

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

CRIMINAL APPLICATION (APL) NO. 664/2020

Vinod s/o Tukaram Nikhade,
Aged about 47 yrs., Occ. Agriculturist,
R/o. Nandara (Tukum), Post-Masal,
Tah. Chimur, Dist. Chandrapur.

..... **APPLICANT.**

VERSUS

1. The State of Maharashtra,
through Police Station Officer,
Chimur Police Station, Tah. Chimur,
Dist. Chandrapur.
2. Varsha w/o Devidas Kosare,
Aged about 29 yrs., Occ. Housewife,
R/o. Mouza Tukum Masal,
Tah. Chimur, Dist. Chandrapur.

..... **NON-APPLICANTS.**

Mr. S.M. Patrikar, Advocate for applicant.
Mr. V.A. Thakare, Addl. Public Prosecutor for non-applicant No.1/State.
Mr. Mayuri Kulkarni, Advocate (appointed) for non-applicant No.2.

CORAM : **VINAY JOSHI AND**
VALMIKI SA MENEZES JJ.

JUDGMENT RESERVED ON : **24.07.2023**
JUDGMENT PRONOUNCED ON : **08.08.2023**

JUDGMENT : (PER VINAY JOSHI, J.)

Heard.

2. **Admit.**

3. This is an application in term of Section 482 of the Code of Criminal Procedure ('Code') seeking to quash First information Report

(‘FIR’) as well as charge-sheet relating to Crime No. 293/2019 for the offence punishable under Sections 376, 354, 506, 109, 509 read with Section 34 of the Indian Penal Code registered with Police Station Chimur, Tah. Chimur, Dist. Chandrapur.

4. It is applicant’s case that the entire allegations of sexual assault are against co-accused Sudhakar. Besides vague reference about applicants conversation with victim at the instance of co-accused Sudhir, there is nothing against him. Learned counsel appearing for the applicant would submit that, the material collected by the Police falls short to make out prima facie case against the applicant. Continuation of such prosecution amounts to abuse of the process of the Court, and therefore, the quashing is sought.

5. Learned APP as well as learned counsel appearing for the informant resisted the application. It is submitted that the victim in her statement recorded under Section 164 of the Code, has specifically stated about sexual assault on the part of the applicant. It is submitted that, the Court cannot embark upon the appreciation of evidence while considering application under Section 482 of the Code. At this stage, the Court is not required to conduct the mini trial. With these contentions, application is prayed to be rejected.

6. The prosecution case can be stated in brief that, at the instance of report lodged by victim married lady aged 28 years, the crime has been registered. It is victim's case that co-accused Sudhakar was running a Pan stall in the village. In the month of January 2019, co-accused Sudhakar accosted her in the way, gave her lift on two wheeler. After few days, the applicant who is neighbouring agriculturist, said to the victim that co-accused Sudhakar loves her (victim) and asked her (victim) to comply his wishes.

7. Victim stated that in the month of February 2019, Sudhakar came to her field and under pretext of demanding drinking water, caught hold her hands, but somehow, she rescued herself. She stated that on 25.05.2019, Sudhakar came to her field, caused her to lay down, and had forcible sexual intercourse with her. On 27.05.2019 also once again he had forcible sexual intercourse with her in the field. At that time, victim's mother-in-law arrived, on which Sudhakar fled. Victim stated that on 28.05.2019, she had disclosed the things to her husband, and then she gathered courage and filed report.

8. It reveals from the FIR dated 14.07.2019 that the entire allegations of forcible sexual assault are against co-accused Sudhakar. The report bears a reference that somewhere in the month of January 2019, the applicant asked victim to satisfy the wishes of Sudhakar.

9. Victim's statement was recorded by learned Judicial Magistrate on 29.07.2019 in terms of Section 164 of the Code. This time, she added that in the month of March 2019, when Sudhakar committed forcible sexual intercourse, applicant Vinod also had sexual intercourse with her. She added that at that time, both of them took her photographs.

10. Apparently, the FIR is totally silent about the sexual assault made by applicant Vinod. Learned counsel appearing for applicant took us through supplementary statement of victim dated 16.08.2020 which was recorded after victim's statement under Section 164 of the Code. In the said later statement victim said nothing about sexual assault on the part of the applicant, but reiterated the contents of FIR. In other words, in the supplementary statement, she merely stated about the sexual assault by co-accused Sudhakar only. The role assigned to the applicant was only to the extent of communication with the victim about the wishes of Sudhakar.

11. Learned counsel appearing for the applicant would submit that in the FIR as well as supplementary statement, victim said nothing against the applicant and thus, the victim's statement recorded by the Magistrate is nothing, but an exaggeration as regards to the role of applicant. There is no denial that in FIR dated 14.07.2019 and supplementary statement dated 16.08.2020, victim has not stated

anything against the applicant about sexual assault. However, in her statement before Magistrate, she added a role of applicant about sexual assault which was neither in FIR nor in subsequent statement.

12. Learned counsel appearing for the applicant would submit that, statement recorded by the Police under Section 161 of the Code is wholly inadmissible, and therefore, it cannot be taken into consideration while adjudicating application filed under Section 482 of the Code. In this regard reliance is placed on the decision of the Supreme Court in case of **Rajeev Kourav Vs. Baisahab and others, (2020) 3 SCC 317**. In the said decision, it is observed that statement recorded under Section 161 of the Code being inadmissible, it cannot be taken into consideration. In the light of said decision, even if the supplementary statement recorded by the Police dated 16.08.2020 is kept aside, still the FIR dated 14.07.2019 which can be used for the purpose of corroboration, speaks nothing about sexual assault by applicant. Since the FIR is totally silent on sexual assault on the part of the applicant, being distinct facts, above decision would not assist the informant in any manner.

13. Learned counsel appearing for the informant has submitted that in reported case of **Hazrat Deen Vs. State of Uttar Pradesh and another, 2022 SCC Online SC 1781**, the Supreme Court has considered

the statement of victim under Section 164 of the Code against her FIR. In the said decision, victim girl did not say about sexual assault in the FIR, however after attaining majority, her statement under Section 164 of the Code was recorded where she made allegation pertaining to the offence of rape. In case at hand, there is material discrepancy in the FIR and statement under Section 164 of the Code. Pertaining to note that in the said case, the victim was minor and therefore, in that context, her statement under Section 164 of the Code recorded after attaining majority has weighed. The case in hand differs on facts since the victim is well grown up married lady aged 28 years. Besides that even after statement under Section 164 of the Code, her further supplementary statement was recorded on 16.08.2020 wherein she is totally silent about the act of the applicant and thus, the said ratio would not help the informant in any manner.

14. The learned counsel appearing for applicant by placing reliance on the decision of the Supreme Court in case of **Central Bureau of Investigation Vs. Aryan Singh etc., 2023 SCC Online SC 379** would submit that powers under Section 482 has to be exercised sparingly and at this stage, the Court cannot hold mini trial. Learned counsel appearing for the informant by placing reliance on the decision of Delhi High Court in case of **Neha Monga Vs. State & Ors. and other connected matters, 2012 SCC Online Del 5641** would submit that at the stage of

quashing or discharge, the Court is not expected to make a roving inquiry into the pros and cons of the matter. In the said decision, the names of rapist were not stated in FIR, but disclosed in the subsequent statement. In said decision, there was reference about sexual assault, but names were disclosed later on. In the case before us, the applicant was neighbouring agriculturist meaning thereby, well known to the victim. She has not stated anything against the applicant about sexual assault and thus, the facts are quite distinct. Apart from the name, total non-disclosure of sexual assault by the applicant at first opportunity is very fatal to the prosecution case.

15. We are well aware about the self-imposed limitations in exercising of inherent powers under Section 482 of the Code of Criminal Procedure. These powers can be used sparingly under two circumstances i.e. to prevent the abuse of the process of the Court and to secure the ends of justice. Though at this juncture, meticulous evaluation of material is not warranted, but certainly the Court invests power to scan the material for the purpose of finding out prima facie case. The Court is required to consider whether sufficient material is available to proceed further for which the accused is to be tried or not. It is settled position that inherent powers should not be exercised to stifle legitimate prosecution, but can be exercised to save accused from undergoing agony of criminal trial in undeserving prosecution.

16. Learned counsel appearing for the applicant would submit that the statement recorded under Section 164 of the Code has no evidentiary value and therefore, much weight cannot be adhered on the canvas of prior and subsequent statement about absence of reference of sexual assault. The law is well settled that the statement recorded under Section 164 of the Code can never be used as substantive evidence of truth of the facts, but may be used for corroboration and contradiction. For this purpose, one can refer to the decision of the Supreme Court in case of **R. Shaji Vs. State of Kerala, (2013) 14 SCC 266** and **State of Karnataka Vs. P. Ravikumar alias Ravi and others, (2018) 9 SCC 614**. A statement given by witness under Section 164 of the Code is like a previous statement given during investigation under Section 161 of the Code. It is not a substantive evidence because, it was not recorded in the presence of the accused. It can be used to corroborate the statement of witnesses or can be used to contradict the witness.

17. The entire material is to be assessed to find out whether prima facie case is made out. As referred above, FIR as well as the subsequent statement is totally silent about sexual assault on the part of the applicant. The learned counsel appearing for the applicant took us through the statement of mother-in-law of victim to contend that the applicant had consensual relationship with Sudhakar. The victim's

mother-in-law stated that on 17.05.2019 she saw victim and Sudhakar embracing each other in the field. She intervened, on which Sudhakar ran away and she dragged the victim to her house. Be that as it may, besides improved allegation in the statement under Section 164, there is no supporting material against applicant.

18. The ultimate object of justice is to find out truth and punish the guilt as well as to protect the innocent. Experience reveals that long and protracted criminal trials lead to rancour, acrimony, bitterness in the relationship. The Supreme Court in reported case of **Zandu Pharmaceutical Works Ltd. Vs. Mohd Sharaful Haque, (2005) 1 SCC 122** has observed in para 8 as below:-

“8..... It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.”

19. Taking over all view of the matter, besides one statement, the victim herself was consistent about the sexual assault by co-accused

Sudhakar only. In the circumstances, there exist no prima facie material against applicant to proceed further. Facing criminal trial is of serious consequence. Continuation of such trial amounts to abuse of the process of the Court. Having regard to the entire material, we find that no prima facie case exist to put the applicant on full-fledge trial. In views of the decision of the Supreme Court in case of **Umesh Kumar Vs. State of Andhra Pradesh and another, (2013) 10 SCC 591**, if at subsequent stage, additional material is found, the Trial Court can well resort to the provisions of Section 216 of the Code, as the order passed under Section 482 cannot term as a final decision.

20. In view of above, application is allowed. We hereby quash and set aside FIR as well as charge-sheet relating to Crime No. 293/2019 registered with Police Station Chimur, Tah. Chimur, Dist. Chandrapur. for the offence punishable under Sections 376, 354, 506, 109, 509 read with Section 34 of the Indian Penal Code as regards to the applicant Vinod Tukaram Nikhade only.

21. Application stands disposed of in above terms.

22. Fees for appointed learned counsel for non-applicant No. 2 be paid as per Rules.

(VALMIKI SA MENEZES, J.)

(VINAY JOSHI, J.)