

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APL) NO.503 OF 2022

Sandip Wasudeo Bhairwar,
aged about 37 years, occupation :
Real Estate and Brokership,
r/o Flat No.11, Indranil Apartment,
Suraj Nagar, Yavatmal, Taluq
and District Yavatmal.

... Applicant

- Versus -

1) State of Maharashtra, through
Police Station Officer, Police
Station, Awadhootwadi, Yavatmal,
Taluq and District Yavatmal.

2) Victim XYZ/complainant in
Crime No.158/2022 at PS,
Awadhootwadi, Yavatmal,
Taluq and District Yavatmal.

... Non-applicants

Shri Firdos Mirza, Advocate for applicant.

Smt. K.S. Joshi, Additional Public Prosecutor for non-applicant no.1.

CORAM : SUNIL B. SHUKRE AND
M.W. CHANDWANI, JJ.

DATED : NOVEMBER 28, 2022

ORAL JUDGMENT (PER SUNIL B. SHUKRE, J.) :

Rule. Rule is made returnable forthwith. Heard finally
by consent of the learned Counsel appearing for the parties. Nobody

is present for the non-applicant no.2 although duly served. In fact, she is absent since long.

2) On going through the First Information Report registered as Crime No.158/2022 at Police Station, Awadhootwadi, Yavatmal, which was filed by the non-applicant no.2, we find that the basis of the allegation of forcible sexual intercourse committed by the applicant with the non-applicant no.2 is of love affair developed between the two sometime in the beginning of the year 2021. This love affair started in spite of the fact that the non-applicant no.2 was a married woman, aged about 37-38 years and was having a 16 years old son. The love affair ultimately ended in development of intermittent sexual relations in between the two. At one point of time, the non-applicant no.2 had even given an offer to the applicant to solemnize marriage with her, but it was turned down by the applicant. The sexual relations, however, continued in spite of spurning by the applicant of the offer of marriage given by the non-applicant no.2. The offer of marriage given by the non-applicant no.2 was with full knowledge that the non-applicant no.2's marriage being alive, the applicant could not have solemnized marriage with her and even then, as stated earlier, the sexual relations between

applicant and non-applicant no.2 went on unabated. These are the facts, which are admitted ones.

3) If the admitted facts are taken at their face value and accepted as they are, the only conclusion that can be drawn is that the sexual relations between applicant and non-applicant no.2 or whatever they were, were consensual in nature and it cannot be said that the consent given by the non-applicant no.2 to have physical relations with the applicant was under any misconception of facts, rather it was with consciousness of the fact that the applicant could not have performed any marriage with the non-applicant no.2 and also that the non-applicant no.2 being a married woman, could not have compelled applicant to perform marriage with her. If the non-applicant no.2 had exercised her choice of having sexual relations with another man during continuance of her marriage, it was her own decision for which she cannot be permitted to blame a person like applicant.

4) Thus, we find that essential ingredients of an offence punishable under Section 376 of Indian Penal Code are missing here. For this view, we would like to draw support from the law laid down by the Apex Court in the case of **Shambhu Kharwar vs. State of Uttar**

Pradesh and another (2022 SCC OnLine SC 1032) wherein in para 13 of the judgment, in the backdrop of the consensual physical relations between informant and accused, the Apex Court found that the essential ingredients of the offence punishable under Section 376 of Indian Penal Code were absent. As such, this is a fit case for making interference in the matter.

5) In the result, the criminal application is allowed in terms of its prayer clauses (i) and (iA). Rule is made absolute accordingly. No costs.

JUDGE

JUDGE

khj