

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO.210 OF 2018

Vishal Vijay Patil

... Applicant

Vs.

The State of Maharashtra & anr.

... Respondents

Mrs.T.A. Bharadi for the Applicant

Ms.Veera Shinde, APP, for the Respondent – State

Mr.Rajkumar Laxman A. Rajhuns for Resp. No.2

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: MARCH 8, 2019

P.C.:

1. This revision application is directed against the order of rejecting discharge application by order dated 12.1.2018 passed by the learned Additional Sessions Judge, Borivali, Mumbai. The applicant/accused is prosecuted for the offences punishable under sections 376 and 420 of the Indian Penal Code. As per the case of the prosecution, the prosecutrix met the applicant/accused in the year 2009; proposed to her and at that time, the prosecutrix sent him a message that she being a muslim, the marriage between them was not possible. At that time, the applicant/accused told her that he is ready for conversion and, therefore, they started meeting and it led to a love affair between the applicant and the

prosecutrix. The applicant had promised her to marry and thereafter, he also demanded sexual intercourse. As he had agreed to marry the prosecutrix, she accepted his demand in May, 2012. Thereafter in 2012 and 2014, their physical relationship continued. It is the case of the prosecutrix that she was fully confident about their marriage, so she accepted the demands of physical relationship made by the applicant/accused. However, gradually, he started avoiding her and informed that he being a Hindu, his parents would not agree for the marriage. He stopped talking with her and stopped responding to her messages and severed the communication. In the year 2015, her parents had knowledge about their relationship and she learnt that he is going to engage with other woman. There was no response from the side of the applicant/accused. So, the prosecutrix lodged an FIR with the Jogeshwari police station, Mumbai, pursuant to which the offence was registered at C.R. No.78 of 2015 on 26.3.2015 for the offences punishable under sections 376 and 420 of the Indian Penal Code.

2. Learned Counsel for the applicant/accused submitted that the applicant/accused is innocent. It is the case of a consensual

sexual relationship between two adults. She has further submitted that there is no evidence disclosing any offence of cheating committed by the applicant/accused. She has further submitted that the applicant/accused has denied that he ever promised her to marry her or has cheated her in any manner. She further submitted that no ingredients of rape are revealed in the present case and he is entitled to discharge. The learned Counsel relied on the judgment of the learned Single Judge of this Court in the case of **Kunal Mandaliya vs. The State of Maharashtra**¹. The learned Counsel also relied on the Supreme Court decision in **Jayendra Vijay Ayare & Ors. vs. Priyanka Ankush Chavan @ Ruchitra & anr. in Criminal Appeal No.1148 of 2018**.

3. Learned Prosecutor while opposing this application submitted that the police have made out a case of rape and cheating against the applicant/accused. The police have collected certain bills of payment made by the prosecutrix for the applicant/accused.

4. The learned Counsel appearing for the prosecutrix has submitted that the applicant/accused has seduced the complainant

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and fraudulently established sexual relationship with her. He promised her to marry and, therefore, the complainant trusted him time to time. He asked for money to meet his different needs and the prosecutrix paid him during the period of 4 to 5 years and has suffered financial losses. The applicant/accused is thus, responsible for cheating her and he is rightly prosecuted for the offence of rape and cheating.

5. Perused the FIR and the statements of witnesses especially a friend of the prosecutrix. It is a case of consensual sexual intercourse which cannot be labelled as rape. The prosecutrix at the time of filing the complaint i.e., March 2015 was 26 years old and according to her statement, the incident of rape has occurred in May, 2012. Thus, at the time of the incident, the prosecutrix was approximately 22 years old. At that time, she was working as a Sales Girl in one mobile agency where the applicant/accused was working as a team manager. Thus, the prosecutrix was wise enough to understand the consequences of keeping sexual relations without marriage. She was aware that they belonged to different religions. Therefore, the consent given by the prosecutrix cannot be said that it was obtained by fraud or out of coercion.

I rely on the judgment of **Shri Kunal Mandaliya vs. The State of Maharashtra (supra)**, wherein para 6 reads thus:

“6. ... Thus, she was aware of the consequences of keeping sexual relations with a man and she was also aware that there may be differences between two persons and they may find each other not compatible. The girl was highly educated and also 25 years old. Therefore, the consent cannot be said to have been obtained by fraud. I also rely on the order dated 12.3.2014 of this Court passed in Criminal ABA No.27 of 2014 wherein a similar issue with identical facts was dealt with and it was held that under such circumstances, it is a conscious decision to keep sexual relations with a man and thus, to have physical relationship is a matter of choice of both the adult persons, it can hardly be said that the consent was obtained fraudulently. Therefore, there is no material against the accused to charge him under section 376 of the Indian Penal Code. However, there are other allegations of intimidation, cheating and causing hurt and beating.”

6. In the case of **Jayendra Ahire (supra)**, the accused was prosecuted under sections 420 and 354 of the Indian Penal Code r/w 34 of the Indian Penal Code. The Supreme Court has observed that the material on record showed that the allegations and the charges made arise out of relationship of love and both persons were involved for a period of nearly 5 years and, therefore, on the very face of it, the charges of prosecution under the relevant sections are not maintainable and the High Court was clearly in

error in refusing to quash criminal proceedings against the accused.

7. As regards cheating, it is necessary for the prosecution to show the wrongful loss and wrongful gain of the property caused to the prosecutrix. Whatever money as alleged was given by the prosecutrix to the accused cannot be considered as cheating because she herself gave that money to him or she spent the money of her own volition for their stay or entertainment. There is no evidence to show that there was *mens rea* in the mind of the accused to make the prosecutrix to part with the money. In the absence of *mens rea*, no offence under section 420 can be made out.

8. Under such circumstances, the revision is allowed. The order dated 12.1.2018 passed by the learned Sessions Judge, Mumbai, refusing discharge is hereby set aside.

(MRIDULA BHATKAR, J.)