

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

**CRIMINAL APPEAL NO. 313 OF 2020**

Milind Madhusudan Dande

**...Appellant**

**Versus**

The State of Maharashtra and ors.

**...Respondents**

Mr. Manoj Mohite, Senior Advocate, i/b Mr. Prashant D. Patil,  
for the Appellant.

Mr. Dilip Shinde, for Respondent no.3.

Mr. S. R. Shinde, APP for the State/Respondent nos.1 & 2.

**CORAM: S. S. SHINDE &  
N. J. JAMADAR, JJ.**

**RESERVED ON: 13<sup>th</sup> SEPTEMBER, 2021.**

**PRONOUNCED ON: 7<sup>th</sup> OCTOBER, 2021.**

**JUDGMENT:- [PER : N. J. JAMADAR, J.]**

1. This appeal under Section 14A of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (“the SC and ST Act, 1989”) calls in question the legality and correctness of an order dated 26<sup>th</sup> February, 2020 in Criminal Application No.1909 of 2019, passed by the learned Additional Sessions Judge, Nashik, whereby the prayer of the appellant – accused for pre-arrest bail in connection with CR No.636 of 2019, registered for the offences punishable under Sections 376, 313, 354, 417, 493, 496, 323, 504 and 506 of the Indian Penal Code, 1860 (“the Penal Code”) and Sections 3(1)(r)(s), 3(2)(va)

and 3(2)(v) of the SC and ST Act, 1989, at the instance of respondent no.3 – prosecutrix, came to be rejected.

**2.** The background facts necessary for the determination of this appeal can be stated as under;

(a) The prosecutrix lodged a report at Upnagar Police Station, Nashik City, initially, with the allegations that on 18<sup>th</sup> March, 2019, a Memorandum of Understanding was executed between the prosecutrix and the appellant, wherein the appellant undertook an obligation to pay money to the prosecutrix. The appellant, however, avoided to make the payment, as agreed, on one or the other pretext. Thus, on 6<sup>th</sup> November, 2019, the prosecutrix, accompanied by her friend, went to the jewellery shop of the appellant, namely, Dande Jewellers, located near Dutta Temple. When the prosecutrix insisted for payment, the appellant asked his staff to down the shutter of the shop. Thereafter, the appellant allegedly abused, and assaulted the prosecutrix and outraged her modesty. Her friend was also abused and pushed. Thus, the prosecutrix approached the police station and lodged report for the offences punishable under Sections 354, 504 and 506 of the Penal Code.

(b) Subsequently, the prosecutrix gave a complaint in writing on 23<sup>rd</sup> November, 2019. In the said complaint, the

prosecutrix alleged that while she was working as clerk in K. N. Kela School, she became acquainted with the appellant, who was the then a trustee of the said institute, which ran the said school. Her marriage was solemnized with another person on 22<sup>nd</sup> July, 2013. However, on 13<sup>th</sup> September, 2013, the appellant took the prosecutrix to his house and in the presence of his father and two sisters implored her to obtain divorce from her husband and marry him. The prosecutrix expressed her inability. The appellant continued to pursue her. Believing the promises made by the appellant the prosecutrix separated from her husband and started to reside with the appellant, at his house, since October, 2013. The appellant treated her as wife, as if they were married, and continued to have physical relations with her without her consent. When the prosecutrix became pregnant, the appellant forced her to abort the foetus at the Samarth Sai Speciality Hospital.

(d) The marriage of the prosecutrix with her husband was dissolved in the year 2017. The appellant, however, avoided to solemnize marriage with the prosecutrix on one or the other pretext. In 2019, the prosecutrix learnt that the appellant surreptitiously solemnized marriage with another girl. Despite marriage, the appellant continued to have physical relations

with the prosecutrix by making a false promise that he would obtain divorce from his wife and marry the prosecutrix.

(e) On 6<sup>th</sup> November, 2019 when the prosecutrix visited the shop of the appellant accompanied by her friend, the appellant allegedly abused the prosecutrix with reference to her caste and threatened to eliminate her. The prosecutrix claimed that while lodging report she had narrated the said fact. However, the police officer who recorded the report on 6<sup>th</sup> November, 2019 did not mention the same in the said report. She further claimed that on 22<sup>nd</sup> November, 2019, she had approached Upnagar Police Station to lodge the report, incorporating the aforesaid allegations. However, the police officer declined to record the report and thus she was constrained to give the complaint in writing.

(e) The said complaint in writing was construed as a supplementary statement of the prosecutrix and the aggravated offences punishable under the Penal Code and the SC and ST Act, 1989, were added.

(f) Apprehending arrest in the aforesaid crime, the appellant preferred application for pre-arrest bail. Initially, it seems, interim protection was granted to the appellant. By the impugned order the learned Additional Sessions Judge rejected

prayer for anticipatory bail on the premise that the custodial interrogation of the appellant was warranted for an effective investigation and the apprehension of tampering with evidence and threatening the witnesses, was justifiable. The learned Additional Sessions Judge, however, continued the interim protection till 11<sup>th</sup> March, 2020.

3. Being aggrieved, the accused has preferred this appeal. On 9<sup>th</sup> March, 2020, noticing the fact that the interim protection granted by the trial Court was in operation till 11<sup>th</sup> March, 2020, the interim protection came to be extended till the next date, and has since been continued from time to time.

4. Admit. Taken up for final disposal.

5. We have heard Mr. Mohite, the learned Senior Counsel for the appellant, Mr. S. R. Shinde, the learned APP for the State and Mr. Dilip Shinde, the learned Counsel for respondent no.3 – the prosecutrix. With the assistance of the learned Counsels for the parties, we have perused the material on record including the report under Section 173 of the Code and its accompaniments, which came to be filed during the pendency of this appeal.

6. Mr. Mohite, the learned Senior Counsel for the appellant, submitted that the instant prosecution is a classic example of

the abuse of the process of the Court to wreak vengeance. Mr. Mohite canvassed a two-pronged submission. First, the report lodged by the first informant – prosecutrix on 6<sup>th</sup> November, 2019, is bereft of allegations of sexual exploitation and atrocities for the reason that the prosecutrix is a member of the Scheduled Caste. In contrast, the said FIR proceeds on the premise that there was a commercial dispute between the prosecutrix and the appellant and the alleged offences were committed when the prosecutrix demanded her dues. In the absence of the allegations of sexual exploitation and atrocities, according to Mr. Mohite, the case sought to be built on the basis of supplementary statement in the form of the written complaint, given after 15 days of the alleged incident dated 6<sup>th</sup> November, 2019, is unworthy of credence.

7. Second, even if the case of the prosecutrix is taken at its face value and construed at par, the offence of rape, cannot be said to have been made out. On the contrary, the allegations in the supplementary statement of the prosecutrix would indicate that the prosecutrix stayed with the appellant while her marriage with another person was still intact. To add to this, the relationship lasted for more than eight years. In the circumstances, according to Mr. Mohite, the custodial

interrogation of the appellant is not at all warranted and the appellant deserves the relief of pre-arrest bail.

8. Mr. S. R. Shinde, the learned APP countered the submissions on behalf of the appellant. It was urged that the prosecutrix has ascribed justifiable reasons as to why the allegations do not find mention in the FIR, recorded on 6<sup>th</sup> November, 2019. In the supplementary statement, the prosecutrix has disclosed the nature of the relationship, the manner in which she was exploited and the atrocities committed by the appellant. The statements of the witnesses recorded during the course of investigation lend support to the claim of the prosecutrix. Therefore, no fault can be found with the impugned order, urged Mr. Shinde.

9. Mr. Dilip Shinde, the learned Counsel for respondent no.3, would submit that the claim of the prosecutrix that she was forced to abort the foetus finds support in the statement of Nanda Prabhakar Salve, the housemaid of the appellant. At this juncture, in the face of the material on record, according to Mr. Shinde, not only the grave offence punishable under Section 376 but also under Section 313 of the Penal Code is made out, and, therefore, custodial interrogation of the appellant is warranted.

10. To start with, it is imperative to note that the first information report lodged on 6<sup>th</sup> November, 2019, is conspicuously silent about the relationship which the prosecutrix and the appellant allegedly shared. Nor the said report sheds light on the acts attributed to the appellant which constitute the offences under the SC and ST Act, 1989. The nature of relationship between the prosecutrix and the appellant, the alleged sexual exploitation on the basis of false promises of marriage, the intentional intimidation and humiliation of the prosecutrix for the reason that she is a member of the Scheduled Caste, are all such grave matters which, in normal course, the prosecutrix would not have missed to state. It is not the case that the prosecutrix, upon realising the abscondence of the aforesaid serious allegations in the FIR, immediately approached the superior police officers. The written complaint, which was construed as a supplementary statement came to be lodged on 23<sup>rd</sup> November, 2019. This time-lag of a fortnight cannot be said to be inconsequential or immaterial.

11. We, therefore, find substance in the submission of Mr. Mohite that the fact that the gravamen of sexual exploitation and atrocities does not find mention in the first information

report has a material bearing upon the entitlement of the appellant for pre-arrest bail. We have carefully perused the statements of the witnesses. It is pertinent to note that even the statement of the friend of the prosecutrix, who allegedly accompanied the prosecutrix to the shop of the appellant on 6<sup>th</sup> November, 2019, is also silent about the incident of hurling abuses at, and humiliating, the prosecutrix with reference to her caste. The statement of the said witness also proceeds on the line that the prosecutrix demanded money and, thereupon, she was abused, assaulted and molested.

12. This factor has a significant bearing on the determination of this appeal, for the reason that, the interdict contained in Section 18 and 18(A)(2) of the SC and ST Act, 1989 against grant of pre-arrest bail, in accordance with the provisions contained in Section 438 of the Code, may not operate if the offences punishable under SC and ST Act, 1989, cannot be said to have been *prima facie* made out. Thus, we are inclined to consider the entitlement of the appellant for anticipatory bail.

13. The tenor of the allegations in the supplementary statement is that the appellant pursued the prosecutrix, even after her marriage. She was made to part ways with her husband. She started to reside with the appellant, since the

month of October, 2013. The prosecutrix's marriage with her husband was eventually dissolved in the year 2017. In the intervening period, the appellant had forcible physical relations with the prosecutrix on multiple occasions. She was once made to abort the foetus. Even after dissolution of her marriage, the appellant continued to buy time on one or the other pretext and ultimately solemnized marriage with another lady.

14. In the aforesaid fact situation, the crucial question which wrenches to the fore is whether the prosecutrix's consent for physical relations was vitiated? Was the prosecutrix under a misconception of facts? Few factors assume significance. One, it is not the case of the prosecutrix that before she solemnized marriage with her quondam husband, the appellant had relations with her on a false promise of marriage. Conversely, the appellant pursued her after marriage. Allegedly, she came to reside with the appellant, at his house, in the month of October, 2013, while she was still in the marital bond with her quondam husband. Such relationship allegedly continued post dissolution of her marriage, in the year 2017. Two, the long standing relationship. Evidently, it lasted for seven to eight years. Three, the allegations of the prosecutrix would indicate that the prosecutrix and the appellant resided as a couple.

15. In the aforesaid circumstances, can it be said that the appellant had physical relations with the prosecutrix without her consent. A useful reference, in this context, can be made to a judgment of the Supreme Court in the case of ***Shivshankar @ Shiva vs. State of Karnataka and another***,<sup>1</sup> wherein it was observed that it would be difficult to hold that the sexual intercourse in the course of relationship, which had continued for eight years, is 'rape', especially in the face of the complainant's own allegation that they lived together as man and wife. The Supreme Court observed, *inter alia*, as under:

"4. In the facts and circumstances of the present case, it is difficult to sustain the charges levelled against the appellant who may have possibly, made a false promise of marriage to the complainant. It is, however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as "rape" especially in the face of the complaint's own allegation that they lived together as man and wife."

16. A profitable reference can also be made to the observations of the Supreme Court in the case of ***Dr. Dhruvaram Mulidhar Sonar vs. State of Maharashtra & ors***,<sup>2</sup> wherein the Supreme Court expounded the distinction between 'rape' and 'consensual sex'. The observations in paragraph 20 are instructive and hence extracted below:

"20. Thus, there is a clear distinction between rape and consensual sex. The Court, in such cases, must very

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**1** (2019) 18 Supreme Court Cases 204.

**2** AIR 2019 Supreme Court 327.

carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the IPC.”

17. The long standing nature of the relationship also bears upon the potency of allegation of sexual exploitation on a false promise of marriage. Misconception of facts to vitiate the consent ought to be approximate to the occurrence. If a relationship continues over eight long years, it may be difficult to draw an inference that the consent was under a misconception of facts. The Supreme Court has adverted to this aspect of the matter in the case of *Maheshwar Tigga vs. State of Jharkhand*<sup>3</sup> as under:

“14. Under Section 90 IPC, a consent given under a misconception of fact is no consent in the eyes of law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four years. It hardly needs any elaboration that the consent by the appellant (sic) was a conscious and informed choice made by her after due deliberation, it being spread over a long period

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**3** AIR 2020 Supreme Court 4535.

of time coupled with a conscious positive action not to protest. ....”

18. If the facts of the case at hand are considered on the anvil of the aforesaid legal position, the appellant can be said to have made out a *prima facie* case to exercise the discretion in his favour, qua the major offence punishable under Section 376 of the Penal Code. As regards the offence punishable under Section 313 of the Penal Code, the doctor, in whose hospital the abortion was allegedly carried out, has categorically asserted that no such abortion was carried out in his hospital nor there is any record to that effect. The allegation is thus, *prima facie*, contentious.

19. In the backdrop of the nature of the allegations, even otherwise, we do not find that to facilitate further investigation, custodial interrogation of the appellant is warranted. The apprehension on the part of the prosecution can be taken care of by imposing stringent conditions.

20. For the foregoing reasons, we are impelled to exercise the discretion in favour of the appellant and allow the appeal.

21. Hence, the following order:

**: O r d e r :**

- (i) The appeal stands allowed.

- (ii) The impugned order stands quashed and set aside.
- (iii) In the event of the arrest of the appellant - Milind Madhusudan Dande in CR No.636 of 2019, he be released on furnishing a PR Bond in the sum of Rs.25,000/- and a surety in the like amount.
- (iv) The appellant shall not tamper with the prosecution evidence.
- (v) The appellant shall not, either himself or through any other person, contact the prosecutrix or any other prosecution witnesses and/or shall give threats or inducement to the prosecutrix or any other prosecution witness.
- (vi) The appellant shall regularly attend the proceeding before the learned Special Judge, Nashik.
- (vii) The appellant shall furnish his current address and contact numbers to the learned Special Judge and the Investigating Officer.
- (viii) The appellant shall surrender his passport, if he holds, and if not, file an undertaking that he does not hold the passport before the learned Special Judge, and shall not leave the country without the prior permission of the learned Special Judge.

(ix) The appellant shall file an undertaking before the learned Special Judge to comply with the condition nos.(iv) to (viii) above.

The appeal stands accordingly disposed of.

[N. J. JAMADAR, J.]

[S. S. SHINDE, J.]

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