Wherein the similar circumstances the

petition came to be allowed in the light of guidelines of **Narinder Singh V/s State of Punjab (2014 AIR SCW 2065)**. Further reliance has been placed on State of **Karnataka V/s L. Muniswamy, (1977 AIR (SC) 1489)**, wherein it has been held that Sessions Court has power to discharge the accused if there is no sufficient grounds for proceedings against the accused. Further reliance has been placed on **B. S. Joshi V/s State of Haryana, (2003 AIR (SC) 1386)**, wherein it has been held that :

"While exercising inherent power of quashing under Section 482, it is for the High Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. Where, in the opinion of the Court, chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may, while taking into consideration the special facts of a case, also quash

the proceedings. The special features in such matrimonial matters are evident. It becomes the duty of the Court to encourage genuine settlements of matrimonial disputes. High Court is exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code".

It is submitted that since the accused and respondent No. 3 are married and they are living a happy married life, they have a daughter, it would be in the interest of justice to quash the proceedings.

06. The learned Addl. Public Prosecutor vehemently submitted that the offences punishable under Section 376 and under POCSO Act are very much serious and heinous in nature. Merely because the accused has married the victim that does not absolve him from punishment.

07. Respondent No. 2 and 3 were personally present before us. We have confirmed from respondent

No. 3 about the contents of her affidavit. She has stated that the said affidavit was filed by her with her free will. In fact she had brought her daughter to the Court also. She has specifically stated that the accused is looking after her properly. She herself had left the home because she was deeply in love with the accused. The respondent No. 2 has also given his no objection for quashing the criminal proceedings against the applicant.

08. There can not be a difference of opinion regarding the fact that the offence under Section 376 of Indian Penal Code and under the POCSO Act are serious in nature and heinous. They are the offences against society and when such offences are against society they can not be quashed by consent. Merely because the accused has married the victim that will not also, in general, absolve him from criminal liability. However, we are also required to consider the facts in the present case in order to appreciate the submissions. It is to be noted that even the victim has stated that the accused has firstly performed marriage with her and thereafter, they were

living as legally wedded husband and wife. Sexual relations took place only after the marriage was performed. That means at time of the sexual intercourse, the accused was 'the husband' of respondent NO. 3. In view of the decision in **Independent Thought V/s Union of India and Anr.**, (Supra) though the exception to Section 375 of Indian Penal Code has been struck down by Judgment dated 11.10.2017, it has been clarified in the said Judgment itself that the Judgment will have prospective effect. The F. I. R. will show that at the time of lodging the same the age of the victim has been shown as 15 years. Her birth date was not mentioned in the report which was filed regarding missing. As well as the F. I. R. in crime No. 117/2013 statement of victim was recorded on 19.9.2014 and at that time she has given her age as 16 years. As regards the evidence about her age is concerned, bonafide certificate from Smt. L. L. R. Nutan (Kanya) Prashala Sailu has been produced which shows that as per that record her birth date is 27.10.1998. It is stated that she had taken admission in the said school on 20.6.2010 in 7th

standard. Her earlier school was Vivekanand Prathamik Shala, Sailu. Along with rejoinder affidavit of bonafide certificate issued by Savitribai Badrinarayan Nutan Prathamik School, Sailu has been produced which shows that she had taken admission in that school on 1.7.2013 in second standard and as per this record her birth date is 2.1.1998. Taking into consideration, the bonafide certificate which is issued earlier in time, is required to be considered and therefore, it can be said that at that time of alleged commission of offence the victim was more than 15 years and 7 months old. The full Bench of Delhi High Court in the case of **Court on its own Motion (Lajja Devi) & Ors. V/s State & Ors., (2012 (131) DRJ 225 (FB)** has come to the conclusion that the consummation of marriage with wife below age of 15 years is an offence. In view of Section 375 and therefore, under the provisions of Section 376 of Indian Penal Code FIR in such cases can not be quashed. This ratio will not be applicable here. As aforesaid the respondent No. 3 victim was more than 15 years and 7 months of age. Therefore, definitely applicant is

entitled to get benefit of the old provision i.e. Exception to Section 375 of Indian Penal Code. It will not be out of place to mention the observation in **Independent Thought V/s Union of India and Anr.**, (Supra) wherein it is observed in para No. 187 that :

"Section 42A of POCSO has two parts. The first part of the Section provides that the Act is in addition to and not in derogation of any other law. Therefore, the provisions of POCSO are in addition to and not above any other law. However, the second part of Section 42A provides that in case of any inconsistency between the provisions of POCSO and any other law, then it is the provisions of POCSO, which will have an overriding effect to the extent of inconsistency. POCSO defines a child to be a person below the age of 18 years. Penetrative sexual assault and aggravated penetrative sexual assault have been defined in Section 3 and Section 5 of POCSO. Provisions of Sections 3 and 5 are by and large similar to Section 375 and Section 376 of IPC. Section 3 of the POCSO is identical to the opening portion of Section 375 of IPC whereas Section 5 of

POCSO is similar to Section 376(2) of the IPC. Exception 2 to Section 375 of IPC, which makes sexual intercourse or acts of consensual sex of a man with his own "wife" not being under 15 years of age, not an offence, is not found in any provision of POCSO. Therefore, this is a major inconsistency between POCSO and IPC. As provided in Section 42A, in case of such an inconsistency, POCSO will prevail. Moreover, POCSO is a special Act, dealing with the children whereas IPC is the general criminal law. Therefore, POCSO will prevail over IPC and Exception 2 insofar as it relates to children, is inconsistent with POCSO".

Though above said fact is required to be considered, yet in this case, the marriage is performed and they are staying together. They are happily married.

09. As regards Section 363, 366A of Indian Penal Code is also considered the above said fact about the marriage between the accused and the victim is required to be considered. In almost similar case

in Writ Petition No. 4168/2013 it was observed that :

"In the instant case, the FIR reveals that the Petitioner and Respondent No. 2 were in love with each other and physical relationship between them was consensual. However, at the relevant time Respondent No. 2 was minor. After she attained majority, she got married to the Petitioner. Now, they are living together. Under such circumstances, if prosecution is allowed to be continued against the Petitioner it will bring discord in their matrimonial relationship and they will be unnecessarily required to face the consequences of prosecution, which is not at all likely to end into conviction. Consequently, no fruitful purpose will be served by continuing with the prosecution of the Petitioner".

10. These observations are equally applicable here. Applicant and respondent No. 3 are happily married. Taking into consideration, said circumstances and in the light of principles laid down by the Apex Court in the decision of **Narinder Singh V/s State of Punjab** there is no impediment in

quashing the F.I.R. and the criminal proceedings. The powers of this Court under Sec. 482 of Code of Criminal Procedure is required to be used in the interest of justice in order to avoid the abuse of process of law. Possibility of witnesses turning hostile during the trial can not be ruled out. Case is made out for quashing the entire proceeding before learned Sessions Judge.

Hence, following Order;

ORDER

(i) Criminal application is hereby allowed.

(ii) The F. I. R. Report bearing C. R. No. 117/2013 registered at the behest of respondent No. 2 at Police Station, Sailu, Tq. Sailu, Dist. Parbhani and the proceedings before Sessions Judge, Parbhani, Special Sessions Case No. 13/2014

for the offences punishable under
Sections 363, 366A and 376 of
Indian Penal Code and Section 6 of
POCSO, 2012 are hereby quashed and
set aside.

[SMT. VIBHA KANKANWADI]
JUDGE

[PRASANNA B. VARALE]
JUDGE

ggd/-.