

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT NAGPUR, NAGPUR.

...
CRIMINAL APPLICATION (BA) NO. 1416/2022
&
CRIMINAL APPLICATION (BA) NO. 29/2023

CRIMINAL APPLICATION (BA) NO. 1416/2022

Fakira alias Bhagyawan s/o Kisanrao Deshmukh .. Applicant
versus
The State of Maharashtra .. Respondent

.....
Mr. Anil Mardikar, Senior Advocate a/by Mr. S.G.Joshi, Advocate for the applicant
Mr. N.R.Rode, APP for Respondent
.....

WITH

CRIMINAL APPLICATION (BA) NO. 29/2023

Dnyaneshwar s/o Asaram Kankhare .. Applicant
versus
The State of Maharashtra .. Respondent

.....
Mr. A.D. Raut Advocate for the applicant
Mr. N.R.Rode, APP for Respondent
.....

CORAM: ANIL L. PANSARE, J.
DATED : 3rd March, 2023.

PC:

Heard learned counsel for both the sides, at length.

2. Both the Applications are under Section 439 of the Code of Criminal Procedure, 1973. The applicant-Fakira Deshmukh in B.A. No.1416/2022 has been arrested on 12.12.2021 whereas the applicant Dnyaneshwar Kankhare in B.A. No. 29/2023 has been arrested on 12.12.2021 in Crime No.411/2021 registered at Police Station Andhera Tq.Deolgaonraja, Dist. Buldana for offences punishable under sections 376(2)(n), 376(d), 506(2), 363 r/ws. 34 of the Indian Penal Code.

3. The learned APP submits that the applicant-Fakira had previously filed bail application before this Court vide Criminal B.A. No. 271/2022 when this Court was pleased to pass the following order on 29.04.2022 :-

“ After hearing the matter for some time on merits, when the Court was not inclined to interfere the matter on merits, Mr. Karode, learned counsel for the applicant on instructions seeks to withdraw the application.

The statement is accepted.

The application is dismissed as withdrawn.”

4. Mr. Anil Mardikar, learned Senior Advocate submits that the present application is filed in view of the change in circumstance. The change in circumstance is the one that would indicate that sexual activity indulged in by the applicants and informant was consensual.

5. Briefly stated, the case of the prosecution is that the incident has occurred between 06.11.2020 to 04.12.2021. The applicant- Dnyaneshwar brought Fakira to the house of the victim and both stayed at her house on 06.11.2020. Both, Fakira and Dnyaneshwar have then committed sexual assault upon the victim. It is also the case of the prosecution that they have committed the said assault by threatening the informant of killing her son. It is further the case of the prosecution that because of such threat and intimidation, the informant made an attempt to commit suicide by consuming poison on 14.09.2021.

6. On 09.02.2023 the following order was passed :

“ During the course of hearing, learned Senior Advocate

has referred to the transcript of conversation between the applicant and the prosecutrix, which indicates that the applicant and prosecutrix were in physical relationship and that whatever has been alleged is with consent of the prosecutrix. On enquiry, learned senior Advocate submits that mobile number of the applicant was 9371829179 and the mobile number of the prosecutrix was 9307950451. According to learned Senior Advocate this conversation was recorded by the applicant in his mobile phone/number.

2. *The learned Senior Advocate invited my attention to page No.186, which is the application filed by the applicant before the learned Sessions Court mentioning therein the time of conversation. However, the pleadings does not disclose the date on which the conversation occurred.*

3. *Applicant to furnish the date when this conversation occurred and learned Additional Public Prosecutor to place on record the CDR details of these two mobile numbers.*

4. *The above direction are issued in view of the fact that the mobile under question i.e Mobile No. 9371829179 was not seized during the investigation and that the applicant on his own motion has furnished this conversation. In other words, to verify the authenticity of the conversation the details mentioned above are necessary.*

5. *Stand over to 20.02.2023.”*

7. The learned APP on instructions of Investigating officer, submits that the transcript of conversation between Fakira and the victim produced by Fakira was verified and appears to be correct. The conversation between Fakira and the victim is such, which indicates that possibility of consensual sex cannot be ruled out. The conversation also indicate that she consumed poison because of ill-treatment given by her husband. Thus, *prima facie*, it appears that Fakira and the victim were in consensual relationship. So far as Dnyaneshwar is concerned, he is

said to have indulged in physical activity only once and that the said act was done on 06.11.2020. In fact, it is alleged that both have committed sexual assault on 06.11.2020. The victim, however, kept mum. She lodged the report on 10.12.2021. The inordinate delay remains unexplained. The benefit should then be extended to the applicants.

8. The charge-sheet has been filed. The charge has not yet been framed. It will take time to commence and conclude the trial. The learned counsel for the applicants contended that there are no criminal antecedents against the applicants, except this crime. In view of the above and considering the nature of evidence and for the reasons recorded in earlier paragraphs, in my considered view, no fruitful purpose will be served by keeping the applicants behind bars. The interest of prosecution can be protected by putting the applicants to appropriate terms.

9. The observations made hereinabove are for the purpose of deciding these Applications only and the trial Court shall not get influenced by it.

10. Hence, the following order :

ORDER

- (i) The Applications are allowed.
- (ii) The applicant-Fakira @ Bhagywan s/o Kisanrao Deshmukh and the Dnyaneshwar Asaram Kankhare, both be released on bail, in Crime No. 411/2021 registered with Police Station Andhera, Tq. Deulgaonraja Dist. Buldana, for the offences punishable under Sections 376(2)(n),

376(d), 506(2), 363 read with section 34 of the Indian Penal Code, on they furnishing PR. bond in the sum of Rs. 25,000/- (Rupees twenty five thousand) each, with one surety in the like amount.

(iii) The applicants shall, at the time of execution of bond, furnish his address and telephone/mobile number (s) to the Investigating officer and the Court concerned, and shall not change the mobile number(s) and the residence till the final disposal of the case.

(iv) The applicants shall regularly attend the court and cooperate the learned trial Court to complete the trial for the above offences. The applicant shall not seek adjournments, except under extreme circumstances to the satisfaction of the trial Court.

(v) The applicants shall not directly or indirectly make any inducement, threat or promise to any witness acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or any Police Officer.

(vi) The applicant shall maintain law and order.

(vii) Both the applicants shall not in any manner contact the informant/victim.

(viii) In case of breach of any condition, the learned trial Court is at liberty to cancel the bail after giving opportunity of hearing to both the sides.

Both Applications are disposed of in the above terms.

[ANIL L. PANSARE, J.]

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