

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

ANTICIPATORY BAIL APPLICATION NO.170 OF 2022

MR. SIDHANT ANANDRAO SONKAMBLE
VERSUS
THE STATE OF MAHARASHTRA

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Advocate for Applicant : Mr. A. R. Mokashi h/f Mr. U. M. Maske Patil
APP for Respondent-State : Mr. B. V. Virdhe

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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Order :
23-02-2022**

**Date of Pronouncing The Order :
28-03-2022**

ORDER :

1. The applicant is apprehending his arrest in connection with Crime No.362 of 2021, registered with Vimantal (Airport) Police Station, Nanded, District Nanded, for the offence punishable under Section 376 (2) (n) and 313 of IPC.
2. Heard learned Advocate Mr. A. R. Mokashi holding for Mr. U. M. Maske Patil for applicant and learned APP Mr. B. V. Virdhe for respondent-State.
3. It has been vehemently submitted on behalf of the applicant that

the applicant has been falsely implicated by the informant. The prosecutrix is a major girl and it appears that she had sexual relationship with the applicant voluntarily. When the major girl had consented for the sexual relationship, then it will not attract offence punishable under Section 376 of IPC. The informant has concealed several facts intentionally. She had come down to Mumbai where the applicant is serving in Fire Brigade and staying in Mumbai itself. She had stayed at his home once and on another occasion it was in Nalasopara in a lodge. She has tried to pretend that she had not consented or she had not gone to Mumbai on the say of the applicant, rather on the say of the prosecutrix the applicant had gone to Nanded, is her say. Another fact to be noted is that from April 2020 when it was the pandemic situation, the applicant who services were very much needed and he could not have left his headquarter, it is hard to believe that he would have gone to meet her in Ganraj Lodge almost every month and had physical relations with her by promising to marry. In fact, it is the case of the applicant that though the applicant was knowing the first informant and is accepting that he had physical relationship with the prosecutrix, but the relations got strained later on. Applicant had caused transfer of some of Rs.5 lakh to one Mandeep Kaur from

Nanded on the say of the prosecutrix and the prosecutrix had given assurance that the said amount would be returned to him. However, after several months when he could not get the amount, he asked the prosecutrix to get back the amount and at that time there were altercations between them and prosecutrix refused to pay the amount. The applicant has produced on record his bank statement to show that he had caused the amount transfer in the name of said Mandeep Kaur. The applicant has also produced on record the attendance sheet from April 2020 to show that he has not left the headquarter as per the contention of the informant. It is further stated that the prosecutrix got pregnant, and thereafter, on the say of applicant, his brother had provided certain tablets which caused miscarriage, but there is no evidence to support the contention of the prosecutrix.

4. It has been further submitted that in the catena of Judgments of the Hon'ble Supreme Court, it has been laid down that where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, then such facts do not attract the offence of rape. He relied on the decision in *Deepak*

Gulati Vs. State of Haryana, reported in (2013) 7 Supreme Court Cases 675. He further relied on the decision in *Uday Vs. State of Karnataka, reported in 2003 (4) SCC 46*, which is on the same line. Further reliance has been placed on the decision of High Court of Madras in *S. Kumaresan Vs. State (Cri.O.P.No.3341 of 2017, decided on 27-02-2017)*, wherein wherein the Tamil Nadu High Court has taken a note of all the earlier decisions of the Hon'ble Apex Court as well as this Court, and had come to the conclusion that the prosecutrix was well educated and taking into consideration this aspect that the consent of physical contact cannot be said to be given on misconception of fact, the bail was therefore granted to the accused. Reliance has also been placed on the decision of this Court in *Akshay Manoj Jaisinghani Vs. The State of Maharashtra, reported in 2017 (1) CriCC 847* and *Mahesh Balkrishna Dandane Vs. The State of Maharashtra, reported in 2015 ALL MR (Cri) 2805*. In both these cases facts were considered and taking into consideration the facts it was held that it appears to be the voluntary act on the part of the prosecutrix and *prima facie* the offence under Section 376 of IPC is not attracted. Further reliance has been placed on the decision of this in *Gulab s/o Laxman Meshram Vs. State of Maharashtra Through its Incharge/PSO, Police Station, Patan,*

Dist.Yavatmal, (Criminal Application (ABA) No.21 of 2022, by the Bench At Nagpur), in which reliance was placed on the decision in *Pramod Pawar Vs. State of Maharashtra, reported in (2019) 9 SCC 608* and *Sonu @ Subhash Kumar Vs. State of U.P., reported in 2021 SCC OnLine SC 181*, again on the similar facts, similar decision has been given.

5. The learned Advocate appearing for the applicant therefore submitted that since the ingredients of the offence are not attracted, the applicant deserves to be released on anticipatory bail. He further pointed out that the intention of the prosecutrix appears to be to extract money as it can be seen that the paternal aunt of the applicant who resides at Gaikwad Galli, Mukhed, has lodged report vide Crime No.27 of 2022 with Mukhed Police Station, District Nanded on 02-02-2022 against the informant lady and other two persons for the offences punishable under Section 336, 323, 504, 506 r.w.34 of IPC. It was stated in the said report that the informant lady along with co-accused had gone to the house of the present applicant on 31-01-2022 and demanded money for compromise or taking back of the FIR lodged by the prosecutrix against the applicant. When they refused, the informant had caused

injuries to the paternal aunt and the co-accused had abused the aunt and her sister. The applicant is ready to abide by the terms of the bail.

6. Per contra, the learned APP has strongly opposed the application and submitted that the applicant had met prosecutrix in 2019 at Mumbai, and thereafter, their friendship developed. They started talking with each other and then promise was given by the applicant to the prosecutrix that he would marry her. He had called her to meet him at Mumbai, but then she told that it will not be possible for her to come there, but he should come to Parbhani. On that the applicant told that he would meet her at Nanded. They used to meet at various places in Nanded and they had physical relations since 2019. In April 2020 also they had met with each other and had sexual intercourse almost each month. She became pregnant in August 2021 and then she insisted that the applicant should marry her, but he avoided on one or the other pretext. Thereafter, through his brother, applicant had managed tablets and gave it to the informant. As a result of the consumption of those tablets, she had miscarriage. Thereafter, she had taken treatment from Dr. Deshpande. Thereafter, the applicant started avoiding.

She has also stated that she had every hope that the applicant would fulfill his promise and marry her, and therefore, at any earlier point of time, she had not lodged the report. But when ultimately she got the message that he is not going to marry with her, she has lodged the report.

7. The learned APP has further submitted that the evidence that has been carried out up till now shows that the record from the different lodge where the applicant and informant had stayed. The statements of the concerned employees of the lodge have been recorded. The record of the register kept with the lodge has been collected and in the form the applicant has made signature and also had given photocopy of his Aadhar card. This shows that he had come down to Nanded and had met her even after April 2020. The medical examination of the applicant deserves to be done in view of the nature of the offence. Further, the brother of the applicant is missing or absconding, and therefore, from where he had procured those tablets, is yet to be revealed. Taking into consideration the seriousness of the offence, he does not deserve to be released on anticipatory bail as the nature of such bail is extraordinary. We are require to go by the allegations in the FIR at this stage, and

therefore, when the informant says that she had not given consent in the beginning, yet there was sexual intercourse by the applicant, and whatever consent was obtained, was under promise to marry. The learned Additional Sessions Judge while rejecting the bail application filed by the present applicant has also referred many cases. Reliance was placed by the side of the prosecutrix who was then opposing the application on the decision in *Yedla Srinivasa Rao Vs. State of A.P., reported in 2006 (4) Crimes 281*, wherein the Hon'ble Apex Court has held that :-

“When the accused obtained the consent from the prosecutrix for sexual intercourse on promise to marry and such process of intercourse continued till the prosecutrix became pregnant and then the accused refused to marry and absconded from village, then it can be said that the accused obtained the consent by false promise to marry and it is no consent at all.”

The facts before this Court are the same. Further reliance has been placed on *Navneet Vs. State of Maharashtra (Criminal Application No.853 of 2021, decided on 22-12-2021)*. It is also based on similar set of facts and it was held that there was no free consent. Learned APP, therefore, prayed for rejection of the application.

8. The contents of the FIR are already produced in the earlier paragraphs, and therefore, they are not repeated. The prosecutrix is 27 year old girl who is said to be a beautician by profession and it is also stated that she is attached to a political party. Therefore, definitely she is not an ordinary lady or girl. It is to be noted that the prosecutrix and the applicant are from different religion. Therefore, the fact is also required to be considered as to whether the prosecutrix was ready for the inter religion marriage. We are unable to get a specific statement to that effect in the FIR. In *Pramod Pawar Vs. State of Maharashtra (Supra)* it has been observed and it is reproduced in *Gulab s/o Laxman Meshram (Supra)* that :-

“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."

Further, in *Mahesh Balkrishna Dandane (Supra)* also the accused and the prosecutrix were from different religion. Taking into consideration the background and the facts of the case, it was observed by this Court that, "*every breach of promise to marry cannot be said to be either a cheating or rape.*" Merely by saying at a later point of time that the sexual favour was sought under the promise of marriage, will have to be assessed by the Trial Court taking into consideration the entire evidence.

9. At this stage, it is only required to consider the conduct on the basis of the allegations as well as the documents those have been gathered. Definitely there is evidence against the applicant here that he had gone to the various lodge in Nanded even after pandemic situation. If at all he want to take a plea of alibi, it is for him to prove it in view of Section 106 of the Indian Evidence Act. But what has been collected is the record from the lodge. It is not only one lodge but at least two lodge from the same city. Not only the photo copy of Aadhar card of the applicant but the photo copy of Aadhar card of the informant has also been collected by the lodge

authority. At one place even the lodge record shows that the present applicant has made signature and the payment has been made. The applicant appears to be admitting that he had physical relations with the informant/ prosecutrix, but according to him, it was the voluntary act on the part of the applicant as well as prosecutrix and he never promised for marriage. As aforesaid and at the cost of repetition it can be said that the informant is an educated lady doing business and also attached to a political party. Now turning towards the allegations about miscarriage, at this stage except her statement there appears to be no evidence collected by the investigating agency. Statement of Dr. Deshpande appears to be not recorded up till now and the documents about treatment to the prosecutrix have not been collected.

10. Taking into consideration the legal position stated in the aforesaid catena of Judgments, no doubt it is held in almost all the cases that consent obtained for sexual favour either under promise to marry or by any other means, will not be consent at all. But since proof of the same depends on the facts of the case and will have to be assessed at the time of Judgment after the evidence is adduced, which of course will take considerable long time in this case, for that

purpose the applicant need not be sent behind the bar. Making the applicant available for the investigation, would serve the ends of justice. This Court would like to refrain itself from making any kind of comments in respect of the offence that has been registered against the informant since it is after the FIR that was filed by the prosecutrix against the applicant. The applicant has not ruled out the possibility of concoction at this stage. Further, this Court also like to refrain itself from dealing with the point that since there was transfer of amount of Rs.5 lakh to one Mandeep Kaur and later on he was demanding repayment thereof, the relationship got strained. All these facts are required to be proved by the applicant. Therefore, with stringent conditions, the application deserves to be allowed. Hence, following order.

ORDER

- 1) Application is hereby allowed.
- 2) In the event of arrest of the applicant Sindhant Anandrao Sonkamble, in connection with Crime No.362 of 2021, registered with Vimantal (Airport) Police Station, Nanded, District Nanded, for the offence punishable under Section 376 (2) (n) and 313 of IPC, he be released on PR of Rs.50,000/- with two solvent

sureties of Rs.25,000/- each.

3) Applicant to remain present before the Investigating Officer on every Sunday in between 10.00 a.m. to 04.00 p.m., till filing of charge-sheet.

4) Applicant to co-operate with the investigation and shall not avoid the attendance to the police station under the garb of his duty with Fire Brigade in Mumbai.

5) Applicant shall not tamper with the evidence of prosecution in any manner and shall not visit Parbhani till the conclusion of the trial.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.