

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.426 OF 2021

XYZ C/O. NAZIYA ZAHIRUDDIN SHAIKH
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS

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Advocate for the Petitioner : Shri Rajendra S. Deshmukh, Senior Advocate
i/by Shri Avhad Abhijeet P. and Shri Pote Ketan D.

Chief Public Prosecutor for Respondents 1 and 2 : Shri D.R. Kale

None for Respondent No.3/ Union of India

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**CORAM : RAVINDRA V. GHUGE
&
B. U. DEBADWAR, JJ.**

DATE :- 07th April, 2021

ORAL ORDER (per Ravindra V. Ghuge, J.) :-

*“Nearly all men can stand adversity, but if you want to test a man’s
character, give him power.”*

*– Abraham Lincoln,
16th President of the United States of America.*

1. We have quoted a very meaningful statement of Abraham Lincoln which sends out a strong message, as an epigram before beginning to write this order, since this case has brought up a contentious issue as regards a police officer deviating from his duties purportedly under the

influence of the accused politician.

2. This petition was filed on 16.03.2021. The petitioner/ original informant has put forth prayer clauses (b), (d) and (f) as under :-

- “b) This Hon’ble Court may kindly be pleased to issue appropriate writ, order or direction whereby the respondent No.2 to arrest the accused in FIR No.806 of 2020 registered with respondent No.2 immediately.”*
- “d) This Hon’ble Court may kindly be pleased to issue appropriate writ, order or direction for transfer of investigation of FIR No.806 of 2020 registered with respondent No.2 to any independent agency such as CBI, CID or any other Police Station.”*
- “f) Considering the conduct of respondent No.2 this Hon’ble Court may kindly be please to conduct an enquiry against the investigating officer and after due enquiry strict action be taken against the erring officer of respondent No.1.”*

3. On 05.04.2021, after considering the submissions of the learned Senior Advocate on behalf of the petitioner and the learned prosecutor, we had passed an order running into seven pages and containing 12 paragraphs. Before we could sign the order, as the transcript was not yet ready, the learned Chief Public Prosecutor moved a motion at 10:30 AM on 06.04.2021 stating that some material facts were required to be brought before this Court, which would have an effect on the result of the petition. Such vital facts were not brought to our notice and as we had not yet signed the order, the matter may be listed for further hearing. We granted circulation to the learned Chief Public Prosecutor, so as to list this petition today, by asking him to intimate the learned advocate appearing

on behalf of the petitioner.

4. The transcript of our order dated 05.04.2021 is ready by way of a rough draft and the same is before us. Since we have not signed it and since all the parties were agreeable for a hearing today, we are keeping the draft order aside. However, to maintain transparency in judicial proceedings, we are marking our draft order dated 05.04.2021 as “X-1”, which will be tagged to the petition paper book.

5. Today, we have considered the extensive submissions of the learned Chief Public Prosecutor on behalf of the State and the learned Senior Advocate on behalf of the petitioner.

6. This matter was listed before us on 01.04.2021 when we passed the following order :-

- “1. We have heard the submissions of the learned Senior Advocate Shri R.S. Deshmukh along with Shri A.P. Avhad, learned Advocate for the petitioner and the learned prosecutor on behalf of respondent Nos.1 and 2. Respondent No.3, Union of India, is a formal party.*
- 2. We have perused the F.I.R., registered on 26.12.2020 bearing F.I.R. No.0806 of 2020.*
- 3. The learned prosecutor seeks time to take instructions.*
- 4. Considering the grievances voiced in this petition, the I.O. Shri Ashok Uttamrao Giri shall remain personally present in the Court, on 05.04.2021.*
- 5. List this petition on 05.04.2021, for passing orders.”*

7. We were informed on 05.04.2021 that the Investigating Officer is not Mr.Giri, who is present in the Court. The Investigating Officer was actually Ms.Ashlesha Patil, Police Sub-Inspector, who officiated

as such till 30.12.2020. She was removed, for reasons not divulged to the Court. Thereafter, Mr.Nishikant Bhujbal, Assistant Police Commissioner, Cidco Region, Aurangabad city, had taken over the investigation from 31.12.2020. We are informed by the learned prosecutor under instructions from the said I.O. Mr.Bhujbal, that now the “B” summary report has been filed before the learned Magistrate on 31.03.2021. Notwithstanding this petition, the learned Senior Advocate for the petitioner insists that his prayers at clauses (b), (d) and (f) should be dealt with as this I.O. has substantially damaged the case of the petitioner.

8. We have perused the contents of the First Information Report and we have also gone through the statement of the victim recorded under Section 164 of the Code of Criminal Procedure on 15.01.2021. We find that the victim has stuck to her story as set out in the FIR and has categorically stated before the learned Magistrate under Section 164 that the accused has committed the offence in the manner set out in the FIR and her statement.

9. Shri Deshmukh, learned Senior Advocate, has strenuously canvassed as follows :-

(a) Considering that the victim was threatened with murder by the accused, it caused a delay in filing the FIR on 26.12.2020, though the crime was committed on 14.11.2020.

(b) The I.O. did not even venture in taking the accused into

custody.

(c) The accused is a high profile politician, active for the last 15 years and it is on account of he being an influential politician, that the I.O. did not dare to arrest him.

(d) The level of confidence of the accused that the I.O. would not dare to touch him is clearly indicated from the fact that despite a heinous crime alleged to have been committed by him, he did not even file an application for anticipatory bail, which is further indicative of the fact that he was absolutely sure that the police machinery would not touch him.

(e) The I.O. has violated the circular dated 09.10.2020 issued by the Government of India, Minister of Home Affairs (Women Safety Division) mandating that crimes against women have to be investigated as per the standard operating procedure issued by the Bureau of Police Research and Development. Without proper investigation, the I.O. has submitted the “B” summary report.

(f) The victim is unmarried. Yet, the I.O. claims that she is married and divorced. So also, ever since the registration of the FIR, it is the victim who has been consistently summoned for investigation/interrogation and harassed. To the contrary, the accused is roaming free in the society.

10. The learned Chief Public Prosecutor submits that this victim

cannot be said to be narrating the truth since earlier, on 07.12.2017, she had filed a complaint against one Shri Sharekh Salim Shaikh from Aurangabad alleging that he had assured her of marriage and had frequently raped her. He had also taken Rs.1,50,000/- from her on 21.03.2017. Specific dates on which the accused had raped her, were not mentioned in her complaint. The last incident appeared to be of 21.03.2017 when the accused allegedly took Rs.1,50,000/- from her. Thereafter, some time in April, 2017, according to her, her marriage with the accused was orally settled. It was further alleged that thereafter, he had declined to marry her and hence, the FIR was lodged on 07.12.2017, which is almost eight months after the last incident.

11. The learned Chief Public Prosecutor further points out that subsequently, on 20.12.2017, further statement of the victim was recorded in which, she had stated that if she receives Rs.1,45,000/- from the accused Mr.Shaikh, she would withdraw her complaint. It is then stated that subsequently, the accused paid her Rs.1,45,000/- and since she withdrew the complaint, the “B” summary report was submitted.

12. The learned Chief Public Prosecutor further submits that in yet another case, the same lady has been involved in lodging of an FIR in connection with monetary transaction. That matter was also settled after she received money.

13. He then submits that, in the present case, on 01.01.2021, the

accused Mehaboob Ibrahim Shaikh walked into the Police Station and has tendered a lengthy oral statement, which was recorded by the I.O.. He had put forth the story of an alibi and that he was not in Aurangabad till 14.11.2020. Prior thereto, the I.O. had collected the CDR record for the period 30.12.2019 till 30.12.2020 and it appeared that the victim and the accused were never in contact with each other on cellular phone. In this period of 12 months, they were not in contact and as such, the I.O. seriously doubted the story of the victim. So also, the CCTV footages on the Hotel Ramgiri – Vasantrao Naik College Road, between 07:00 PM to 10:00 PM of 14.11.2020, were checked as the footages were available from CCTV cameras of certain shop owners. No vehicle with maroon colour had halted at 09:00 PM at the spot which was pointed out by the victim as being the crime spot. The crime is said to have occurred at 09:00 PM. The case diary running into 770 pages is referred to by the learned prosecutor. He, therefore, submits that, these above factors were taken into consideration by the I.O. and hence, the accused was not arrested.

14. He then submits that the delay of 42 days in registering the FIR was noted and hence, the I.O. tread cautiously. He had interrogated a long list of persons in his investigation as they were found to be of assistance. According to the information of the police authorities, the victim was a married lady, though divorced about three years ago. Her medical tests conducted on 27.12.2020, did not reveal any external injury.

Since the accused was a politician, the possibility of his implication in the crime to destroy his political career, cannot be ruled out.

15. Having considered the submissions of the learned Senior Advocate and the learned Chief Public Prosecutor and having carefully gone through the investigation papers which were placed before us, we find that the victim will now have to oppose the “B” summary report by filing her protest petition/ say/ objection. The learned Magistrate would be deciding as to whether, the “B” summary report deserves to be accepted or not.

16. The learned Senior Advocate submits that the first I.O. was searching for the accused, who was not found till 30.12.2020. She was removed and the present I.O. was appointed. When the accused appeared before the Police Station on 01.01.2021, why has the I.O. not arrested him? Merely because he was an influential politician, he was accorded royal treatment. After his statement was recorded on 01.01.2021, the I.O. thereafter, did not arrest him upon noticing the names of senior active politicians at the State and national level, who have held very senior portfolios in various ministries in the State and the Centre, in the statement. Such royal treatment is never meted out to commoners when Section 376 offences are registered. He further submits that the accused was so confident that the police would not touch him, that he did not seek anticipatory bail. He, therefore, submits that the public trust in the police

machinery would badly suffer if the police officers shelter accused politicians.

17. The learned Senior Advocate then submits that the grievances of the petitioner should not be overlooked and this Court should take cognizance of the conduct of the I.O., lest the public at large would stop trusting the police machinery, whom they already have started doubting.

18. The learned Senior Advocate submits that it would be shocking for the public at large that this accused being influential, was treated courteously, an unexpected treatment for an offender under Section 376 and to the contrary, the victim was harassed by being frequently summoned in the process of investigation. He frankly submits that insofar as the earlier episode of the petitioner lodging an FIR on 07.12.2017 alleging an offence punishable under Section 376 and withdrawing the same after accepting Rs.1,45,000/-, he was not aware of this incident. He, however, hastens to add that the said 2017 incident has no nexus with the case in hand.

19. The learned Chief Public Prosecutor has responded by stating that the victim was not cooperating. Whenever her assistance was sought in the investigation of the crime, she used to be accompanied by one Mr.Nadeemoddin. When the police desired to visit her residence, she was reluctant in divulging her residence. Eventually, when the police traced out her residence and reached the place, she literally ran away.

20. The learned Chief Public Prosecutor has relied upon the judgment delivered by the Honourable Supreme Court in ***M.C. Abraham vs. State of Maharashtra, 2003 (2) SCC 649***, to support his contention that Section 41 of the Cr.P.C. vests discretionary powers in the I.O. as regards arresting an accused. Paragraphs 14 and 15 in ***M.C. Abraham (supra)*** read as under :-

“14. Tested in the light of the principles aforesaid, the impugned orders dated 10th January, 2002 and 11th January, 2002 must be held to be orders passed by overstepping the para-meters of judicial interference in such matters. In the first place, arrest of an accused is a part of the investigation and is within the discretion of the investigating officer. Section 41 of the Code of Criminal Procedure provides for arrest by a police officer without an order from a Magistrate and without a warrant. The section gives discretion to the police officer who may, without an order from a Magistrate and even without a warrant, arrest any person in the situations enumerated in that section. It is open to him, in the course of investigation, to arrest any person who has been concerned with any cognizable offence or against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. Obviously, he is not expected to act in a mechanical manner and in all cases to arrest the accused as soon as the report is lodged. In appropriate cases, after some investigation, the investigating officer may make up his mind as to whether it is necessary to arrest the accused person. At that stage the Court has no role to play. Since the power is discretionary, a police officer is not always bound to arrest an accused even if the allegation against him is of having committed a cognizable offence. Since an arrest is in the nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends inter alia upon the nature of the offence alleged

and the type of persons who are accused of having committed the cognizable offence. Obviously, the power has to be exercised with caution and circumspection.

15. *In the instant case the appellants had not been arrested. It appears that the result of the investigation showed that no amount had been defalcated. We are here not concerned with the correctness of the conclusion that the investigating officer may have reached. What is, however, significant is that the investigating officer did not consider it necessary, having regard to all the facts and circumstances of the case, to arrest the accused. In such a case there was no justification for the High Court to direct the State to arrest the appellants against whom the first information report was lodged, as it amounted to unjustified interference in the investigation of the case. The mere fact that the bail applications of some of the appellants had been rejected is no ground for directing their immediate arrest. In the very nature of things, a person may move the Court on mere apprehension that he may be arrested. The Court may or may not grant anticipatory bail depending upon the facts and circumstances of the case and the material placed before the Court. There may, however, be cases where the application for grant of anticipatory bail may be rejected and ultimately, after investigation, the said person may not be put up for trial as no material is disclosed against him in the course of investigation. The High Court proceeded on the assumption that since petitions for anticipatory bail had been rejected, there was no option open for the State but to arrest those persons. This assumption, to our mind, is erroneous. A person whose petition for grant of anticipatory bail has been rejected may or may not be arrested by the investigating officer depending upon the facts and circumstances of the case, nature of the offence, the background of the accused, the facts disclosed in the course of investigation and other relevant considerations."*

(Emphasis supplied)

21. We have perused Section 41 of the Cr.P.C., which reads as

under :-

- “41. *When police may arrest without warrant.—*
- (1) *Any police officer may without an order from a Magistrate and without a warrant, arrest any person—*
- [(a) who commits, in the presence of a police officer, a cognizable offence;*
- (b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:—*
- (i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;*
- (ii) the police officer is satisfied that such arrest is necessary—*
- (a) to prevent such person from committing any further offence; or*
- (b) for proper investigation of the offence; or*
- (c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or*
- (d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer;*
- or*
- (e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured; and the police officer shall record while making such arrest, his reasons in writing:*
- [Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.]*
- (ba) *against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with*

death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;]

- (c) who has been proclaimed as an offender either under this Code or by order of the State Government; or
- (d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or
- (e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or
- (f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or
- (g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or
- (h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or
- (i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

[(2) Subject to the provisions of section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.]”

(Emphasis supplied)

22. The discretion vested in the I.O. in arresting an accused is to be exercised wisely in cases where a cognizable offence is punishable with imprisonment for a term which may be less than seven years or may extend to seven years, or more, whether, with or without fine subject to the conditions set out below Section 41(1). Proviso below Section 41(1) indicates that the police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest. We have not been cited any judicial pronouncement laying down the law that the discretion under Section 41 of the Cr.P.C. can be exercised by an I.O. while dealing with an FIR in which, an offence punishable under Section 376 of the IPC has been alleged, by blindly believing the story of alibi put forth by the accused, when the name of the accused has been specifically mentioned along with his address and a statement under Section 164 clearly indicates his involvement.

23. We cannot turn a blind eye to the above recorded factors insofar as the manner in which the I.O. conducted the investigation into the offence registered on 26.12.2020. The present I.O. took over the investigation on 31.12.2020. We do not find a single convincing and plausible reason as to why the I.O., while conducting investigation into a heinous offence punishable under Section 376 of the Indian Penal Code, refrained from arresting the accused. We are also intrigued by the fact that

the first I.O., a lady officer, was suddenly removed without any reason within 4 days and the present I.O. Shri Bhujbal was appointed. The removal of the first I.O. is conspicuous.

24. We have gone through the statement of the accused recorded by the I.O. in which, he has dropped names of senior national leaders belonging to the Nationalist Congress Party, including a former CM, an M.P. and an M.L.A.. He has claimed in his statement that he was with an M.P. and then with an M.L.A. and was never in Aurangabad on 14.11.2020. We cannot ignore the fact that any normal human being, alleged to have committed an offence punishable under Section 376, would have had rushed to the Court for seeking anticipatory bail. The accused herein has not filed any application before the competent court for seeking such relief. We are also aware that normally, the statement of the accused, in the face of the allegation of commission of a heinous crime against a woman, is recorded only after his arrest so as to facilitate a free and fair investigation in the matter. In the instant case, we find that the I.O. did not have the courage to touch the accused. In the light of the submissions of the learned Senior Advocate, we do find that his apprehension to be well placed because the accused was a high profile politician that the I.O. did not arrest him.

25. The Government of India, Ministry of Home Affairs (Women Safety Division) has issued a circular to all Chief Secretaries/ Advisors to

Administrators (All States and Uts), dated 09.10.2020. The subject of the circular being “mandatory action by police in cases of offences registered against women”. It is thus, mandated that offences against women should be investigated urgently and the investigation should be completed within two months. There shall be compulsory registration of an FIR in case of cognizable offences, under Section 154(1) of the Cr.P.C.. Failure to record an FIR would be punishable. Failure of the police to adhere to the mandatory requirements in investigation of crimes against women, would be subject to stringent action against the errant officers.

26. Having considered the case papers (770 pages) with the assistance of the learned Chief Public Prosecutor, we do find that the present I.O. Shri Nishikant Bhujbal, Assistant Police Commissioner, CIDCO Region, Aurangabad city, has extensively investigated into the offence. However, we do not find any plausible explanation as to why he blindly relied upon the statement of the accused recorded on 01.01.2021, in which, the accused had stated, while taking the plea of alibi, that he had visited senior political leaders active at the State level and at the national level, despite the fact that the statement of the victim under Section 164 of the Cr.P.C. was recorded on 15.01.2021 in which, she has reiterated the offence against the accused, without a contradiction. Instead of relying upon the statement of the victim, set out in her complaint as well as under Section 164, the I.O. chose to rely upon the plea of alibi put forth by the

accused. This shows, either his insensitivity to the offences committed against women, or he was manipulated by the accused.

27. The learned Senior Advocate has contended that there cannot be any explanation from the I.O. as to why he did not arrest the accused, in view of the latter having boasted of being a politician who is purportedly in the good books of national and state leaders. In this backdrop, we have every reason to be astonished with this conduct of the I.O..

28. We cannot appreciate that the I.O. could have had numerous reasons to assign for not arresting the accused, as no such reason has been cited before us, much less recorded under Section 41 of the Cr.PC.. We are of the view that as the accused was bold enough in taking the names of national and state leaders in his statement recorded on 01.01.2021, probably with the intention of displaying the weight that he carries in the political circles, that the I.O. developed cold feet and could not muster courage to arrest him. We would, therefore, be justified in directing the Commissioner of Police, Aurangabad that the said I.O. Shri Bhujbal needs to undergo a sensitization course/ program with regard to crimes against women before he could be called upon to shoulder or be entrusted with the responsibility of investigating into crimes against women.

29. Having dealt with the prayers of the petitioner with the above direction, now that the "B" summary report has been tendered on

31.03.2021 with the learned Magistrate, we are disposing off this Writ Petition as it would be purposeless to keep the same pending in view of the legal position that the petitioner will have to oppose the “B” summary report as is provided for in law. This Writ Petition is, therefore, disposed off.

30. We direct the learned Magistrate that the copy of “B” summary report with all annexures be supplied to the victim within two weeks from today. Thereafter, the victim can file her protest petition/ say within two weeks. We expect the learned Magistrate to decide the fate of the “B” summary report within four weeks thereafter. The learned Magistrate would not be influenced by our observations in this order while deciding the objections of the victim on the “B” summary report.

31. A copy of this order shall be circulated to all the Commissioners of Police, Range D.I.G., the District Collectors and the District Superintendents of Police in the State of Maharashtra.

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(B. U. DEBADWAR, J.)

(RAVINDRA V. GHUGE, J.)