IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 1282 OF 2021

Rohit Awani Singh .... Applicant

Versus

The State of Maharashtra .... Respondent

Dr.Abhinav Chandrachud a/w Sujay Gawde i/b Shree and Company for the applicant.
Mr. Ajay Patil, APP for the State/Respondent.

CORAM :SARANG V. KOTWAL, J.
DATE : 30th APRIL, 2021
(Through Video Conferencing)

P.C. :

1. The applicant is seeking his release on bail in connection with C.R.No. 263 of 2020 dated 05/12/2020 registered at Kharghar Police Station, Navi Mumbai under sections 376(2)(n), 406, 313, 323, 504, 506 of the Indian Penal Code. The applicant was arrested on 07/12/2020 and since then he is in custody. The charge-sheet was filed on 03/02/2021 after completion of the investigation.

2. Heard Dr. Abhinav Chandrachud, learned counsel for the applicant and Mr. Ajay Patil, learned APP for the State.

3. The FIR was lodged by the prosecutrix herself. She was 45 years of the age at the time of lodging of the FIR. She was residing with her 20 years old son. She was married to her husband in the year 1998. According to the prosecutrix, her divorce took place in the year 2016. In the year 2009, she got acquainted with the present applicant when she used to attend her Gym. Their acquaintance had developed into friendship. By that time she was having dispute with her husband. Therefore the applicant and the informant became close. It is alleged in the FIR that the applicant proposed for marriage. He suggested to the informant that she should divorce her husband. The informant consented. It is alleged that the applicant used to avoid arranging any meeting between the informant and his parents. The FIR further mentions that in November 2010, the applicant was given Rs. 2.5

lakhs by the informant on his request because his mother was not well. In December 2010, he had taken Rs. 1.5 lakhs for Gym training. The FIR mentions that the applicant had purchased a flat in April 2011 at Kharghar. For the purpose of registration and transfer the informant had paid Rs. 4 lakhs to the applicant. The informant started residing separately from her husband since March 2011. It is alleged that the applicant represented to the informant that he wanted to marry her and on this inducement kept physical relations with the informant. The FIR mentions that he kept physical relations on many occasions, in the same flat which was purchased in April 2011. The FIR mentions that the physical relations were kept against her wish. Whenever the applicant was asked about marriage, he used to tell her that after she obtained divorce from her husband, he would marry her. The FIR further mentions that the applicant was unemployed and requested for money from the informant in January 2012. She had paid Rs. 2.5 lakhs. After that he started business of supplying machineries and equipments for construction.

4. It is alleged in the FIR that in September 2012, because of the informant's physical relations with the applicant, she became pregnant but she was forced to terminate her pregnancy by the applicant. She under went the procedure in September 2012. After that the applicant stopped communicating with the informant. Whenever the informant used to ask for refund of her money, he used to refuse. The informant came to know in May 2013, that the applicant had got married to a third person on 29/04/2013. The informant got disturbed and stopped talking with the applicant. In January 2020, the applicant again tried to establish communication with her. He used to threaten her that he would spoil her name. The informant therefore reluctantly met him. At that time, he represented to her that he would give divorce to his wife. In November 2015, he gave proposal to the informant that she should invest in his business of supplying machineries and equipment for construction

and that he would pay Rs. 94,000/- per month as monthly rent. The informant agreed. She paid Rs. 17 lakhs to the applicant. The applicant imported machineries. He paid the money as promised for one year. After that he told the informant that he had taken divorce from his wife. The applicant therefore against started residing with the informant. Again the informant became pregnant. There are allegations that on this occasion too, she was made to terminate her pregnancy against her wish. The informant came to know that the applicant had not obtained divorce from his wife. She quarreled with him. Even then the informant continued staying with the applicant as husband and wife. In October 2016, again he imported machineries and for that purpose took Rs. 14 lakhs from the informant. In October 2017, he obtained Rs. 10 lakhs from her. In August 2017, the informant transferred further amount from her account in the account of one Anand Bihari and the applicant’s firm. She had given ornaments worth Rs. 16 lakhs to the applicant. He mortgaged those ornaments and obtained loan. There are allegations that the applicant used to have forcible sexual intercourse and used to beat the informant. The informant even thereafter paid him more money till February 2020. There are allegations that on 26/09/2020, the informant had seen the applicant with another lady. There was quarrel between the informant and that lady for which an NC was lodged at Kharghar Police Station. After all these, the informant lodged her FIR. Besides the allegations of rape, there were allegations that she had paid Rs. 94,50,000/- to the applicant which were misappropriated by him. On this basis the FIR is lodged.

5. Dr. Chandrachud, learned Counsel for the applicant submitted that the narration in the FIR itself shows that it was a consensual relationship. It was not a case of breach of promise amounting to rape. The conduct of the parties show that there was no misconception of fact in the mind of the informant and therefore the offence of rape is not made out at all. He

relied on few judgments of the Hon'ble Supreme Court. They are as follows:-

(i) **Prashant Bharati Vs. State (NCT of Delhi) reported in (2013) 9 SCC, 293.**

(ii) Anurag Soni Vs. State of Chhattisgarh reported in (2019) 13 SCC 1.

(iiI) Sonu @ Subhash Kumar Vs. State of Uttar Pradesh and Anr. passed in Criminal Appeal No. 233 of 2021.

6. Dr. Chandrachud, learned Counsel for the applicant further submitted that the applicant had repaid amount about Rs. 60,17,800/-. This is reflected in the applicant's bank details of SBI and HDFC. Gist of such entries is tendered before the Court in the form of compilation at page 65 to 68. He submitted that, as far as the machineries were concerned for which allegedly the informant had made payment, two MOU's were entered into between the parties. The informant has legal

remedies available to her. But they would be civil remedies. On that count the applicant should not be denied bail.

7. Learned APP Shri Patil opposed this application. He relied on the averments in the FIR itself. The charge-sheet contains the bank details and entries showing that the amounts were transferred. He submitted that the subsequent conduct of the applicant should also be taken into account. Even after his arrest, the applicant has sold machineries to his own companies. He submitted that besides the allegations of rape, there are allegations of misappropriation of property and criminal breach of trust which should not be ignored. Shri Patil relied on NC dated 29/12/2020 in which the informant had alleged that the informant was threatened by the brother of the applicant.

8. I have considered all these submissions and with the assistance of both learned Counsels, I have

perused the entire charge-sheet. An important submissions made by Dr. Chandrachud is that the offence of rape is not made out and for that purpose he relied on few judgments of the Hon'ble Supreme Court. Recently this Court had an occasion to deal with such an issue in Anticipatory Bail Application No. 1016 of 2021 in case of Nitesh Gopi Paramel Vs. State of Maharashtra decided on 7th April 2021. In that case, though the bail was denied to the accused, the ratio laid down by the Hon'ble Supreme Court in cases of Anurag Soni (supra) and Sonu @ Subhash Kumar (supra) was considered.

9. In Anurag Soni's case (supra) reference was made to earlier judgments. In paragraph 12 it is held thus :-

> " The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an

> assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under section 375 of IPC and can be convicted for the offence under Section 376 of the IPC."

In the facts of that case it was held that the accused had dishonest intentions and consent was given by the prosecutrix on misconception of fact.

10. In the case of Sonu @ Subhash Kumar (supra), the Hon'ble Supreme Court again elaborated the principles on this issue. In that case, it was observed that there were no allegations to the fact that the promise to marry was given to the prosecutrix was false at the inception and the proceedings against the accused in that case were quashed.

11. In Prashant Bharti's case (supra) it was held

that in the facts of that case, the assertion made by the prosecutrix that she was induced to physical relations established by the accused on the basis of promise to marry her, was falsified.

12. Therefore, it is necessary to see the conduct of the parties to decide whether the offence of rape is made out or not and as to whether the consent was given by the prosecutrix under some misconception of facts. It is of course a matter of trial to answer this issue conclusively. However for the question of bail, conduct of the parties can be taken into consideration to see whether there is substance in the contention of the applicant that the relationship was purely consensual and no offence of rape is made out. In every case the facts of that particular case will have to be examined.

13. If the narration in the FIR which is reproduced hereinabove is considered, it shows that the applicant and the prosecutrix had got acquainted and had got friendly

since the year 2009. Their relationship had continued for about 10 years. In between, on two occasions, according to the informant she underwent medical termination of pregnancy. On one occasion, the informant came to know that the applicant was married to another lady. During all this period, till at least 2016, the informant herself was a married lady and her divorce had not taken place. Therefore, there is substance in the contention of the applicant that the informant was very well aware of various hurdles in both of them getting married. Therefore, it is difficult to believe that the informant was misled on the promise of marriage and had given consent on that promise for sexual intercourse.

14. The charge-sheet contains statement of Doctor who had carried out MTP procedure in the year 2016. He has categorically mentioned that the procedure was carried out with her consent.

15. It appears that triggering point for registration

of this FIR is the incident dated 26/09/2020 when the informant had seen the applicant with another lady. Considering all these facts, it is difficult to observe that the informant had given her consent for sexual relationship based on some misconception of facts. She was a married lady. She had not obtained divorce. The applicant himself had got married in between. Inspite of this the informant willingly kept physical relations with the applicant. Divorce of the informant had taken place on 27/09/2017 as can be seen from the charge-sheet. Thus, I find substantial force in the submissions of Dr. Chandrachud that it was purely a consensual sexual relationship and offence of rape as defined under section 375 r/w Section 90 of the Indian Penal code is not made out. Of course, it is made clear that these observations are made for the purpose of deciding the bail application and final conclusion on this issue can only be arrived at during trial.

16. The next question would be about

misappropriation of various amounts which the informant had given to the applicant, amounting the offence under section 406 of IPC, as the applicant had not returned that amount.

17. As mentioned earlier, the compilation given by Dr. Chandrachud, which is taken on record shows that the applicant had returned Rs. 60,17,800/- to the prosecutrix. The allegations in the FIR are pertaining to the amount of Rs. 94,50,000/-. The charge-sheet contains two MOU's. Both of them are executed in the year 2017. Those are in respect of the machineries which the applicant had imported. Both of these MOU's mentioned that the applicant was to pay certain amount per month as rental charges to the informant. Thus there was a written agreement between the parties. The legal effect of breach of this promise can be decided before proper Civil Forum. Admittedly the applicant had made payment initially for some period. The prosecutrix has a remedy to approach proper forum for breach of such MOU. That

can be decided only by a Civil Forum in proper proceedings if permissible in law.

18. Apart from this, narration in the FIR shows that various amounts including the ornaments were given by the informant to the applicant on many occasions over a period of 10 years. Last payment was made in February 2020. The informant had not made any grievance about loss of money immediately before the police. All these allegations surfaced only after the relations between the parties turned sour. The narration also shows that the informant was very much aware of bad financial condition of the present applicant and on every such occasion financial help was extended by the informant knowing fully well about this situation. There are no agreements in respect of these advances. Therefore whether it will amount to misappropriation of property and criminal breach of trust will again have to be decided during the trial.

19. As far as the NC lodged in December 2020 is concerned, the Police are free to take their independent action on the allegations of the issuance of threats.

20. Considering these aspects the applicant has made out a case for his release on bail. It is made clear that all these observations in this order are restricted to the consideration of grant of bail to the applicant. The trial Court shall not be influenced by these observations while deciding the trial.

21. Hence the following order.

O R D E R

(i) In connection with C.R. No. 263 of 2020 registered with Kharghar Police Station, Navi Mumbai, the Applicant is directed to be released on bail on his furnishing PR bond in the sum of Rs.50,000/- (Rupees Fifty Thousand Only) with one or two sureties in the like amount.

(ii) Before being released on bail, the applicant shall deposit his passport, if any, with the Investigating Officer.

(iii) The applicant shall not make any efforts to contact the prosecutrix or other witnesses and shall not threaten the witnesses including the prosecutrix.

(iv) The applicant shall attend the concerned Police Station once every month till the charges are framed.

(v) The application stands disposed of accordingly.

(SARANG V. KOTWAL, J.)