

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

ANTICIPATORY BAIL APPLICATION NO.902 OF 2020

Sarvar @ Tayeesh Afzal Momin,
Age 28 years, Occupation Business,
R/o Momin Colony, Georai
Tq. Georai Dsit. Beed.

...Applicant

VERSUS

The State of Maharashtra,
Through Georai Police Station,
Tq. Georai Dist. Beed.

...Respondent

.....
Advocate for Applicant : Mr. C. V. Dharurkar.
APP for Respondent : Mr. Mr. Y. G. Gujarati.

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 16-10-2020.

ORDER :

- 1) Present applicant is apprehending his arrest in connection with Crime No.398 of 2020, dated 02-09-2020, for the offence punishable under Section 376 (2) (n), 504 of Indian Penal Code, registered with the Georai Police Station Tq. Georai Dist. Beed.
- 2) Heard learned Advocate Mr. C. V. Dharurkar for the applicant and learned Additional Public Prosecutor Mr. Y. G. Gujarati for respondent- State.

3) It has been vehemently submitted on behalf of the applicant that, perusal of the First Information Report would show that, there was love affair between the prosecutrix and the applicant. It is also stated that, though the family members were knowing about the love affair between them, the marriage of the prosecutrix was performed with another boy, and it is her say that, on the say of the applicant, she obtained divorce from her husband. It is her allegation that, under the pretext of promise, the accused has sexually exploited the informant. Thereafter, when it was found by the prosecutrix that the accused has performed marriage with another girl, she has filed the First Information Report. It is to be noted that, just earlier to the First Information Report, one non-cognizable complaint was filed under Section 504 and 506 of the Indian Penal Code by the prosecutrix against the present applicant, at that time she has not whispered about sexual exploitation. The First Information Report appears to be a pressurizing tactics and has been filed with ulterior motive. When the relationship appears to be consensual, the physical custody of the applicant for the purpose of investigation is not required. The learned Advocate appearing for the applicant prayed for ad-interim relief. He also prayed for notice to be issued in the matter.

4) The learned Additional Public Prosecutor strongly opposed the application and submitted that, the order passed by the learned Trial Judge is elaborate and would show that, the physical custody of the applicant would be necessary for the purpose of investigation.

5) At the outset it can be seen that, the prosecutrix is aged 21 and she herself has come with a case that, after she got acquaintance with the applicant in March 2017, they developed love affair and the applicant had promised her to marry. Even the applicant had visited the house of the prosecutrix in May 2017 and put proposal for marriage between him and the prosecutrix. When the parents of the prosecutrix met the parents of applicant, they refused to give permission to the marriage. Prosecutrix says that, thereafter her marriage was performed with another boy on 10-12-2017. Even after her marriage, the applicant was constantly visiting her matrimonial home and insisting her that they would perform marriage and, therefore, she should take Talaq from her husband. Prosecutrix says that, as per the wish of the applicant, she took Talaq from her husband and started residing with her mother. Applicant had introduced his friend to the prosecutrix. The friend of the applicant used to reside alone. When nobody used to be in his

house, the applicant used to take the prosecutrix at that place and there used to be sexual intercourse between them when applicant used to give promise that he would marry her within few days and would start residing as husband and wife. This act went on for considerable longtime. Thereafter the applicant used to say that, his sisters were to be married and he would perform marriage with the prosecutrix after the marriage of his sisters. Even after the marriage of sisters were performed, yet applicant did not marry her and continued his physical relations with the prosecutrix. The prosecutrix then claims that, during lockdown period without giving any information to the prosecutrix, the applicant performed marriage with another girl. When she made inquiry with the applicant, at that time he had abused her and, thereafter, she has lodged the report. Thus it can be seen that, the tenor of the First Information Report would show that the applicant had prevailed on the prosecutrix to take divorce from her husband when his parents had refused the marriage between them and then she had performed the marriage with another boy. Thereafter, by giving promise that after the marriages of his sisters would be performed, he would marry her, he kept on the physical relations. Therefore, *prima facie* it can be seen that the consent has been obtained. If at all it has to be inferred in

that way from the prosecutrix by giving false promise to marry, even at this *prima facie* stage from the papers it can be seen that the applicant had the knowledge about the falsity in his promise. It will not be out of place to mention here that, the learned Trial Judge i.e. Additional Sessions Judge, Beed in his order dated 23-09-2020 has taken note of various decisions on the point wherein there was consensual sexual relationship. The ratio laid down in *Anurag Soni v. State of Chhattisgarh*, reported in *AIR 2019 S.C.1857* has been noted. Further it has been also considered that the non-cognizable complaint filed by the prosecutrix was relating to a incident that had occurred on 01-09-2020 wherein there is no mention about the offence under Section 376 of the Indian Penal Code. Definitely the facts of the case, the manner in which it is stated to be committed, the seriousness in the said offence is definitely required to be considered when it comes to discretionary powers under Section 438 of the Code of Criminal Procedure. When case is not even made out for ad-interim protection, then definitely it deserves to be rejected outright. Hence, the application stands rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-