

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION [ABA] NO. 399 OF 2021.

Aashish Prakash Kalsarpe.

-VERSUS-

The State of Maharashtra, through P.S. Gittikhadan, Nagpur.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders

Shri P.R. Parsodkar, Advocate for the Applicant.
Shri M.J. Khan, A.P.P. for the Non-applicant.
Shri S.P. Bhandarkar, Advocate for the Complainant.

CORAM : VINAY JOSHI, J.

DATE : SEPTEMBER 24, 2021.

Heard.

2. The applicant is apprehending his arrest in connection with Crime No. 388/2021 registered with the Non-applicant Gittikhadan Police Station, Nagpur for offence punishable under Sections 376[2][n] and 506 of the Indian Penal Code.

3. The allegation of rape is leveled by the informant - lady aged 37 years. In her report dated 12.06.2021, the informant has stated that she got acquainted with the applicant through facebook. Later on they exchanged phone numbers and were frequently

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in contact through facebook and whatsapp. On 28.11.2020, the applicant called the informant at his house under the pretext of guiding her in workout and dieting. At that time, the applicant gave her cold drink mixed with some intoxicant, due to which the informant fainted. Within a short while the informant realized that the applicant had committed sexual intercourse with her. The informant tried to resist, but, the applicant promised her for marriage.

4. On the following day, the applicant came to the house of the informant and tied marital cord. He also assured to perform marriage in a legal way. After that, both of them used to meet frequently as husband and wife. The applicant was also demanding money from her. She stated that on 23.05.2021, when she went to the house of the applicant, he had sexual relations with her. Thereafter, they continue to talk on mobile. On 26.06.2020, when the victim/informant asked about marriage, the applicant flatly refused, hence, the report.

5. Learned Counsel for the applicant would submit that the allegations leveled in the first

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information report are totally false and at the most it is a case of consensual sexual relationship between two adults. He has specifically denied that the applicant has sexually exploited the informant by administering intoxicant. It is denied that under false promise, he has obtained the consent for sexual relations.

6. The State as well as the informant resisted the bail by filing separate reply-affidavits. The story as has been narrated in the first information report has been reiterated in the reply. In addition to that, the informant stated that while the applicant was on interim bail, he tried to pressurize her through a middle man. She does not feel it safe as the applicant allegedly deployed men to threaten her.

7. Undeniably, the informant is a grown up lady aged 37 years, having a daughter aged 14 years. It has not been specifically stated whether the informant had divorced with her husband. It reveals that both of them got acquainted through social media and developed friendship. Prima facie, it appears that the incident dated 28.11.2020, was with consent, since the informant had not put any grievance in close proximity.

As per the informants' case in their first meeting dated 28.11.2020, the applicant allegedly had forcible sexual intercourse. The facts being so then, in normal course a lady of matured understanding may resist stiffly by putting her grievance in that regard. However, it appears that after said alleged incident, both were intermittently meeting and continued their relationship.

8. The last incident is dated 23.05.2021, when the informant allegedly resisted the relationship. On the other hand it suggest that the informant lady used to meet the applicant at his house, where they had relations. Pertinent to note that the police report shows that even after the incident dated 23.05.2021, both were in talking terms. Since both were adults, it is a matter of trial to establish that the informants' consent was obtained under misconception of fact.

9. While resisting bail, the learned counsel for the informant relied on the decision of Supreme Court in cases of (1) **Aparna Bhat and others .vrs. State of Madhya Pradesh and another (2021 SCC Online SC 230)**, (2) **Anurag Soni .vrs. State of Chattisgarh (2019)**

13 SCC 1 and (3) State of Uttar Pradesh .vrs. Naushad (2013) 16 SCC 651. Moreover, he has produced some orders passed by different High Courts in which the prayer for grant of pre-arrest bail has been rejected. As against this, the learned Counsel for the applicant has relied on the decision of Supreme Court in case of **Pramod Suryabhan Pawar .vrs. State of Maharashtra and another (2019) 9 SCC 608**, to contend that there is distinction between false promise and breach of promise.

10. The decision in case of *Aparna Bhat [supra]*, lays a general proposition regarding sexual offences and about its seriousness. The Supreme Court in case of *Pramod Pawar [supra]*, relied by the applicant, has considered catena of earlier decisions, therefore it is apt to refer the same only to avoid multiplication. In said case, after considering its earlier pronouncements, the Supreme Court has summarized the legal position in paragraph no.18, which reads below :

“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.”

11. Thus, consistently it has been ruled that, to establish that consent vitiates by misconception of facts, the prosecution has to prove that since inception a false promise was given with no intention to perform marriage and that should have immediate relevance in between the things. It is a matter of trial to establish that, from the inception the accused gave false promise with no intention to perform marriage.

12. The facts of the case are such, that though the informant was already married long back, having a grown up daughter, she never made a categorical statement that she had divorced from her husband, though there was a passing reference to that effect. On

the other hand, the applicant was a youth of 28 years, serving in police department. On the canvass of such divergent situation, it has to be established that whether the applicant/accused, a bachelor of 28 years under a promise of marriage to a lady who was 10 years older than him and having grown up daughter of 14 years, had indulged into sexual relations.

13. It is argued that while the applicant was on interim bail, he tried to pressurize the informant lady. In that regard, the informant has filed additional affidavits on 13.08.2021 and 17.08.2021. To counter said contention, by denying the allegations, learned counsel for the applicant has attracted my attention to the reply-affidavit dated 26.08.2021 filed by the prosecution. The informant in her affidavit dated 13.08.2021 alleged that a person namely Raj Shetty, has telephonically threatened and pressurized her. So also the applicant has contacted brother of the informant namely Ruben for withdrawal of report. The said grievance was reiterated by the informant to the investigating agency.

14. The additional affidavit filed by the State

dated 26.08.2021, is worth to note. The investigating officer has made a statement that when she was informed by the informant about the threats, she has verified the things. Particularly, the investigating officer has contacted the person namely Raj, and also verified CDR of informant. She made a statement that the concerned person – Raj disclosed that he was common friend of applicant and informant, who had friendly talk with her. The investigating officer states that from the CDR it is revealed that the informant has also made several calls to Raj and there was exchange of whatsapp message in between them. Prima facie the said material indicates the story is otherwise than what has been tried to push by the informant. Moreover, the investigating officer has stated that she has tried to contact informants' brother Ruben to record his statement, but, he did not turn to give statement. Besides that the investigating officer put her grievance that the informant is unnecessarily making allegations against the investigating officer. Suffice to say that there is no substance in the contentions of the informant raised on that premise.

15. The investigating officer has informed that in pursuance of interim order, the applicant has attended the police station and cooperated with the investigation. Medical examination of applicant was already carried out. Having regard to above circumstances and nature of accusation, when nothing is to be seized from the applicant, his custodial interrogation is not necessary. In view of above, applicants' liberty can be protected by putting him on certain terms. The above observations are restricted to decide this application, which will have no impact on the merits of the trial. Hence, the following order.

- (i) Criminal Application is allowed and disposed of.
- (ii) The interim order dated 07.07.2021 passed by this Court, is hereby made absolute on same terms and conditions.
- (iii) The applicant shall continue to attend the police station, as directed earlier, till the filing of the charge sheet.
- (iv) Violation of any of the condition, would give rise to prosecution to move for cancellation of bail.

JUDGE

Rgd.