

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

CRIMINAL WRIT PETITION NO.823 OF 2018

1. Sanjay Sravan Bhojne,
Aged 28 years, Occ: Advocate,
R/o Zurad (Bhankpuri),
Tah. Balapur and District: Akola. **PETITIONER**

// VERSUS //

1. State of Maharashtra,
Through P.S.O. P. S. Yavatmal,
Tq. & Dist. Yavatmal.
2. Sujata Dadarao Tathade,
Aged about 31 years, Occ: Private Service,
R/o. Gautam Nagar, Dhamangaon Road,
Yavatmal, Tq. & Dist. Yavatmal. **RESPONDENTS**

Mr. S. V. Sirpurkar, Advocate for petitioner.
Mr. I. J. Damle, APP for respondent No.1/State.

CORAM : AVINASH G. GHAROTE, J.
DATED : 10/01/2022

ORAL JUDGMENT :

Heard Mr. Sirpurkar, learned counsel for the petitioner and
Mr. Damle, learned Additional Public Prosecutor for the respondent
no.1/State.

2. The order passed below Exh.7 dated 17.02.2018 passed by
the learned Sessions Court, Yavatmal in Sessions Trial No.95 of 2015,
rejecting the application for discharge filed by the petitioner/accused has

been challenged in the present petition.

3. The charge which is being faced by the petitioner is one under Section 376(2)(n) and 417 of the Indian Penal Code (hereinafter 'the IPC'). Mr. Sirpurkar, learned counsel for the petitioner submits that the charge-sheet did not make out any offence against the petitioner as according to him, the petitioner and the prosecutrix were known to each other since 2001 onwards and they were having a love affair since then. He further submits, that the relations between the petitioner and the prosecutrix had gone to the extent of they being sexually intimate with each other several times, on the ground, that the petitioner, was willing to marry the prosecutrix, considering which, the requirement of the provisions of Sections 376(2)(n) and 417 of the IPC were not made out, as the relationship and the intimacy was voluntarily and not under a false promise. He invites my attention, to the statement of the prosecutrix, in which, she has admitted that she was in love with the petitioner, and used to visit several places with the petitioner over a period of time and also had intimate relations with him on various occasions as the petitioner was willing to marry her. It is therefore, contended that the material available on record, filed with the charge-sheet, read as a whole, without anything else would demonstrate that the offence punishable under Section 376(2)(n) and 417 of the IPC

has not been made out.

4. Reliance is place upon *Dr. Dhruvaram Murlidhar Sonar Vs. The State of Maharashtra and Ors., 2019 (18) SCC 191, Pramod Suryabhan Pawar Vs. State of Maharashtra and another, 2019 (9) SCC 608 (para 18)* and *Akshay s/o Kailashrao Gaikwad and others Vs. State of Maharashtra Through Police Station Officer, City Kotwali, Akola and another, Criminal Application (APL) No.285 of 2021, decided on 28.09.2021*. He therefore submits, that considering the material placed on record along with charge-sheet, the same was not sufficient to establish a charge under Section 376(2)(n) and 417 of the IPC, and therefore, the learned Sessions Court, ought to have accepted the application for discharge. By inviting my attention to the impugned order, he submits that the same does not consider the position on record, in light of the law applicable, and therefore, needs to be set aside and the application be allowed.

5. Mr. Damle, learned APP for the respondent No.1, opposes the petition and contends, that there is sufficient material, to frame the charge. He submits, that at the stage of framing of charge under Section 227 of Cr.P.C. what is required is a strong suspicion, which leads the Court to think that there is a ground for presuming that the accused had

committed an offence. Reliance is place on *Amit Kapoor Vs. Ramesh Chander and Another*, 2012 (9) SCC 460 and *State of Rajasthan Vs. Fatehkaran Mehdu*, 2017 (3) Mh. L.J. (Cri) (S.C.) 444. He submits, that the statement of the prosecutrix and the witnesses placed on record, would indicate that there was no consent at all of the prosecutrix, and therefore, there was sufficient material to frame a charge.

6. In *Amit Kapoor* (supra) the Hon'ble Apex Court has held as under:

“17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the “record of the case” and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the section exists, then the court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is the expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

“18. It may also be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. Of course, it may be subject to jurisdiction of this Court under Article 136 of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the

court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases.”

and again further held that at the initial stage of framing of a charge, the Court is concerned not with the proof, but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty and all that the Court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not, the final test of the guilt not being applied at that stage. Relying upon ***State of Bihar Vs. Ramesh Singh, (1977) 4 SCC 39***, the following principles have been laid down therein:

“27. Having discussed the scope of jurisdiction under these two provisions, i.e., [Section 397](#) and [Section 482](#) of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under [Section 397](#) or [Section 482](#) of the Code or together, as the case may be :

27.1. Though there are no limits of the powers of the Court under [Section 482](#) of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of [Section 228](#) of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5. Where there is an express legal bar enacted in any of the provisions *of the Code* or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7. The process of the court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a “civil wrong” with no “element of criminality” and does not satisfy the basic ingredients of a criminal offence, the court may be justified in quashing the charge. Even in such cases, the court would not embark upon the critical analysis of the evidence.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12. *In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.*

27.13. *Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.*

27.14. *Where the charge-sheet, report under [Section 173\(2\)](#) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.*

27.15. *Coupled with any or all of the above, where the Court finds that it would amount to abuse of process [of the Code](#) or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.*

27.16. *These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under [Section 482](#) of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance to the requirements of the offence.”*

The dictum in ***Amit Kapoor*** (supra) has been followed in ***Fatehkaran Mehdu*** (supra).

7. It is thus apparent that while considering the application for discharge, the test to be applied is as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith *prima facie* indicate the offence or not and it is only

in case the allegations made are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere, which would indicate the limited scope of interference by the Court at the stage of framing of a charge under Section 227 of the Cr. P. C.

8. Looking at the record, in light of the above parameters, the FIR as well as the statement of the prosecutrix, indicate that she was having a love affair with the petitioner, who had promised to marry her from 2001 onwards. The statement further states that the prosecutrix had been to various places such as Shegaon and Aurangabad to meet the petitioner, and had resided there with him. She further states that in the year 2007 when her parents started receiving proposals, at that time as the petitioner was not willing to go ahead and tie the nuptial knot, she had married one Siddharth Sirsat. However, on account of the attempt to suicide by the petitioner, she had broken up the marriage and later on continued the affair with the petitioner. It is further stated by her that she had always avoided to bow to the pressure of the petitioner for having sexual relations and had always refused him whenever he demanded for the same stating that she would agree to the same only after marriage. It is in this background, that the two incidences narrated

in the statement assume significance in as much as she states that in February 2014, the petitioner had come to meet her at Yavatmal and had taken her for a ride outside and had in fact committed forcible sexual assault on her, on the backside of Amolakchand College, against the will of the prosecutrix. She further states, that upon her opposition she was also assaulted by the petitioner, who had thereafter informed the prosecutrix that he had recorded obscene scenes of the prosecutrix on his mobile. On the second occasion, the prosecutrix narrated that on 22.10.2010 the petitioner had approached her and on the pretext of wanting to talk with her taken her near the Gayatri Mandir, Polytechnic College and again had forcible sexual assault with her against the will of the prosecutrix, at which time also she was assaulted and threatened with being defamed. The statement of the prosecutrix consistently states that at no point of time, she was willing to have sexual relations with the petitioner and the two incidences quoted clearly indicate at least *prima facie* suspicion of the offence under Section 376(2)(n) of the IPC. The statement of the prosecutrix is substantiated by the statement of two of her friends namely Sau. Pooja Anurag Imle and Sau. Ujwala Sandip Mishra. This fact, in my considered opinion, clearly substantiates, the requirement of the test as enumerated in ***Amit Kapoor*** (supra), that the documents on record *prima facie* establish a suspicion of the offence. The statement of Sunil Haribhau Kanherkar merely indicates, the

prosecutrix accompanying the petitioner to the lodge and recording of the entry as husband and wife, which by itself, cannot be construed at this stage, as consent by the prosecutrix for having intimate relationship. The question of the promise being genuine and sincere, may not ultimately be germane, to the allegation of having committed an offence under Section 376(2)(n) of the IPC for the reason that Section 376(2)(n) of the IPC, requires repeated rape on the same woman and the two incidences quoted above, would *prima facie* demonstrate a strong suspicion of the fulfillment of the requirements.

9. ***Pramod Suryabhan Pawar*** (supra) relied upon by Mr. Sirpurkar, learned counsel for the petitioner, is based upon a premise that the promise to marry must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given, in which case the consent being based upon a misconception of fact arising out of the promise to marry would stand vitiated. In the instant case, the petitioner as is obvious from his statement did not stand up to his promise, to marry the prosecutrix, as a result of which, the prosecutrix had entered into a wedlock with one Sirsat, which is an admitted position. That wedlock was ultimately broken and the act of the petitioner to commit suicide was the reason for the same, is what is stated in the statement by the prosecutrix. The position thereafter, even

if considered with an angle, that there was genuine promise to marry, earlier to her marriage with Sirsat, however, cannot be said to having been carried forward, post the breakup of the marriage of the prosecutrix. What is relevant therefore, are the two statements in the FIR as well as the statement of the prosecutrix relating to the incidents of February of 2014 and 22.10.2014, which specifically alleged the commission of an offence under Section 376(2)(n) of the IPC, *de hors* any promise to marry.

10. The judgments in Dr. ***Dr. Dhruvaram Murlidhar Sonar*** and ***Akshay s/o Kailashrao Gaikwad*** (supra) relied upon by Mr. Sirpurkar, learned counsel for the petitioner, were under the provisions of Section 482 of Cr. P. C. for quashing the FIR and thus are of no assistance in the present case which seeks a discharge under Section 228 of the Cr. P. C., considering which, I do not find any infirmity in the order passed by the learned Sessions Court. The parameters for consideration of a plea of discharge under Section 227 of the Cr. P.C. are totally different than the parameters for quashing under Section 482 of Cr. P.C. The criminal writ petition is therefore, without any merit and is accordingly dismissed.

11. Rule is discharged.