

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.508 OF 2021

Sandip Shivaji Pise ...Appellant
vs.
The State of Maharashtra and Another ...Respondents

Mr. Aabad Ponda, Senior Advocate a/w. Mr. Yusuf Iqbal Yusuf, Ms. Shaista Pathan, Mr. Zain Shroff i/b. Y and A Legal, for the Appellant.
Mr. S.R. Phanse, appointed advocate for Respondent No. 2.
Mrs. S.D. Shinde, APP for the Respondent-State.

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

JUDGMENT RESERVED ON : 19th JULY, 2021
JUDGMENT PRONOUNCED ON: 29th SEPTEMBER, 2021

JUDGMENT : (Per N.J.Jamadar, J.)

1. This appeal under section 14A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('SC and ST Act, 1989'), is directed against the order dated 31st May, 2021 passed in Bail Application No. 950 of 2021 by the learned Special Judge, Greater Mumbai, whereby the application of the appellant/accused for pre arrest bail came to be rejected.

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

a] The appellant is posted as an Assistant Police Inspector at Cuffe Parade police station, Mumbai. In the year 2013, the appellant

came to be posted at Dongri police station along with nine others probationary Police Sub Inspectors, including the prosecutrix, who is a member of the Scheduled Tribe. The appellant and the prosecutrix became friends and developed intimacy.

b] The prosecutrix alleged that on 1st January, 2014 the appellant had forcible physical relations with her, for the first time, on the promise that he would marry her. The appellant continued to have physical relations with the prosecutrix despite the resistance of the prosecutrix to such relations before marriage. In the year 2016 when the prosecutrix demanded the appellant to marry her, the later sought time on the pretext that his mother was suffering from cancer and they would solemnize marriage after her treatment was over. As the officers and the colleagues of the appellant and prosecutrix came to know about the relationship, the prosecutrix sought transfer to Pune. The appellant visited Pune every week and had physical relations with the prosecutrix at various places on the promise of marriage. In the year 2018, the appellant allegedly recorded objectionable videos of the prosecutrix and threatened to upload those videos.

c] In the month of April, 2021 the prosecutrix learnt from one of her friends that the marriage of the appellant was settled with another girl. The appellant did not take the calls of prosecutrix. On an inquiry with the Cuffe Parade police, it transpired that the

appellant had solemnized marriage and was on leave. In order to ascertain the facts, the prosecutrix decided to proceed to appellant's house at Malshiras, Dist.Solapur. The appellant intercepted the prosecutrix and dissuaded her from visiting his house. On 9th April, 2021 the appellant took her to a resort. Again promising marriage, the appellant had physical relations with the prosecutrix. When the prosecutrix informed the appellant that she would inform his parents about their relationship, the appellant abused her with reference to her tribe and assaulted her.

d] A colleague of the prosecutrix apprised her that the appellant had, in fact, solemnized marriage. Thereupon on 12th April, 2021 the prosecutrix visited the house of the appellant along with her sister and brother in law. The mother and other relatives of the appellant told the prosecutrix that the marriage of the appellant was solemnized on 15th March, 2021. They abused and assaulted the prosecutrix and her sister and brother in law. Thus the prosecutrix lodged the report on 16th April, 2021 leading to registration of C.R. No. 83 of 2021 for the offences punishable under section 346, 376(2)(a), 377, 420, 323, 504, 506, 354 of the Indian Penal Code, 1860 and sections 3(1)(w)(i)(ii), 3(2)(va), 3(1)(r) of the SC and ST Act, 1989.

e] The appellant preferred an application for pre-arrest bail asserting that the relations between the appellant and prosecutrix

were consensual. It commenced in the year 2014. In the year 2018 the appellant and prosecutrix had a break up and they decided to part ways amicably. The prosecutrix would occasionally call the appellant. In the month of March, 2020, the prosecutrix had sent a note to the appellant wherein she threatened to commit suicide. The appellant solemnized marriage on 15th March, 2021. Thereafter, to wreak vengeance the prosecutrix had lodged the report with a false and concocted story.

f] The learned Special Judge was persuaded to reject the application opining, inter alia, that whether the physical relations between the appellant and prosecutrix were consensual was a matter for investigation and for an effective investigation custodial interrogation of the appellant was necessary. It was further noted that in the backdrop of the allegations that the appellant had recorded objectionable videos of the prosecutrix, the custodial interrogation of the appellant was necessary to recover the mobile phone handset and carry out further investigation. Since the offences under SC and ST Act were also alleged, in the opinion of the learned Special Judge, the bar under section 18A(2) of the SC and ST Act, 1989 came into operation. Thus, the application came to be rejected.

3. Being aggrieved, the appellant is in appeal.

4. Admit. Taken up for final disposal.

5. We have heard Mr. Aabad Ponda, learned senior counsel for the appellant and Mrs. Shinde, learned APP for the State and Mr. S.R. Phanse, learned counsel appointed to espouse the cause of the respondent No. 2- prosecutrix.

6. With the assistance of the learned counsels for the parties, we have carefully perused the material on record.

7. Mr. Aabad Ponda, learned senior counsel, submitted that neither the offences punishable under SC and ST Act, 1989 nor the major offence of rape are prima facie made out. Amplifying the submissions, Mr. Ponda would urge that the allegations in the first information report are required to be appreciated in the backdrop of the long standing consensual relationship between the appellant and prosecutrix, their situation in life and the trigger for lodging the FIR. According to Mr. Ponda, the thrust of the allegations in the FIR that the prosecutrix was subjected to sexual exploitation by repetitive promises of marriage is belied by the facts and attendant circumstances. From the own showing of the prosecutrix, according to Mr. Ponda, they were in a relationship for more than seven years. It is thus inconceivable that the prosecutrix would consent to have

relations with the appellant under the misconception of fact. It was strenuously urged that in the totality of the circumstances, no inference other than that of consensual relations is conceivable.

8. As regards the allegations of acts and conduct attributed to the appellant which fall within the dragnet of the offences punishable under SC and ST Act, 1989, Mr. Ponda would urge that the applicability of the provisions contained in section 3(1)(r) is firmly ruled out as the alleged insult or intimidation was not committed 'within the public view'. Nor the offences punishable under section 3(1)(w)(i) and (ii) are made out as the relations were with express consent. Thus, according to Mr. Ponda, there is impediment to exercise the discretion in favour of the appellant as the offences punishable under SC and ST Act are not prima facie made out.

9. In opposition to this, Mrs. Shinde, learned APP endeavored to support the impugned order. It was urged that the appellant had repeatedly exploited the prosecutrix by giving promise of marriage without there being a semblance of intent to perform the marriage. In view of the allegations in the FIR to the effect that the appellant abused the prosecutrix with reference to her tribe and, upon inquiry, it turned out that the appellant refused to solemnize the marriage for the reason that the prosecutrix was a member of Scheduled

Tribe, it cannot be said that the offences punishable under SC and ST Act, 1989 are not prima facie made out. Thus, the learned Special Judge was justified in rejecting the application for pre arrest bail.

10. Mr. Phanse, learned counsel for the respondent No. 2 adverted to the chronology of the events which transpired from the year 2014 to 2018. It was submitted that the appellant had given promise of marriage over the years and continued to exploit the prosecutrix. Inviting the attention of the Court to the explanation to section 3(w) (ii) under which the '*consent*' means "an equivocal voluntary agreement when the person by words, gestures, or any form of non-verbal communication, communicates willingness to participate in the specific act.", Mr. Phanse would urge that the mere fact that there was intimacy for a long period does not imply that the physical relations were with the consent of the prosecutrix.

11. We have given our anxious consideration to the submissions canvassed across the bar. First and foremost, it is imperative to consider the applicability of the interdict contained in section 18 and 18A of the SC and ST Act, 1989 against grant of relief of pre arrest bail. If the Court comes to the conclusion that the offences punishable under SC and ST Act, 1989 are prima facie made out, then no fault can be found with the impugned order.

12. For an answer recourse to the allegations in the FIR is inevitable. The FIR begins with the assertion that the prosecutrix is a member of Scheduled Tribe and the appellant was in the know of the same. The relationship allegedly commenced in the year 2014. Though there are allegations regarding sexual exploitation of the prosecutrix on the strength of false promise of marriage, over the years, it is pertinent to note that the reference to the tribe of the appellant and the alleged abuses in that context finds mention as a part of the incident which occurred on 9th April, 2021. The said incident allegedly occurred in the room which the appellant had booked at a Camping resort. The second incident, allegedly occurred on 12th April, 2021 when the prosecutrix visited the house of the appellant at Malshiras, Dist. Solapur and the mother, wife and other relatives of the appellant allegedly abused the prosecutrix with reference to her tribe and assaulted her. Evidently, the appellant was not present at the said place of occurrence.

13. Conversely, in the narrations in the FIR the allegation that the appellant refused to solemnize marriage with the prosecutrix on the count that the prosecutrix was a member of Scheduled Tribe is conspicuous by its absence, at least up to the incident dated 9th April, 2021. As indicated above, the incident dated 9th April, 2021 did not occur in public view. In the backdrop of the aforesaid facts,

we find substance in the submission of Mr. Ponda that there is no material to prima facie make out the offence punishable under SC and ST Act, 1989, for which the appellant has been arraigned. In the absence of such prima facie material, in our view, this Court would be justified in embarking upon an inquiry regarding the entitlement of the appellant for pre arrest bail.

14. Mr. Ponda, made a strenuous effort to invite the attention of the Court to the note allegedly sent by the prosecutrix to the appellant which indicates that the relationship between the appellant and prosecutrix was put to an end at the volition of the prosecutrix and she was frustrated with her situation in life and threatened to commit suicide. Attention was also invited to alleged conversations between appellant and the prosecutrix on Whatsapp. At this juncture, we do not deem it appropriate to delve into this aspect of the matter. We are of the view that the question of the entitlement of the appellant for pre arrest bail is required to be determined on the basis of allegations in the FIR and the material collected during the course of investigation.

15. Mr. Ponda would urge that even if the prosecution case is taken at its face value, it would be difficult to draw an inference that the prosecutrix gave consent for the physical relations under a

misconception of fact. The long standing relationship, according to Mr. Ponda, runs counter to the prosecutrix's version. In any event, there is no material to draw an inference that the appellant never intended to perform the promise to marry the prosecutrix at the commencement of the relationship, urged Mr. Ponda. Mere failure to perform the promise to marry the prosecutrix, without anything more, would not fall within the dragnet of offence of rape, submitted Mr. Ponda.

16. In order to lend support to the aforesaid submissions, Mr. Ponda placed a strong reliance on the judgment of the Supreme Court in the case of **Dr. Dhruvaram Murlidhar Sonar vs. The State of Maharashtra and Ors.**¹ wherein the distinction between “rape” and “consensual sex” was expounded in the following words:

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

1 AIR 2019 SUPREME COURT 327.

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. Reliance was also placed on the judgment of the Supreme Court in the case of **Pramod Suryabhan Pawar vs. The State of Maharashtra and Anr.**² wherein, after reference to the previous pronouncements the Supreme Court enunciated the legal position as regards the consent of woman for sexual act under misconception of fact as under:

18] To summarise the legal position that emerges from the above cases, the “consent” of a woman with respect to [Section 375](#) must involve an active and reasoned deliberation towards the proposed act. To establish whether the “consent” was vitiated by a “misconception of fact” arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman’s decision to engage in the sexual act.

18. Mr. Ponda further submitted that the question of consent under misconception of fact cannot be determined bereft of the proximity of allegations to the time of the occurrence. To lend support to this submission, Mr. Ponda placed reliance on the judgment of the Supreme Court in the case of **Maheshwar Tigga vs. The State of Jharkhand**³ wherein the Supreme Court laid emphasis on the element of proximity of time to the occurrence. The

² AIR 2019 SUPREME COURT 4010.

³ AIR 2020 SUPREME COURT 4535.

observations in para 14 are instructive and read 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 was a conscious and informed choice made by her after due deliberation, it being spread over a long period of time coupled with a conscious positive action not to protest. The prosecutrix in her letters to the appellant also mentions that there would often be quarrels at her home with her family members with regard to the relationship, and beatings given to her.

19. In the backdrop of the aforesaid enunciation of the legal position, reverting to the facts of the case, the position which emerges, in the light of the allegations in the FIR, is as under:

- (i) The appellant and the prosecutrix being the batchmates, became friends in the year 2013 and eventually developed intimacy.
- (ii) The appellant and the prosecutrix had physical relations at multiple places over a period of time.
- (iii) The relationship continued even after the prosecutrix came to be posted at Pune.
- (iv) The tenor of the F.I.R indicates that differences arose in the year 2018.
- (v) The appellant solemnized marriage with another girl in March, 2021 and, after the prosecutrix learnt about the same, the FIR was lodged in April, 2021.
- (vi) Though the prosecutrix had an inkling about the marriage of the appellant and made inquiry with the appellant on 2nd April, 2021 itself, the prosecutrix and the appellant stayed together at a resort on 9th April, 2021.

20. In the backdrop of the aforesaid facts, coupled with the situation in life of the parties, we are of the view that the claim of the appellant that the relations was consensual cannot be brushed aside lightly. Undoubtedly, the question as to whether the physical relations were consensual is a question of fact and is a matter for trial. However, on balance, we find that the appellant has made out a prima facie case for grant of pre arrest bail.

21. In the backdrop of the nature of allegations, in our view, the custodial interrogation of the appellant is not warranted to facilitate further investigation. The appellant being a police officer, like prosecutrix, the possibility of fleeing way from justice appears remote. In the peculiar facts of the case, the direction for release of the appellant in the event of arrest is not likely to hamper the investigation even in respect of recovery of the mobile phone handset and investigation in that regard.

22. A profitable reference in this context can be made to the constitution Bench judgment in the case of **Sushila Aggarwal and Ors. vs. State (NCT of Delhi) and Anr.**⁴ wherein “deemed custody” was held sufficient for the purpose of fulfilling the provisions of section 27 of the Evidence Act. Paragraph 92.8 reads as under:

4 (2020) 5 Supreme Court Cases 1.

92.8] The observations in Gurubaksh Singh Sibbia vs. State of Punjab regarding “limited custody” or “deemed custody” to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibbia (s) had observed that :

“19. if and when the occasion arises, it may be possible for the prosecution to claim the benefit of section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. vs. Deoman Upadhyaya.

23. The conspectus of the aforesaid discussion is that the appeal deserves to be allowed. Hence, the following order.

ORDER

- 1] The Criminal Appeal stands allowed.
- 2] The impugned order dated 31st May, 2021 passed in Bail Application No. 950 of 2021 stands quashed and set aside.
- 3] In the event of arrest of the appellant Sandip Shivaji Pise in connection with F.I.R. No. 83 of 2021 registered with Dongri police station, Mumbai for the offences punishable under sections 346, 376(2)(a), 377, 420, 323, 504, 506, 354 of the Indian Penal Code, 1860 and sections 3(1)(w)(i)(ii), 3(2)(va), 3(1)(r) of the SC and ST Act, 1989, the appellant be released on bail on furnishing a P.R. Bond in the sum of Rs. 25,000/- with one or two sureties in the like

amount.

4] The appellant shall not tamper with the prosecution evidence or witnesses.

5] The appellant shall not contact the first informant and/or give threats or inducement to the first informant.

6] The appellant shall cooperate with the investigation and appear before the investigating officer as and when directed.

7] In the event of filing of the chargesheet, the appellant shall regularly attend the proceeding arising out of F.I.R. No.83 of 2021 before the Special Court.

8] The appellant shall not leave the country without prior permission of the Special Court.

9] By way of abundant caution, it is clarified that the observations made in this judgment and order are limited to the consideration of the question of grant of bail to the appellant and they shall not be construed as an expression of opinion which bears on the merits of the matter at the trial. The learned special Judge shall proceed with the trial against the appellant uninfluenced by the observations made hereinabove.

10] The appeal stands accordingly disposed of.

(N.J. JAMADAR, J.)

(S.S. SHINDE, J.)