

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.115 OF 2022

Shriraj Rajendra Rao

Age : 28 Years, Occ: Service,
R/At: A/A/12, Sai Hill Nagar CHS.
Chandansar Road, Opposite Water Tank,
Chandansar, Virar (East),
Tal.: Vasai, Dist.: Palghar,
Pin Code: 401305

.. Appellant

Versus

1. The State of Maharashtra
(Through Sr. P.I. Virar
Police Station, Dist: Palghar)

2. Ms. "X"
Age: 27 yrs, Occu: Artist
R/at. B-403, Shri Sai Sharda,
Bhavani Shankar Road,
Dadar (West), Mumbai – 400028.

.. Respondents

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- Mr. Kuldeep Patil i/by Ms. Saili Dhuru, Advocate for the Appellant
 - Ms. M.M. Deshmukh, APP for the State
 - Mr. Pawan Mali, Appointed Advocate for Respondent No.2
 - Mr. R.B. Deshmukh, ACP Virar Division present
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**CORAM : SMT. SADHANA S. JADHAV &
MILIND N. JADHAV, JJ.**

DATE : MARCH 30, 2022.

ORAL ORDER (Per SADHANA S. JADHAV, J.) :

1. Heard.

2. This is an application under Section 438 of the Code of Criminal Procedure (for short, "**Cr.P.C.**"). The Appellant is apprehending his arrest in Crime No.952 of 2021 registered with the Virar police station, District Palghar for the offences punishable under Sections 376, 416, 504 and 506 of the Indian Penal Code (for short "**IPC**") and under Section 3(1)(10) of the Scheduled Castes and Scheduled Tribes (Prevention and Atrocities) Act, 1989 (for short "**the SC & ST Act**") .

3. It is the case of the prosecution that on 16.10.2021, the Respondent No.2 - complainant (Ms. X) herein lodged First Information Report (**FIR**) at Virar Police Station alleging therein that she is working as an artist in the Film Industry. She is residing with her mother and brother Somesh who is an Architect at Dadar. She had registered her name on "TINDER" social dating Application. On 07.04.2021, she received a friend request from the Appellant. Thereafter they started chatting on the social media sites such as Facebook, Instagram etc. They exchanged their cell phone numbers and used to chat with each other on various issues. The Appellant told the complainant that he was working as a Bartender in Radio Bar, Khar (East). In the meanwhile, due to the pandemic situation, Radio Bar was shut down and the Appellant took up a job at Canari Farms in Lonavala. Thereafter they decided to meet each other along with their friends at Whispering Woods Resort in Lonavala. Accordingly on

07.06.2021, the Appellant and the complainant with their respective friends met at Whispering Woods Resort in Lonavala. They stayed there for two days. During that period, the Appellant disclosed to her that he likes her. He proposed to her and also disclosed his intention to marry her. Since she had also liked the Appellant, she accepted the proposal. Thereafter, they developed a relationship. They were chatting with each other for a long time.

4. On 07.07.2021, the complainant went to Lonavala to meet the Appellant. They stayed together in a private bungalow for two days. The Appellant as well as the complainant were accompanied by their friends. They had introduced each other. The Appellant and one of his friend was present in the Bungalow. The Appellant attempted to get close to her, however she was of the opinion that since they were not yet married, it would be morally wrong to reciprocate, hence she declined to accept his advances. However when he reiterated his intention to marry her, they had sexual intercourse. According to her she had not voluntarily consented but later on she did as she was convinced that they would get married, as the Appellant had expressed his intention to marry her before her friends Sujit and Shephali and she trusted him. She had shared this incident with her friend Shephali. Thereafter she returned to Mumbai. They met each other at Shivaji Park on 20.07.2021 in the afternoon. The Appellant

suggested to her that it would be better if they met in a closed room instead of open spaces. He assured her that he would arrange a meeting between her and his parents so that they could get married.

5. On 26.07.2021, they once again met at Mira Road. The Appellant booked a room at Hotel Jalaja. According to her she had refused to go to the room. The Appellant told her that he wanted to discuss about their marriage, hence she reluctantly went along with the Appellant. The Appellant had sexual intercourse with her under coercion on 27.07.2021. Thereafter he blocked her number on the social media sites. He had not given her his residential address and therefore she could not meet him. She had met his friends Yatin and Sujit. He had disclosed to them that he had sexual relationship with her under the pretext of marriage. The friends disclosed to her that the Appellant never had an intention to marry her and she should forget the Appellant. After all attempts to meet the Appellant failed, Yatin facilitated a meeting of the Appellant with her in Gala No.201/204 in HDIL area. At that time, the Appellant refused to marry her.

6. Being aggrieved by the said turn of events, the complainant approached the police station on 16.10.2021 and lodged the FIR on the basis of which Crime No.952 of 2021 was registered. Initially the

offence was registered only under Section 376 of the IPC. The Appellant filed Criminal Application No.1207 of 2021 for seeking pre-arrest bail. In the course of hearing, the complainant appeared before the Court. She orally disclosed to the learned Court that she belonged to Scheduled Caste and Scheduled Tribes caste / category and that the police has not registered the First Information Report under the provisions of the SC & ST Act.

7. Naturally as a consequence the Appellant had withdrawn the Criminal Application as 'not pressed' as the Appellant had to move before the appropriate forum that is the Special Court. The learned Court therefore had passed the following order:

“Application is withdrawn with liberty to file before the Additional District Court as section added in said case are about SC & ST Act for which special Court has power. Hence I am allowing the file fresh Anticipatory Bail Application before the ADJ, Court.”

8. It appears from the records that on 03.01.2022, the complainant approached before Shri. Sadanand Date, Police Commissioner of Mira-Bhayandar. According to her she had informed the PSI that she belonged to Scheduled Caste, however he had asked her to withdraw the application. She stated before the Commissioner in her written application that she belonged to the Chambhar caste. She further stated that the Court has rejected the application filed by the Appellant. Hence, the investigation was transferred to the

Superintendent of Police.

9. The learned APP has placed on record a report dated 09.11.2021 which shows that the investigating agency has added Sections 376(2) (m), 417, 504 and 506 of the IPC and Section 3(1) (12) of the SC & ST Act. The report dated 08.11.2021 filed by the investigating agency below “Exhibit 8” before the learned Additional Sessions Judge shows that during the pendency of the Anticipatory Bail Application and in the course of investigation the complainant had disclosed for the first time that she belonged to Chambhar Caste and the Appellant is from open category. Accordingly her supplementary statement was recorded on 08.11.2021 and therefore on 09.11.2021 the said Sections were added.

10. The Appellant subsequently filed an application under Section 438 of the Cr.P.C. before the learned Additional Sessions / District Judge at Vasai. The said application came to be rejected on 05.01.2022. Being aggrieved by the said order, the Appellant has filed the present Criminal appeal on 01.02.2022.

11. Mr. Kuldeep Patil, learned counsel for the Appellant vehemently submits that the Appellant as well as the complainant are 28 and 27 years old respectively; that the complainant was completely

aware of the consequences of her actions; that moreover on every occasion she voluntarily went to meet the Appellant; that when she registered herself on “TINDER” dating App, she was well aware of the purpose of registering herself on the said app; that the said dating app is not synonymous to registration of one's name on the matrimonial site; that it is true that they had developed love for each other, however some dispute arose between them and she withdrew herself from their relationship under social pressure; that at the highest, it can be an offence punishable under Section 417 and not under Section 376 of the IPC.

12. PER CONTRA, learned counsel Mr. Pawan Mali, who is appointed by the Court to espouse the case of the complainant has submitted that the Appellant was fully aware of the disparity in their castes and it was well within his knowledge that he would not be able to marry a girl from the Scheduled Caste / Scheduled Tribe; that therefore it was apparent that he had no intention to marry the complainant right from inception; that he placed reliance upon the transcript of the chats between the Appellant and the Complainant on 26.09.2021 wherein they discussed about the nature and character of a particular caste in general; that the Appellant expressed his opinion about the mannerism and behaviour of a particular caste whereas the complainant attempted to convince him that such opinion would differ

from person to person as some people are open minded; that the complainant reasoned with the Appellant that one cannot identify and blame the entire caste because of the behaviour of one person from that caste and that the Appellant was being judgmental about the caste and community in general; that the said conversation is before the time when they had their first sexual intercourse on 07.07.2021. Mr. Mali has also drawn our attention to the transcript of the conversation between the parties wherein it was evident that the Appellant and the complainant were serious about their relationship.

13. Upon perusal of the papers of investigation and more particularly the booking registers of the hotel / resort, it appears that on 07.07.2021 the room was booked in the name of the complainant. The statement of the owner of the hotel was recorded and he has disclosed that the complainant had approached the hotel first and informed that the Appellant has booked a room in her name. She had given the proof of her identification. Upon verification, it was seen that the room was booked in Sushila Villa. The complainant had also shown the booking confirmation note to the Manager and informed him that it is booked for five people, however one of the friends had declined to accompany them and only four people would be staying for two days. The two boys had arrived in the hotel much later i.e. after about 02.00 p.m. They all left the hotel on 09.07.2021 at about

11.00 a.m. On the second occasion, a room in lodging and boarding hotel at Nallasopara was booked in the joint names of the Appellant and the complainant for the period 27.08.2021 to 29.08.2021. They checked in the hotel at about 10.30 p.m. on 27.08.2021. The signatures of the Appellant and the complainant were obtained by the Manager of the said hotel. The statement of the Manger is also recorded and he has disclosed that the Appellant and the complainant had disclosed their address as Sai Hill Nagar CHS, Chandansar Road, Virar (East) Tal. Vasai, District Palghar which was entered into the booking register. They both had shown their Aadhar cards to the Manager and thereafter their signatures were obtained by the Manager and they were allotted room No.103.

14. The learned counsel for the complainant was given access to the papers of investigation before the Court. He has vehemently argued that the Court cannot be oblivious of the fact that the incident had occurred and the consent of the complainant was obtained by misrepresentation of fact by the Appellant by stating and assuring that he would marry her, whereas in reality he had no intention to marry her.

15. The learned counsel for the Appellant has drawn our attention to the reply filed by the prosecution. The Appellant is shown to have

being prosecuted under Section 3(1)(12) of the SC & ST Act. The learned counsel for the complainant has submitted that in fact the offence is made out is 3(w)(1), which reads as follows:

“3. Punishments for offences of atrocities - (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, -

.....

.....

(w)(i) intentionally touches a women belonging to a Scheduled Castes or Scheduled Tribes, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient's consent;

(ii)

Explanation:- For the purpose of sub-clause (i), the expression “consent” means an unequivocal voluntary agreement when the person by words, gestures, or any form of non-verbal communication, communicates willingness to participate in the specific act:

Provided that a woman belonging to a scheduled caste or a scheduled tribe who does not offer physical resistance to any act of a sexual nature is not by reason only of that fact, is to be regarded as consenting to the sexual activity.

Provided further that a woman's sexual history, including with the offender shall not imply consent or mitigate the offence;”

16. The learned counsel for the complainant submits that in the case where the woman to Scheduled Castes or Scheduled Tribes, the consent would be immaterial. In the present case, the principal offence is under Section 376 of the IPC. Even before 07.07.2021, when the complainant offered the proposal of marriage to the Appellant, she was fully aware of his opinion in respect of a general category / caste. In any case there was no personal conversation

between the two in respect of their own respective castes or the disparity of their castes. This is all by implication. In fact the complainant has not stated, nor there is any material to show that she had disclosed her caste to the Appellant and the general discussion which took place between them or their opinions about any particular caste in general was being taken to understand that the Appellant was fully aware of her caste prior to 07.07.2021 or rather before the registration of the FIR under the provisions of the SC & ST Act.

17. In fact, upon perusal of the statement of the close friends of the complainant and the Appellant, it appears that the Appellant was planning to take up a job on a ship which was not approved and disliked by the complainant; and this was the main cause for dispute between them and there was a grave misunderstanding. The complainant was angry and annoyed by the fact that he did not accede to her request to continue to work when he was working and she was unable to dissuade the Appellant from taking up the job on the ship. The learned counsel for the Appellant has placed reliance upon the observations of the Supreme Court in the case of **Uday Vs. State of Karnataka**, reported in **2003 (4) SCC 46**. The observations of the Supreme Court in paragraph 25 of the judgment are relevant and read thus:

“25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, is permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 O'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it.”

18. We have also perused the judgment of the Supreme Court in the case of **Union of India Vs. State of Maharashtra and Ors.**, reported in **AIR 2019 SC 4917**, wherein while considering the overall situation, the Supreme Court in paragraph 66 has observed as follows:

“66. The creation of a casteless society is the ultimate aim. We conclude with a pious hope that a day would come, as expected by the framers of the Constitution, when we do

not require any such legislation like Act of 1989, and there is no need to provide for any reservation of SCs/STs/OBCs, and only one class of human exist equal in all respects and no caste system or class of SCs/STs/OBCs exist, all citizens are emancipated and become equal as per Constitutional goal.”

18.1. In conclusion, the Supreme Court was considering the judgment dated 20.03.2018 passed in Criminal Appeal No.416 of 2018 and was considering the review of the five guidelines issued in the said judgment. By way of review, the Supreme Court has maintained the first two guidelines which read as follows:-

"i) Proceedings in the present case are clear abuse of process of court and are quashed.

ii) There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no *prima facie* case is made out or where on judicial scrutiny the complaint is found to be *prima facie mala fide*.”

18.2. The Supreme Court has approved the view taken and approach of the Gujarat High Court in the case of Pankaj D. Suthar and Dr. N.T. Desai and clarified the judgments of this Court in Balothia and Manju Devi's case. The said observations are further confirmed by the Supreme Court in the case of **Prathvi Raj Chauhan Vs. Union of India and Ors.**, reported in **AIR 2020 SC 1036**.

19. In the present case, the allegation against the Appellant is principally a breach of promise to marry. According to the complainant, having taken advantage of the situation, the Appellant has emotionally persuaded her to have sexual intercourse. The

Appellant and the complainant are of the same age. In view of our discussion above, it cannot be said that custodial interrogation would be necessary in the present case. It *prima facie* appears that the complainant had allowed the Appellant to take certain liberties only because she was also equally involved in love with the Appellant. At least on 27.10.2021 she had exercised her choice between resistance and assent. The complainant has voluntarily consented to have sexual relation with the Appellant; she had checked into the hotel room on more than one occasion giving her Aadhar card as proof; that she had also signed the hotel registers. According to her she did not know the address of the residence of the Appellant but the same is mentioned in the hotel register which was to her knowledge as she had signed the said register. The allegation of the complainant that she had misconceived that the Appellant would marry her and therefore had consented to the act *prima facie* does not appear to be correct in the facts of the case and on the basis of the papers of investigation. Hence, the liberty of the Appellant cannot be curtailed or else it would amount to punitive detention.

20. The observations herein above are *prima facie* in nature on the basis of the papers of the investigation placed before us.

21. The learned APP upon instructions from the Investigating Officer, Mr.R.B. Deshmukh, who is present in Court submits that charge sheet would be filed within a period of four weeks from today as the investigation is almost completed.

22. In view of the above, we pass the following order:-

- (i) The Criminal Appeal is allowed;
- (ii) In the event of arrest in CR No.952 of 2021 registered at Virar Police Station, District Palghar, the Appellant Shiriraj Rajendra Rao be enlarged on bail on furnishing PR bond in the sum of Rs.1,00,000/- with one or more solvent sureties in the like amount;
- (iii) The Appellant shall deposit his passport with the Investigating Officer in Crime No. 952/2021 registered at Virar Police Station;
- (iv) The Appellant shall appear before the A.C.P., Virar Division twice a week i.e. on Monday and Thursday between 10.00 a.m. to 12.00 noon;
- (v) Upon failure to attend any two consecutive dates, the prosecution is at liberty to seek cancellation of the reliefs granted by this order.

23. This Court appreciates the services of Mr. Pawan Mali, Advocate appointed to espouse the case of Respondent No. 2 - complainant. He is entitled to the professional fees to be paid by the Legal Aid Services Authority / Committee as per rules.

[MILIND N. JADHAV, J.]

[SMT. SADHANA S. JADHAV,J.]

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