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

CRIMINAL APPEAL NO.619 OF 2020

Popatrao s/o Ramrao Gaikwad,

..APPELLANT

VERSUS

The State of Maharashtra & anr.

..RESPONDENTS

Mr G. K. Naik Thigle, Advocate for appellant;

Mr S. D. Ghayal, A.P.P. for respondent No.1;

Smt. B. B. Gunjal, Advocate appointed for respondent No.2

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

DATE : 15th January, 2021

PER COURT:

1. By this appeal, the appellant prays for setting aside the order dated 23-10-2020, passed by the learned Special Judge, Biloli, District Nanded, vide which, application – Exh.13, filed by the appellant for seeking regular bail in Special Case No.25 of 2020, has been rejected. The appellant has been arrested on 17-08-2020.

2. We have considered the strenuous submissions of the learned Advocate for the appellant, the learned APP appearing on behalf of the State and the learned Advocate appointed on behalf of respondent No.2, original complainant. Vide order dated 07-10-2020, we had rejected Criminal Appeal No.494 of 2020, filed by this very appellant

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and we had refused him bail since he was not traceable for interrogation after the registering of the crime on 28-01-2020 and he was finally arrested on 17-08-2020. Since we noticed that the charge-sheet had already been submitted without interrogation of the appellant, that we had rejected the earlier appeal so as to enable the investigation machinery to submit an additional/supplementary charge-sheet within three weeks from 07-10-2020.

3. Having considered the strenuous submissions of the learned Advocates and having perused the appeal paper-book, threadbare, we find that the complainant had raised her complaint of rape. The appellant was the friend of her husband. He used to frequently visit their home. Since the husband realized that the two were getting into a relationship, that he drove the complainant out of her marital home and since then the complainant was residing along with her two children from her marriage, with her mother at Tq. Naigaon, Dist. Nanded. She is employed in a private bank in the recovery section. For about three years, she and the appellant had maintained physical relations at Nanded. The complainant started residing separately in a rented room away from her mother, allegedly on the insistence of the appellant. She permitted the appellant to have physical relations for more than three years since he told her that he would marry her. Both were aware that the appellant is a married man and so is the complainant.

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4. It is the story of the complainant that she insisted for a marriage, knowing well that the appellant is still a married person and her marriage is also not dissolved. Since the appellant declined to marry her as they belong to different castes and as the appellant obtained her signature on a blank bond paper, that she lodged the police complaint on 05-12-2018 with Bhokar Police Station, followed by another complaint on 29-09-2019 and then stopped talking to the appellant. On 16-12-2019, the appellant is said to have meet the complainant at 9.00 p.m. in her house in Pansare Nagar at Naigaon and is said to have had sexual intercourse, forcibly. The complainant stated that she was about to shout, but the appellant told her that he would kill her children and therefore, she allowed him to have physical relations the whole night. On 17-12-2019, at about 7.00 a.m., he left her residence.

5. The complainant relies on a statement of her minor daughter, recorded under Section 164 of the Code of Criminal Procedure, in which her daughter has said that after the appellant left their home on 17-12-2019, her mother was weeping and when she asked her for a reason, she informed that the appellant is not willing to marry her because she belongs to a Scheduled Caste and the appellant has said that if she approaches the Police Station, he would kill her.

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6. The learned Advocate for the complainant, therefore contends that it is extremely dangerous to grant bail to the appellant as he might again visit her or he might harm her children. He forcefully committed sexual intercourse with her on 16-12-2019 and he might repeat such offence. The learned Prosecutor supports the contentions of respondent No.2 and prays for the rejection of this appeal.

7. In **Uday Vs. State of Karnataka, (2003) 4 SCC 46**, the Honourable Apex Court has observed in paragraphs 23 to 27 as under :

“23. Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant. She was however aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to it. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take

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place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily, and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.

24. *There is another difficulty in the way of the prosecution. There is no evidence to prove conclusively that the appellant never intended to marry her. Perhaps he wanted to, but was not able to gather enough courage to disclose his intention to his family members for fear of strong opposition from them. Even the prosecutrix stated that she had full faith in him. It appears that the matter got complicated on account of the prosecutrix becoming pregnant. Therefore, on account of the resultant pressure of the prosecutrix and her brother the appellant distanced himself from her.*

25. *There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste*

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considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, is permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 O'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are over come with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as

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well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.

26. In view of our findings aforesaid, we do not consider it necessary to consider the question as to whether in a case of rape the misconception of fact must be confined to the circumstances falling under Section 375 Fourthly and Fifthly, or whether consent given under misconception of fact contemplated by Section 90 has a wider application so as to include circumstances not enumerated in Section 375 IPC.

27. In the result, this appeal must succeed, and is accordingly allowed. The impugned judgment and order convicting and sentencing the appellant for the offence punishable under Section 376 IPC is set aside, and the appellant stands acquitted of the charge. Since the appellant was granted exemption from surrendering when the special leave was granted, no further order for his release is necessary.”

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8. Considering the facts and circumstances of the case in **Uday (supra)**, the Honourable Apex court noted that the lady was an adult and was aware of the consequences of freely permitting the male companion to have physical relations and merely because the marriage is not possible on account of the social gap or due to difference in their castes, that the appellant could not have been convicted under Section 376 of the Indian Penal Code.

9. In **Hitesh Verma Vs. The State of Uttarakhand & anr., AIR 2020 SC 5584**, the Honourable Apex Court considered the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and recorded its conclusions in paragraph 13 and 14 as under:

“13. The offence under Section 3(1)(r) of the Act would indicate the ingredient of intentional insult and intimidation with an intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe. All insults or intimidations to a person will not be an offence under the Act unless such insult or intimidation is on account of victim belonging to Scheduled Caste or Scheduled Tribe. The object of the Act is to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes as they are denied number of civil rights. Thus, an offence under the Act would be made out when a member of the vulnerable section of the Society

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is subjected to indignities, humiliations and harassment. The assertion of title over the land by either of the parties is not due to either the indignities, humiliations or harassment. Every citizen has a right to avail their remedies in accordance with law. Therefore, if the appellant or his family members have invoked jurisdiction of the civil court, or that respondent No.2 has invoked the jurisdiction of the civil court, then the parties are availing their remedies in accordance with the procedure established by law. Such action is not for the reason that respondent No.2 is member of Scheduled Caste.

14. *Another key ingredient of the provision is insult or intimidation in “any place within public view”. What is to be regarded as “place in public view” had come up for consideration before this Court in the judgment reported as Swaran Singh & Ors. v. State through Standing Counsel & Ors. The Court had drawn distinction between the expression “public place” and “in any place within public view”. It was held that if an offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, then the lawn would certainly be a place within the public view. On the contrary, if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then it would not be an offence since it is not in the public view. The Court held as under:*

“28. It has been alleged in the FIR that Vinod Nagar, the first informant, was insulted by

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Appellants 2 and 3 (by calling him a “chamar”) when he stood near the car which was parked at the gate of the premises. In our opinion, this was certainly a place within public view, since the gate of a house is certainly a place within public view. It could have been a different matter had the alleged offence been committed inside a building, and also was not in the public view. However, if the offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, the lawn would certainly be a place within the public view. Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view. We must, therefore, not confuse the expression “place within public view” with the expression “public place”. A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaon sabha or an instrumentality of the State, and not by private persons or private bodies.”

10. It is apparent from the facts of the case in hand that the dispute between the complainant and the appellant has not occurred at a public place or at a place within public view. There are no averments by the complainant in her complaint/FIR that the appellant has abused her by

making attributes against her scheduled caste in public view or that there was a public spat.

11. In a Judgment delivered by learned Single Judge in **Ashok Lakhaji Halmare Vs. State of Maharashtra, 2006 (1) BCR Cri. 171**, it was observed in paragraph 15 with regard to abuse in public view, as follows :

“15. It is required to be noted that every quarrel or altercation between the member of the higher caste and that of the Scheduled Castes and Scheduled Tribes would not ipso facto constitute acts of commission of offence which are capable of cognizance under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and Protection of Civil rights Act as the case be. If the imputations are grossly vague and perfunctory, it would be appropriate to quash the proceedings being abuse of process of law and courts. Moreover particularly even when the complaint may technically answer the ingredients of offence sought to be complained of, but the evidence be so perfunctory to raise prima facie case for trial, the proceedings deserve to be quashed, as is the ratio in Zandu Pharmaceutical Co. Ltd., case (supra) Item (6) in heading.”

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12. In the instant case, there is no issue of abusing the complainant by the appellant in public view.

13. In **Tilak Raj vs. State of Himachal Pradesh, (2016) 4 SCC 140**, the Honourable Apex Court dealt with a case of the prosecutrix being an adult lady of 40 years, who was in physical relationship with the appellant for two years and had permitted the appellant to stay at her residence overnight. The appellant was acquitted for offences punishable under Section 376 and was convicted for offences punishable under Sections 417 and 506, Part I, IPC. It was concluded in paragraph 16 and 20 in Tilak Raj as under :

“16. We have carefully heard both the parties at length and have also given our conscious thought to the material on record and relevant provisions of the Indian Penal Code (in short “the IPC”). In the instant case, the prosecutrix was an adult and mature lady of around 40 years at the time of incident. It is admitted by the prosecutrix in her testimony before the trial court that she was in relationship with the appellant for the last two years prior to the incident and the appellant used to stay overnight at her residence. After a perusal of copy of FIR and evidence on record the case set up by the prosecutrix seems to be highly unrealistic and unbelievable.

20. A careful reading of evidence on record clearly shows that there is no evidence against the appellant from which it can be conclusively inferred by this Court that there was any fraudulent or dishonest inducement of the prosecutrix by the appellant to constitute an offence under

Section 415 of IPC. For conviction of the Appellant for above said offence, it is important that all the necessary ingredients constituting an offence under the said Section must be proved beyond reasonable doubt. In the instant case, the appellant cannot be convicted for the offence of cheating punishable under Section 417 of IPC as the prosecution has failed to prove all ingredients of the said offence beyond reasonable doubt.

14. In **Dataram Singh vs. State of Uttar Pradesh & anr., (2018) 3 SCC 22**, the Honourable Apex Court has laid down the principle of incarceration of an accused for longer periods in certain circumstances and more so when the custodial interrogation or the detention of an accused is no longer required. It was observed in paragraphs 1 to 5 as under :

“Leave granted. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles

appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

2. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

3. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being

victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

4. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in *In Re-Inhuman Conditions in 1382 Prisons*. In (2017) 10 SCC 658

5. The historical background of the provision for bail has been elaborately and lucidly explained in a recent decision delivered in *Nikesh Tarachand Shah v. Union of India* going back to the days of the Magna Carta. In that decision, reference was made to Gurbaksh Singh

Sibbia v. State of Punjab in which it is observed that it was held way back in Nagendra v. King-Emperor that bail is not to be withheld as a punishment. Reference was also made to Emperor v. Hutchinson wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal interpretation to the provision for bail is almost a century old, going back to colonial days.”

15. Considering the factors involved in this case at a prima facie stage, while keeping in view that the trial is yet to be completed and by considering the law in relation to cases involving two adults maintaining physical relations by choice and upon knowing each other's social status as well as marital status, we are of the prima facie view that the appellant and the prosecutrix have been in a relationship almost for more than three years. It is too earlier to assess the evidence so as to speculate as to what transpired between them which may have led the appellant to obtain the signature of the complainant on a bond paper in 2018 and we do not intend to go into that aspect since the said aspect may not be of much relevance to us as we are deciding this appeal for bail. Suffice it to say, the charge-sheet has been filed in the Court after the detention of the appellant in view of our earlier refusal to grant bail vide our above referred order dated 07-10-2020.

16. Hence, this criminal appeal is allowed and the appellant shall be released on bail on the following conditions :

- a) The appellant shall furnish a P.R. Bond of Rs. 50,000/- (Rs. Fifty Thousand only) and one solvent surety in the same amount.
- b) Since the appellant is in employment and is now posted in Nanded, and considering his statement that he would never visit Naigaon, Tq. Naigaon, except for marking his attendance with the Naigaon Police Station, he shall mark his attendance on every 2nd and 4th Saturday in between 1.00 p.m. to 5.00 p.m. His attendance shall be noted in the Station House Diary and the SHO shall obtain his signature to evidence his attendance.
- c) He shall not contact the complainant or her children or her relatives or such persons, who are likely to be witnesses in the trial and shall not tamper with the evidence.
- d) He shall supply self attested copies of his Adhar Card, Election Commission Voter I.D. and his employment identity card while tendering a P.R. Bond. So also he would tender his cellular phone number.

e) Violation of any of the above conditions shall be a good ground for cancellation of the bail.

17. Since we had appointed the learned Advocate Smt. Gunjal on behalf of respondent No.2 through the High Court Legal Services Sub-Committee, Aurangabad, we quantify her fees at Rs.5,000/-.

(B. U. DEBADWAR, J.)

(RAVINDRA V. GHUGE, J.)

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