

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION No.146 OF 2022

Nilofer Mohammed Khan

Adult, Indian Inhabitant aged about 25 years

Residing at E-Sector, J-2 Line, Room No.1,

Cheeta Champ, Trombay, Mumbai – 400 088.

...Petitioner

Vs.

The State of Maharashtra,

through Inspector Incharge,

Trombay Police Station,

To be served through Public Prosecutor,

High Court, Mumbai.

...Respondent

Mr. Ashok M. Saraogi a/w. Mr. Sushil Upadhyay a/w. Amit Dubey a/w. Mr. Jitendra Gautam a/w. Mr. Akash Singh for Petitioner

Dr. Birendra Saraf, Advocate General a/w. Ms. M.M. Deshmukh , APP for the State

Petitioner in person present.

**CORAM : NITIN W. SAMBRE &
RAJESH S. PATIL, JJ**

DATED : 23rd AUGUST, 2023

ORAL JUDGMENT:- (Per NITIN W. SAMBRE, J.)

1. Heard Mr. Saraogi, learned counsel for the Petitioner, Ms. Deshmukh, learned APP appearing for Respondent -State.

2. The Petitioner, alleged victim of sexual offence has approached this Court invoking provisions of Article 226 of Constitution of India, with following prayers.

3. Brief facts necessary for deciding the petition are as under:
- (a) That this Hon'ble Court be pleased to issue appropriate writ, order and direction directing the transfer of FIR No. 71 of 2021 originally registered under the provisions of Section 376(2) (N), 377 of IPC registered at the instance of the Petitioner from the present Respondents to any other Police Station with a direction to carry out further/fresh investigation in respect of the same on such terms as this Hon'ble Court may deem fit and proper.
 - (b) that pending the hearing and final disposal of the present Petition and further investigation to be carried out in the matter, the Trial arising out of FIR No.71 of 2021 originally registered under the provisions of Section 376(2) (N), 377 of IPC now, being Police Case No. 3917/2021 pending to the file of the Ld. Additional Chief Metropolitan Magistrates Kurla, 60th Court be stayed on such terms as this Hon'ble Court may deem fit and proper.

The Petitioner on March 20, 2021 approached the Respondent No.1 Police Station with a complaint alleging that person by name Mohammed Ghouse Abdul Rauf Sheikh (Accused) is residing in the very same locality. The Petitioner had friendship with the said person, however, subsequently developed intimacy and love relations. It is further stated that the family members of both i.e. Petitioner and said person agreed for the marriage of

the Petitioner with the said Mohammed. Taking undue advantage of promise to marry, it is claimed that the said accused sexually exploited the Petitioner in 2018. It is claimed that subsequently, differences between the Petitioner and said Mohammed erupted however, in April, 2020, the relationship was normalized and in January, 2021, he had refused to marry the Petitioner. Alleging that under the false promise of marriage, the petitioner was time and again sexually exploited at the place of her friend namely Kavita. The offence punishable under section 376 (2) (N), 377 of the IPC came to be registered pursuant to the aforesaid complaint which was reduced in writing by the lady police sub-inspector of the Respondent Police Station.

4. The matter thereafter was investigated into by the officer of the level of API-Assistant Police Inspector. It appears that the accused was chargesheeted only for an offence punishable under 417 of the IPC i.e. cheating. The accused appeared before the Court of Metropolitan Magistrate, 60th Court, Kurla, Mumbai against the aforesaid challan and pleaded guilty. As such, the Court of Metropolitan Magistrate convicted accused Mohammed under Section 252 of the Code of Criminal Procedure for an offence punishable under Section 417 of the Indian Penal Code and sentenced to pay fine of Rs.2,000/-, in default to suffer Simple

Imprisonment for 7 days. The said accused was further directed to deposit compensation of Rs.8,000/- in exercise of powers under Section 357(3) of Code of Criminal Procedure Code payable to the Petitioner Informant.

5. The Petitioner claimed that she was unaware about the aforesaid development and having noticed that the accused Mohammed was not chargesheeted for an offence punishable under Section 376 of the IPC and since the investigation is carried out contrary to the provisions of Cr.P.C., particularly the amended section 376 of the IPC, has sought the transfer of investigation with an oral prayer of reinvestigation.

6. Mr. Saraogi, learned counsel for the Petitioner, while trying to make out the case for transfer of investigation, would urge that after the offence was registered, the Petitioner was never put to notice for recording her statement under Section 164 of the Cr. P.C. or she was never asked to attend the medical officer for carrying out her medical examination. According to him a bias investigation is carried out by the Investigating Officer which has led to chargesheeting accused Mohammed only for an offence punishable under Section 417 of the IPC.

7. He would further urge that in a calculated manner the accused got rid of the prosecution for the offence of sexual exploitation in the case in hand as could be inferred from the order of the Magistrate passed on November

12, 2022 whereby the accused has pleaded guilty for an offence punishable under Section 417 of the Indian Penal Code. Mr. Saraogi as such, would urge that once the complaint dated March 20, 2021, disclosed a commission of cognizable offence, the investigating officer ought to have chargesheeted the Accused Mohammed for an offence punishable under Section 376. He would further urge that there is necessity to carry out further investigation in the matter as the Petitioner is still willing to give her statement under Section 164 of the Cr. P.C. before the Magistrate and was always willing to do so in addition to her willingness to go for medical examination.

8. While countering the aforesaid submissions, learned APP has produced on record the affidavit of the investigating officer. In addition, she has also placed on record the affidavit duly sworn by the Deputy Commissioner of Police, who was In-charge of the concerned police station where the offence came to be registered and investigated. The learned APP submits that the investigating officer never gave up the investigation qua the offence punishable under Section 376/377 of the IPC. According to Ms. Deshmukh, learned APP, the investigation was carried out in accordance with chapter XII of the Cr.P.C. and it was for the Petitioner victim to cooperate in the investigation. She would try to demonstrate from the

investigation papers viz. the station diary entries, case diaries entries, the affidavit of the Investigating Officer, the affidavit of the Deputy Commissioner of Police of the concerned police station that the investigation was carried out in a proper manner. It was the petitioner who had failed to extend the co-operation in the matter of carrying out the investigation. According to Ms.Deshmukh, learned APP, time and again the Petitioner was insisting for the physical presence of the accused in the police station without which she was not willing to cooperate with the investigation such as, submitting to the medical examination before the competent doctor, making herself available before the Magistrate for recording the statement under Section 164 of Cr.PC.

9. In this background, Ms. Deshmukh would urge that the investigating officer as such was left with no other option but to chargesheet the accused Mohammed only for an offence punishable under Section 417 of IPC as the necessary ingredients and the evidence qua the said offence was available on record. She would also invite our attention to the fact that the investigating officer has specifically submitted before the Magistrate that the evidence for an offence punishable under Section 376/377 since was not available, an appropriate report to that effect was submitted to the Court.

10. In this background, the submissions are, the provisions of Section 173 (8) of Cr.P.C. would not be attracted.

11. We have appreciated the aforesaid submissions.

12. Since the allegation of frivolous or malafide or bias investigation are made by the Petitioner, we have called for the entire investigation papers in the matter.

13. The provisions of Section 376 underwent an amendment way back in 2013 and accordingly it is made mandatory that in case of a victim of sexual offence approaching the police authorities, the FIR has to be reduced in writing by a lady police officer which act is duly complied with in this case. The FIR in the case in hand is registered by a police sub-inspector and as per the orders of the Senior Police Inspector of the police station, the investigation was handed over to the officer of the rank of Assistant Police Inspector.

14. With the assistance of learned APP, we have perused the investigation papers. The investigation papers in categorical term reflect that after the offence came to be registered, the Petitioner was made to understand that she has to undergo the medication examination. The case diary entries on the date of registration of offence depict that the victim was called upon to show the place of the incident so as to draw spot panchanama. However,

she refused to cooperate by not showing the place of the incident. Apart from above, on March 22, 2021, i.e. immediately after three days of the FIR, a communication was issued to Rajawadi Hospital, Mumbai with a request to examine the victim medically. However, she refused to undergo medication examination as could be inferred from the Station Diary Entry No. 24 and Case Diary No. 3 which was made on March 22, 2021.

15. A communication dated March 23, 2021 asking the victim to attend the hospital for the purpose of medical examination, was also refused to be acknowledged and a Station Diary Entry No. 17 was made on March 27, 2021.

16. Subsequent to the above, the investigating officer went ahead and further the offence punishable under section 323, 504, 506 r/w. 34 of the IPC came to be added with the earlier section 376 (2) (N) and 377 of the IPC in Crime No. 71 of 2021. The Station Diary No. 25 dated March, 26, 2021 reflects that though the Petitioner was present in the Court, however, she refused to accompany lady constable to undergo the medical examination. A Station Diary Entry No.29 was made on March 29, 2021 that the Petitioner refused to cooperate with the police authorities till the accused returned to India from Kuwait. On March 30, 2021, Petitioner attended the police station, for which a Station Diary Entry 2023 was made

that neither the Petitioner conceded for undergoing medical examination, nor she has permitted the investigating officer to record the statement of her mother and she has created scene in the police station.

17. Apart from above, if we see the further investigation carried out by the investigation officer in the matter, the Petitioner has specifically named a witness in her complaint at whose place she was sexually assaulted. The investigating officer has recorded the statement of the said witness viz. Kavita on March 8, 2021 under Section 161 of the Cr.P.C. However, said Kavita has not supported the case of the prosecution. Apart from above, the said Kavita has accepted the request to record her statement under Section 164 of the Cr.P.C. and her statement under Section 164 was recorded by the Magistrate during the investigation of the present offence. In the said statement also which was recorded by the Magistrate on May 24, 2021, she has not supported the case of the prosecution.

18. Apart from above, the other statements which are recorded during the course of investigation, have not supported or established the case of the prosecution which has prompted the police officer to file the chargesheet only for an offence punishable under Section 417 of the IPC and not other offences.

19. The investigating officer also recorded the statement of Zalma, mother

of the accused on March 13, 2021, Mariumbi on April 8, 2021, sister of the accused, Smt. Ruksana on April 11, 2021 and Smt. Adilaxmi on 11th April, 2021 about the adverse conduct of the Petitioner. He has also placed on record the communication dated March 22, 2021, issued to the medical officer, Rajawadi Hospital, Mumbai bearing Outward No.1715 of 2021, and the communication issued to the Petitioner on March 23, 2021 asking her to attend the police station for submitting herself for medical examination with an endorsement that not only she has acknowledged the same but also refused to undergo medical examination.

20. Apart from above, it appears that the Petitioner submitted a complaint on March 19, 2021 to the Deputy Commissioner of Police. It appears that the Deputy Commissioner of Police accordingly called upon through Senior Police Inspector of the police station to the investigating officer to submit the report in the investigation of the matter. The Investigating Officer has submitted written report to the Deputy Commissioner of Police as could be inferred not only from the case diary but also from the affidavit placed on record by the Deputy Commissioner of Police.

21. In this backdrop, it cannot be said that there was any attempt on the part of the investigating officer to take up bias or misdirect investigation in the matter in question so as to save the accused. The station diary entries,

the case diary entries, the communications issued to the medical officer, the recording of the statement of the witness under Section 164 of the Cr.P.C. and the report submitted to the Judicial Magistrate thereby adding offence punishable under Section 323, 504, 506 r/w. 34 of the IPC sufficiently establishes that the investigation was carried out in a proper manner in the case in hand. In support of above observations reliance can be placed on provisions of section 114 of Evidence Act viz. presumption by the Court of existence of certain fact.

22. Be that as it may, what is required to be now considered is, whether after the chargesheet was submitted against the accused person for an offence punishable under Section 417 of the IPC, wherein he was already convicted, this Court can direct re-investigation in the matter.

23. The perusal of the affidavit of the investigating officer reflects that apart from an offence punishable under Section 417 of the IPC, the rest of the offences are said to be non-cognizable for want of evidence.

24. The fact remains that against the order of conviction for an offence punishable under Section 417, the Petitioner, a victim has not taken any steps in the matter. Apart from above, learned APP Ms.Deshmukh has rightly pointed out what has been stated by the investigating officer in his affidavit, paragraph 14, which reads thus :

“14. I say that on 01/09/2021 the NC summary report, u/s. 417 of IPC has been submitted before the Metropolitan Magistrate, Kurla, Mumbai by dropping sections 376(2) (N), 377, 323, 504, 506 r/w. 34 of IPC. Petitioner was informed about the same orally”.

In such an eventuality, the only option left with the Petitioner is to approach before the Magistrate with a prayer for issuance of direction for carrying out the investigation for the offence punishable under Section 376 (2) (N), Section, 377, 323, 504, 506,r/w. 34 of the Indian Penal Code.

25. Though Mr. Saraogi, learned counsel appearing for the Petitioner has stated that the Petitioner was always ready and willing to cooperate in the investigation and the Petitioner has never received any communication from the investigating officer for recording her statement under Section 164 of Cr.P.C. or calling upon her to undergo the medical examination, the fact remains that it is always open for the Petitioner at this stage of the proceedings to approach before the Magistrate for redressal of her grievance in view of the aforesaid stand taken by the investigating officer.

26. In the aforesaid background, we are of the view that it shall be open for the Petitioner to take recourse to the provisions of Section 173(8) of the Cr.P.C. in the matter of the offence punishable under Section 376(2) (N),

377, 323, 504, 506 r/w. 34 of the Indian Penal Code. We have taken aforesaid view in the matter particularly having regard to the fact that the accused was chargesheeted for an offence under Section 417 and the Petitioner is demonstrated to have not cooperated in the investigation, which has prompted the investigating officer to chargesheet the accused for an offence punishable under Section 417 of the Cr.P.C.

27. In the aforesaid background, we deem it appropriate to grant the liberty to the Petitioner to approach before the Magistrate for redressal of her grievance qua the sexual offence.

28. In case if such proceedings are taken up before the Magistrate at the behest of the Petitioner, we direct the Magistrate to decide the same without being influenced by the disposal of the earlier proceedings qua the offence punishable under section 417 of the IPC.

29. In view of above, this Court cannot direct re-investigation in the matter or transfer the investigation to any other agency. Once the Magistrate is satisfied that a case for investigation for sexual offences as alleged is made out, it shall be open for the Magistrate to pass an appropriate order in the matter. For the aforesaid reasons we, dispose of the petition with liberty as observed hereinabove.

30. The investigation papers, which are taken in custody, be returned to the learned APP.

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(RAJESH S. PATIL, J)

(NITIN W. SAMBRE, J.)