

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

CRIMINAL APPLICATION (APL) NO. 763 OF 2020

Pravin Mahadeo Tayade,
Aged about : 45 years,
Occ. Legal Practitioner,
R/o Om Namah Shivay
Apartment, Ranpise Nagar,
Akola, Tq. and Dist. Akola.

... **APPLICANT**

V E R S U S

1. State of Maharashtra,
Through P.S.O. P.S.,
Shegaon, Tq. Shegaon,
Dist. Buldhana.
2. Sau. Maya Sharad Manwar,
Aged about : 40 years,
Occ. Household Work,
C/o Champabai Pamaji
Nikhade, R/o Paras Barad,
Tq. Balapur, Dist. Akola.

Second Address :

C/o Sharad Manwar,
R/o Lal Daongari, Tilak Nagar,
Chembur (East), Mumbai.

... **NON-APPLICANTS**

Shri Anil Mardikar, Senior Advocate assisted by Shri Ved R. Deshpande, Advocate for applicant.

Shri S. P. Deshpande, APP for non-applicant No.1-State.

Shri R. K. Maheshwari, Advocate (Appointed) for non-applicant No.2.

CORAM: Z.A. HAQ & AMIT B. BORKAR, JJ.

DATED : 16/02/2021.

Criminal Application (APPP) No.1435/2020

For the reasons stated in the application, application is allowed. The applicant to carry out amendment forthwith.

ORAL JUDGMENT : (PER : AMIT B. BORKAR, J.)

1. Heard.

2. **Rule.** Rule made returnable forthwith.

3. This is an application under Section 482 of the Code of Criminal Procedure challenging the registration of First Information Report No.396/2020 registered with the non-applicant No.1 - Police Station for the the offences punishable under Sections 376(2)(n) and 506 of the Indian Penal Code.

4. The First Information Report came to the registered against the applicant with the accusations that the non-applicant No.2 was residing at Mumbai and had married with one Sharad Manwar in the year 2001. After the marriage, she was residing with her husband at Mumbai. In the year 2016, she engaged the services of applicant as an Advocate for the purpose of possession of her ancestral land. She was visiting Akola from Mumbai for the purpose of attending the said case and had meetings with the applicant. It is further alleged that in the month of September, 2016, the applicant took her to a Hotel at Shegaon and in the said Hotel the applicant committed forcible sexual intercourse with the non-applicant No.2.

5. It is alleged that since the applicant threatened the non-applicant No.2 that in case she discloses any one about the sexual intercourse, he will kill her. It is further alleged that thereafter from 2016 till March, 2020, applicant repeatedly committed forcible sexual intercourse with the non-applicant No.2. She also alleged that due to sexual intercourse with the applicant, she got pregnant and the applicant admitted her at Main Hospital, Akola and got abortion done. The First Information Report came to be registered on 29/09/2020.

6. The applicant has, therefore, filed present application challenging the registration of First Information Report. This Court on 17/11/2020 issued notice to the non-applicants. The non-applicant No.2 is served. Shri R. K. Maheshwari, learned Advocate is appointed by the High Court Legal Services Sub-Committee, Nagpur, at the request of the non-applicant No.2, to represent her.

7. The non-applicant No.1 has filed reply and has stated that since 2016 till March, 2020, the applicant committed repeated sexual intercourse with the non-applicant No.2 against her wish at various places. In the year 2017, the husband of complainant came to know about the relationship of the applicant

with the non-applicant No.2 and therefore, she was driven out of his house. The applicant, therefore, arranged rented room for the non-applicant No.2 and promised that he will construct a new house for the non-applicant No.2.

8. In the present application, charge sheet came to be filed against the applicant. The applicant has, therefore, filed Criminal Application (APPP) No.1435/2020 challenging the filing of charge sheet against the applicant. This Court on 16/02/2021 allowed the application and permitted the applicant to challenge the charge sheet also.

9. Section 375 defines the offence of rape and enumerates six descriptions of the offence. The first clause operates where the woman is in possession of her senses and, therefore, capable of consenting but the act is done against her will and the second where it is done without her consent; the third, fourth and fifth when there is consent but it is not such a consent as excuses the offender, because it is obtained by putting her, or any person in whom she is interested, in fear of death or of hurt. The expression “against her ‘will’ ” means that the act must have been done in spite of the opposition of the woman. “Consent” is also stated to

be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of. Section 90 though does not define “consent”, but describes what is not “consent”. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent.

10. In the above backdrop, we have carefully considered the contents of the First Information Report and the material in the charge sheet. The statement of the non-applicant No.2 under Section 164 of the Code of Criminal Procedure is recorded before the Judicial Magistrate First Class, Shegaon. The non-applicant No.2 in the said statement stated that before filing of the First Information Report, the non-applicant No.2 visited the office of applicant several times. It is further stated that for a period of 5 - 6 months during Lockdown, the applicant did not provide rent of room nor did he pay amount for her expenses. It is further stated

by her that she was required to borrow the amount on interest for the purpose of payment of rent of a room and her expenses. It is stated that due to non-payment of amount by the applicant towards her expenses and rent of room, she was constrained to file First Information Report against the applicant. Having considered the said statement under Section 164 of the Code of Criminal Procedure and the facts stated by the non-applicant No.1 in its reply that the non-applicant No.2 was in relationship with the applicant from 2016 till March, 2020 and in the year 2017, husband of the non-applicant No.2 came to know about her relationship and therefore, she was driven out of her house, we are satisfied that the relationship between the non-applicant No.2 and the applicant was in consensual. It hardly needs any elaboration that sexual intercourse by the non applicant No. 2 was a conscious and informed choice made by her, it being spread over a long period of time coupled with a conscious positive action not to protest. It is undisputed that the applicant is married and the non-applicant No.2 is also married. The applicant is 45 years old and the non-applicant No.2 is 40 years old.

11. Shri Maheshwari, learned Advocate appearing for the non-applicant No.2 submitted that there is material on record to

show that the non-applicant No.2 became pregnant and the applicant admitted her at Main Hospital, Akola on 17/01/2019 and carried out abortion. According to him, this shows that the relationship between the applicant and the non-applicant No.2 was not consensual. We have thoughtfully considered the submission of the non-applicant No.2. In our considered view, even if the submission of the non-applicant No.2 is accepted still the said fact does not indicate that the repeated sexual intercourse by the applicant with the non-applicant No.2 was not consensual. From the averments of the First Information Report, it is clear that for more than 4 years, the non-applicant No.2 had visited several places along with the applicant and had never complained to any one about the said sexual relationship. Apart from the said fact, in view of the statement recorded under Section 164 of the Code of Criminal Procedure, in which the non-applicant No.2 has categorically stated that she filed First Information Report against the applicant only because the applicant had not paid her amount of room rent and expenses for a period of 5 - 6 months during Lockdown. Therefore, we cannot accept the submission of the non-applicant No.2 that the relationship between the applicant and the non-applicant No.2 was not consensual relationship.

12. On overall consideration of the facts and circumstances of the present case, we are satisfied that the relationship between the applicant and the non-applicant No.2 was consensus relationship and both the applicant and the non-applicant No.2 are above age of 18 years. We are satisfied that the ingredients of Section 376 of the Indian Penal Code are not attracted even if material in the charge sheet is accepted as correct.

13. First Information Report is also registered under Section 506 IPC which prescribes punishment for the offence of criminal intimidation. “Criminal intimidation” as defined in Section 503 IPC is as under:

“503. *Criminal intimidation.*—Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.”

14. A reading of the definition of “criminal intimidation” would indicate that there must be an act of threatening to another person, of causing an injury to the person, reputation, or property of the person threatened, or to the person in whom the threatened person is interested and the threat must be with the intent to cause alarm to the person threatened or it must be to do any act which he is not legally bound to do or omit to do an act which he is legally entitled to do. From the accusation in the FIR it appears that the allegation of threat against the applicant is vague. It is not stated in which month or day, the non applicant no. 2 was threatened by the applicant. In view of our finding of consensual relationship between applicant and non applicant no. 2, we find allegation of threat against the applicant inherently improbable.

15. We are, therefore, satisfied that the continuation of prosecution against the applicant would amount to an abuse of process of Court.

16. We, therefore, pass the following order :-

The First Information Report No.396/2020
registered with the non-applicant No.1 - Police
Station for the offences punishable under Sections

376(2)(n) and 506 of the Indian Penal Code and consequent charge sheet No.161/2020 dated 23/11/2020 are quashed and set aside.

Rule is made absolute accordingly.

17. The fees of the Advocate appointed to represent the non-applicant No.2 be paid as per the Rules.

JUDGE

JUDGE

Choulwar