

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

963 CRIMINAL APPLICATION NO.3132 OF 2022

Humza Hussainkha Pathan
Age- 20 years, Occu.: Education,
R/o Gat No.103, Plot No.55,
Shadab Nagar, Mitmita, Aurangabad,
Tq. & Dist. Aurangabad

..APPLICANT

-VERSUS-

1. The State of Maharashtra

2. XYZ

..RESPONDENTS

WITH
CRIMINAL APPLICATION NO. 3106 OF 2022

1. Azhar Ashfak Shaikh
Age- 24 years, Occu.: Education,
R/o Suraj Apartment, A-wing,
Room No.3, 1st Floor, KK road,
Mahagiri, Thane, Tq. & Dist. Thane

2. Ussama Asjad Khan
Age-25 years, Occ : Education,
R/o Plot No.134, Motiwala Nagar,
Aurangabad, Tq. & Dist. Aurangabad.

..APPLICANTS

-VERSUS-

1. The State of Maharashtra

2. XYZ

..RESPONDENTS

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Advocates for Applicants : Mr.Gore Ravindra Vitthal & Mr.Bodkhe
Chandrakant V.

APP for Respondent/State : Mr.S.J. Salgare
Advocate for Respondent No.2 : Mr. Jarare Prasad D.

**CORAM : R.G. AVACHAT AND
SANJAY A. DESHMUKH, JJ.
DATED : 27th JULY, 2023.**

PER COURT :-

. Criminal Application No.3132 of 2022 and Criminal Application No.3106 of 2022 are filed for quashment of FIR i.e. Crime No.0497 of 2021, registered with City Chowk Police Station, Aurangabad and consequential charge-sheet in proceedings in Juvenile Case No.21 of 2022 and Sessions Case No.329 of 2022, for the offence punishable under sections 376, 376(2)(n), 385, 504, 506 and 34 of the Indian Penal Code

2. The respondent/informant (victim) has filed her affidavit, giving her express consent to allow these applications.

3. The learned APP has strong reservations to grant the applications. According to him, offence is serious one. He relies on judgment of the Apex Court in the case of ***Daxaben Versus The State of Gujarat and others*** (Criminal Appeal arising out of SLP(Cri.) No.1132-1155 of 2022) decided on 29th July, 2022. He adverted our attention to the paragraph nos.38, 39 and 40 of the said judgment, which read as under :-

“38. However, before exercising its power under Section 482 of the Cr.P.C. to quash an FIR, criminal complaint and/or criminal proceedings, the High Court, as observed above, has to be circumspect and have due regard to the nature and gravity of the offence. Heinous or serious crimes, which are not private in nature and have a serious impact on society cannot be quashed on the basis of a compromise between the offender and the complainant and/or the victim. Crimes like murder, rape, burglary, dacoity and even abetment to commit suicide are neither private nor civil in nature. Such crimes are against the society. In no circumstances can prosecution be quashed on compromise, when the offence is serious and grave and falls within the ambit of crime against society.

39. Orders quashing FIRs and/or complaints relating to grave and serious offences only on basis of an agreement with the complainant, would set a dangerous precedent, where complaints would be lodged for oblique reasons, with a view to extract money from the accused. Furthermore, financially strong offenders would go scot free, even in cases of grave and serious offences such as murder, rape, bride-burning, etc. by buying off informants/ complainants and settling with them. This would render otiose provisions such as Sections 306, 498-A, 304-B etc. incorporated in the IPC as a deterrent, with a specific social purpose.

40. In Criminal Jurisprudence, the position of the complainant is only that of the informant. Once an FIR and/or criminal complaint is lodged and a criminal case is started by the State, it becomes a matter between the State and the accused. The State has a duty to ensure

that law and order is maintained in society. It is for the state to prosecute offenders. In case of grave and serious non-compoundable offences which impact society, the informant and/or complainant only has the right of hearing, to the extent of ensuring that justice is done by conviction and punishment of the offender. An informant has no right in law to withdraw the complaint of a non-compoundable offence of a grave, serious and/or heinous nature, which impacts society.”

Ultimately, the learned APP urged for rejection of the applications.

4. We have perused both the authorities relied on. Powers under section 482 of the Criminal Procedure Code are discretionary in nature. True, the discretion is to be exercised judiciously based on facts and circumstances of each case.

5. In the present case, that the FIR has been lodged by 26 years old victim (respondent) on 23.09.2021. She did BDS (Bachelor of Dental Surgery). One Uneja Shaikh was classmate of the victim/informant. She (victim) attended Uneja's marriage in December, 2019. The victim got acquainted with the present applicant, his mother and sister Alia in the said marriage. The acquaintance developed into friendship. Communication between the two started on cellphone. Applicant – Azhar told the victim that he

was holding high position with “Frontier Airlines, Mumbai”. He even expressed his love for her. He put up a proposal of marriage. He even informed that he was likely to get job with “Saudi Airlines”. The friendship gradually developed into emotional relationship.

6. The applicant – Azhar came to his uncle’s residence at Aurangabad on 4th October, 2020. He called the victim/informant to meet him there. She, therefore, met him. Applicant – Azhar then told her that after marriage, they would be settling at Jeddah (Foreign Country) and for obtaining Vissa, he asked the victim to give him her copies of Aadhar card and other documents. It was decided that talks for marriage would be held between the elders of their family members. Both of them got closure to each other. Communication on phone calls and whatsapp chatting gradually grew.

7. It has further been alleged that applicant – Azhar came to Aurangabad on 21.11.2020 and stayed in a hotel “7 Apple”. He called the victim to meet him there. She went and met him at Reception Counter. He asked her to join him to his room. She initially refused, but later on gave in, in view of his proposal for marriage. Applicant – Azhar allegedly committed sexual intercourse with her without her consent and against her wish. While she was putting on her clothes, he took some photographs. She asked him to delete the

same. He told her that he wanted to preserve those photographs as a memory of first meeting. Azhar then left for Mumbai.

8. It has further been averred/alleged that again in January, 2021, he came to Aurangabad. He stayed in the same hotel. Called her to meet him there. When she refused, he told her that he was going to delete her those photographs. She, therefore, went there to meet him with a apprehension that if she did not go there, he may make those photographs viral. Applicant – Azhar again had sexual intercourse with her. He threatened her of making those photographs viral, if she did not submit to his desire. He behaved with her similar on the following day as well i.e. on 9th January, 2021. It has further been averred/alleged that on 1st and 22nd February, 2021, he again had sexual intercourse with her in a flat of his friends Osama Khan and Hamja Pathan. He then threatened her of making her photographs viral. He made demand of Rs.10,00,000/- for not doing so. He even sent those friends to her residence on 4th June, 2021 for collecting money. The victim and her family members however did not open the entrance door of their house.

9. It has further been averred that in August, 2021, those were the days of Muharram, applicant – Azhar text her a message informing to have sent her photographs on whatsapp of her parents.

She verified the same and thereby got frightened. He then again made message on 22nd September, 2021 and made a demand of Rs.10,00,000/-. She, therefore, informed his mother and sister. Both of them told her to have her photographs in pen drive with them. The victim thereafter lodged FIR.

10. Close reading of the FIR would indicate that first both the victim/informant and applicant – Azhar got acquainted with each other. Both of them are well educated and highly placed. The acquaintance developed into friendship. The applicant put up a marriage proposal. Friendship developed into emotional relationship. Both started meeting each other. On about 4-5 occasions they met in a hotel and in flat as well. There was sexual intercourse between them. It is true, that in the first such meeting, applicant – Azhar took photographs of the victim. He even sent them to the victim and her mother. He is alleged to have threatened of making them viral. The cell phone of applicant – Azhar has now been seized. The incidents of threatening the victim to make her to submit to his sexual desire started from 9th June, 2021. Last incident of sexual intercourse between the two took place in February, 2021. What went wrong between them would be anybody's guess. From the FIR, there is nothing to indicate that from inception applicant – Azhar had put up a false promise of marriage. It is not known as to why the FIR was not

lodged immediately when the applicant allegedly threatened her of making her photographs viral and allegedly compelled her to submit to his sexual desire. The FIR has been lodged seven months after last such incident. We do not propose to make further observations as regards merits of the matter, since the victim herself has filed her affidavit giving express consent to allow the present applications. In our view, it was a case of consensual relationship. FIR was lodged long after last incident of alleged sexual intercourse. It would, therefore, be a question as to whether it was in fact an offence of rape. When veracity of the allegations in the FIR is seriously in doubt and victim/informant herself (a well educated and adult) gives her express consent to allow these applications, we find it fit to allow the applications in the interest of justice.

11. So far as regards other applicants are concerned, no overt act as regards of rape or abetment thereof has been alleged against them. They are alleged to have come to the residence of the victim to collect money. When they had come, entrance door was not opened by the family members of the victim. As such, we find their case also fit to grant relief of quashment of the proceeding.

12. In view of the above, both the applications are allowed in terms of prayer clause "B".

13. The applicants shall deposit Rs.25,000/- as costs with this Court. Amount be credited to State Government Treasury.

(SANJAY A. DESHMUKH, J.)

(R.G. AVACHAT, J.)

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