

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

ANTICIPATORY BAIL APPLICATION NO.483 OF 2022

NAWAJ RAJU SHAIKH (REAL NAME) @ NAWAJ SHAKIL PATHAN
@NAWAJ SHAKIL QURESHI (AS PER F.I.R.)
VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER

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Advocate for Applicant : Ms. Rashmi S. Kulkarni

APP for Respondent No.1 : Ms. V. S. Choudhari

Advocate for Respondent No.2 : Mr. Amol R. Joshi (*Appointed*)

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CORAM : S. G. MEHARE, J.

DATE : 01-08-2022

PER COURT :-

1. Heard Ms. Kulkarni, the learned counsel for the applicant, Ms. Choudahri, the learned APP for the respondent/State and Mr. Joshi, the learned counsel for respondent No.2.

2. The prosecution has a case that on 07.08.2020 during the lock-down, the complainant and her parents went to reside in the field at village Takli Kazi. That time, the accused and his parents went there to that land. They intended to purchase that land. The father of the victim offered tea to them. The father of the applicant said to her parents that he is searching for a girl for his son Nawaj. He has proposed to her for his son. Her father told him that his daughter is a minor, and recently, her sister got married. Therefore, he is unable to marry her. Then they convinced her

father and told him that their son does a job in a beef company in Karnataka and resides there. They had also promised that Walima would be done one year after his return and compelled them to marry. Accordingly, her marriage was performed on 16.08.2020 outside the Dargah with the applicant. Thereafter, she went to cohabit with him. She also alleged that the applicant was doing sex with her forcefully. She tried to resist him, but nobody came to her help. The next day she stated to her mother-in-law that she did not want to stay there and wanted to go to her parent's home. However, she did not listen to her. The applicant does sex time and again without her consent. She learnt that the applicant was already married and performed marriage with another girl by a different name. It has also been alleged against the applicant and his family that they were using two other names. Lastly, her mother-in-law left her to her parents' home in October. At her home, they had some exchange of hot words. She disclosed to her mother how she was treated, and the applicant has already been married.

3. The complainant lodged the report on 08.07.2021. The applicant, his parents, Maulana, one witness, Sandip and parents of the complainant and a few others have been arraigned as accused.

4. The learned counsel for the applicant has vehemently argued that no marriage as alleged has been performed on 16.08.2020 since the implementation of strict lock-down. At that time, nobody was allowed to travel and go out of the home. The applicant was stuck in Karnataka. The father of the complainant had borrowed money from the father of the applicant. He had executed the hand loan receipt. However, he could not return the amount. Her father had issued a cheque. The cheque was dishonoured. Therefore, the father of the applicant had filed a complaint under Section 138 of the Negotiable Instruments Act, 1881. That case is pending. Only to avoid the return of Rs.3 Lakhs, the complainant with her parents cooked a false story and arraigned the applicant and her parents and others in a false crime. There is eight months delay in lodging the FIR. Nothing is to be recovered from the applicant. Hence, the applicant may be released on anticipatory bail.

5. The learned APP has strongly opposed the application. She has pressed into service the provision of Section 8 of the Protection of Children from Sexual Offences (POCSO) Act, 2012. She has referred to the papers supplied by the Investigating Officer, particularly the medical examination report and the birth certificate of the victim. Referring to these documents, the learned APP has argued that the victim was a minor at the time of the incident. She has specifically alleged that she was resisting the

forceful sex that the applicant was doing. The applicant and his family have committed a serious offence. The money transaction with her parents is an altogether different issue, and it has no concern with the present case. The applicant has committed a sexual offence. Therefore, the application deserves to be dismissed.

6. Mr. Joshi, learned counsel appearing for respondent No.2, has vehemently argued that the movements during the lock-down period were relaxed in the month of June 2020. The applicant has not produced the evidence to believe that he was stuck in Karnataka at the relevant time. The applicant and her parents were living in a field. The movements were restricted to the Municipal limits only. Therefore, only on the ground that there was a strict lock-down the contention of the applicant that he was stuck in Karnataka cannot be believed. The victim was opposing the intercourse with the applicant. That apart, the applicant has already been married to another woman by a different name. The applicant not only has committed a sexual offence, but he has also played fraud by using two different names. Section 29 of the POCSO Act presumes the commission of the offence. The applicant has no *prima facie* evidence to rebut the presumption. The father of the victim has no reason to put his daughter's life at stake for the financial transactions between him and the father of the applicant. The defence raised by the applicant is fictitious.

Therefore, the application may be rejected.

7. The case has peculiar facts that the parties belong to the Muslim community. Therefore, the allegations that the applicant has already married would not stand. Admittedly, the FIR is delayed by eight months. The FIR reveals that the father of the victim was well acquainted with the father of the applicant by name. The dispute about the dishonour of the cheque issued against the hand loan is also not disputed. The FIR also reveals that the victim did not oppose the marriage. She went to cohabit with the applicant with her consent. A question of whether having sexual intercourse with a minor wife would attract the provision of the POCSO Act has been raised. However, in that Act, the term 'child' has been used in common terminology. In the said Act, sexual intercourse with a minor wife has not been specifically exempted or distinguished. Therefore, the word 'child' means a woman below the age of 18 years, whether married or not.

8. Be that as it may, the papers produced by the learned APP reveal that there were no visible injuries on the person of the victim. The marriage is admitted to the applicant. The learned counsel for the applicant has referred to an exception in Section 375 of the Indian Penal Code and tried to point out that the victim was not below the age of 15. Therefore, the offence under Section 376 of the IPC would not attract. The overall allegations reveal that

both the parties were well acquainted with each other. The acquaintance of both parties may be a good ground for considering the defence of the applicant. The facts do not reveal that the custodial interrogation of the applicant would serve any purpose. Therefore, the application deserves to be allowed. Hence, the following order -

- i) The application is allowed.
- ii) In the event of arrest, applicant Nawaj Raju Shaikh (Real Name) @ Nawaj Shakil Pathan @ Nawaj Shakil Qureshi (as per the FIR) be released on bail, on furnishing P.B. and S.B. of Rs.20,000/- with one solvent surety of the like amount, in connection with C.R.No. 370 of 2021 registered with Nagar Police Station, Ahmednagar, for the offence punishable under Sections 3, 4, 5(l), 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012, and Sections 9, 10, 11 of the Prohibition of Child Marriage Act, 2007 and Sections 376, 420, 376(2)(n), 494, 344, 504 and 506 read with Section 34 of the Indian Penal Code.

**(S. G. MEHARE)
JUDGE**