

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

ANTICIPATORY BAIL APPLICATION NO.362 OF 2022

SAGAR TAYAPPA SHINDE
VERSUS
THE STATE OF MAHARASHTRA

Advocate for Applicant : Mr. Abhijit S. More
APP for Respondent : Mr.V.M.Kagne

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 8th April, 2022

ORDER :-

1. The applicant is apprehending his arrest in connection with Crime No.0043 of 2022 registered with Paranda Police Station, Dist.Osmanabad, for the offence punishable under Sections 376(2)(n), 323, 504, 506 of the Indian Penal Code (IPC).

2. It has been vehemently submitted on behalf of the applicant that the informant prosecutrix is 21 years old lady and from the contents of the FIR it can be seen that she was earlier married, however, by leaving her husband, she came back to her parents house. The informant states that since prior to her marriage, there was love affair between her and the applicant and after she came back to her parents house, she alleges that the applicant has committed sexual intercourse with her by giving promise to marry. Even she used to go to the places

where the applicant used to call, however, she is now giving a colour of forcible sexual intercourse and levelling allegations of rape. It appears that infact it is a consensual act.

3. The learned Advocate for the applicant relied on the decision in *Maheshwar Tigga Vs. State of Jharkhand* [(2020) 10 Supreme Court Cases 108] wherein it has been held that consent given under the misconception of the fact is no consent in the eyes of law, but misconception of fact has to be in proximity of time to occurrence and cannot be spread over period of four years. Further reliance has been placed on the decision by this Court in *Anticipatory Bail Application No.170 of 2022 (Mr.Sidhant Anandrao Sonkamble Vs. The State of Maharashtra)* decided on 28th March, 2022, wherein upon the FIR lodged by a major girl and after considering all the documents on record, this Court had granted bail wherein offences that were levelled against that applicant were under Sections 376(2)(n) and 313 of the IPC. Further reliance has been placed on the decision in *Capt. Simranjit Singh Sambhi Vs. State (NCT of Delhi) and Anr.* [2022 LiveLaw (Del) 186] wherein after taking note of the decision in *Dipak Gulati Vs. State of Haryana* [(2013) 7 SCC 675] and also the decision in *Pramod Suryabhan Pawar Vs. State of Maharashtra* [(2019) 9 SCC 609], it has been held that “Section 90 of the IPC stipulates that consent given under fear or

misconception cannot be said to be consent. In this context, it becomes relevant to factor in the aspect that the prosecutrix was in a long relationship spanning a period of four years and the FIR was only filed after the said relationship ended on hostile terms. Therefore, it cannot be said that the consent so accorded for establishment of physical relationship was predicated upon misconception or fear”.

4. The learned Advocate for the applicant, therefore, submitted that the custodial interrogation of the applicant is not required for the purpose of investigation and therefore, applicant deserves to be released on anticipatory bail.

5. Per contra the learned APP for the respondent strongly opposed the application and submitted that the contents of the FIR would show that how the applicant had forced the prosecutrix to leave her husband. The applicant and the informant might be having love affair prior to her marriage but she got married on 25th June, 2020, but within only three days, the present applicant had given phone call on the mobile of the husband of the informant and told the informant that she should come back. He gave threat to her that if she does not get back and perform marriage with him, he would commit suicide by consuming poison. It is then stated that after two months of marriage, the

informant came back to her parents house and then the husband also received information about the love affair between the applicant and the informant. She states that there was oral divorce in front of a Panchayat. Whether it is legal or not that is a different thing but since then she was residing with the parents. She thereafter states that after August, 2020, the applicant started establishing sexual relationship with her under the promise to marry. He used to call her at different places and since the promise continued to marry, she had no complaint against him, however, on 19th February, 2022, applicant called her to her grandmother's place. When she went there, applicant was present and she asked as to when he is going to marry her. At that time, it was told by the applicant that since he is suffering from financial crises, she should wait for some time. Even at that place, he again gave the promise to marry and when she started to go, the applicant had committed forcible sexual intercourse with her. She further states that on 21st February, 2022 also the applicant called her to come to her grandmother's place but then she refused but he gave threat to kill her as well as her brother. She went to place of her grandmother and when applicant wanted to do the act, at that time, the brother of the informant came and at that time, applicant assaulted the informant and her brother. All these acts cannot show that there was consent by

the informant for the sexual intercourse. The custodial interrogation of the applicant is necessary.

6. At the outset, the ratio laid down in *Maheshwar Tigga* (supra) cannot be disputed but it can be seen that those observations were made on the basis of evidence that was adduced in the matter and the matter had gone up to the Hon'ble Supreme Court by way of appeal. We are at a very preliminary stage and therefore, those observations cannot be made use of. Even in respect of decision in *Mr. Sidhant Anandrao Sonkamble* (supra), taking into consideration the various authorities and the facts wherein in the FIR itself it was told that there was consent for the sexual relationship, no doubt in that case also promise to marry was the factor, however, it was then observed that "*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.*" The other factors were also considered in view of the fact that the prosecutrix in

that matter was of a different religion and applicant was of a different religion. Whether the prosecutrix was herself ready for inter religion marriage was the question there and therefore, prima facie fact about consensual relationship was considered. Further, in *Capt. Simranjit Singh Sambhi* (supra) it was a writ petition filed under Section 482 of the Code of Criminal Procedure for quashing of the FIR. The criteria for the same is different.

7. The facts in this case are required to be considered before considering whether the applicant can be released on anticipatory bail or not. The contents of the FIR clearly show that within three days of her marriage, the applicant has contacted her and because of his such advances she had come back to her parents house. She states that she has obtained divorce from her husband. Whether this is legal or not is a different thing but then according to her that divorce was outcome of the promise given by the applicant. Thereafter, she states about the promises given and makes a categorical statement that since the promise was continued on behalf of the applicant to marry with her, she has not lodged any report. It appears that on 19th February, 2022, when again the promise was given to her but when under that promise the sexual favour was asked, it was refused by the prosecutrix and then there was forcible act. Even

on 21st February, 2022 it was the same action.

8. The Police papers show that CDR has been collected in respect of mobiles. There are entries about the conversation between the prosecutrix and the applicant. Statements of witnesses have been recorded and especially the statement of one of the brothers of the prosecutrix states that another brother had gone on 21st February, 2022 at about 11:00 a.m. in the house of grandmother of the informant and at that time, the applicant and the informant were seen in almost compromising position. Thereafter, the applicant pushed the brother of the informant and fled away. According to the informant, this was a forcible act on the part of the applicant. Under such circumstance, the custodial interrogation of the applicant would be necessary, so also the facts of the case are not such that this Court would exercise extraordinary discretionary power under Section 438 of the Code of Criminal Procedure. Hence, Anticipatory Bail Application stands rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

SPT