

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

CRIMINAL APPLICATION (BA) NO. 1304 OF 2022

Salman Khan Yusuf Pathan

vs.

The State of Maharashtra and another

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. M. N. Ali, Advocate for applicant.
Mr. N. R. Rode, APP for respondent No.1 State
Mr. Mahesh Rai, Advocate for respondent No.2.

CORAM : ANIL L. PANSARE J.

DATE : 03/01/2023

The applicant has filed application under
Section 439 of the Criminal Procedure Code, 1973
seeking regular bail.

2. The applicant has been arrested on
12/10/2022 on the accusation that he has committed
rape on his wife. The First Information Report (FIR)
came to be lodged under Sections 376, 504 and 506
of the Indian Penal Code (IPC) vide Crime No.0267
dated 08/10/2022 at the instance of wife. According
to the wife she and applicant are residing separately.
On 08/10/2022, the applicant came to her house
and committed forcible sexual intercourse. Applicant

threatened to kill her son, father and brother, if she disclose the incident to anyone.

3. Mr.M.N.Ali, learned counsel for the applicant invited attention of this Court to the Exception 2 of Section 375 of the IPC. Section 375 of the IPC defines rape, however, Exception 2 provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.

4. The learned counsel for the applicant submits that the applicant could not have been booked for committing rape on his wife, at the first instance and secondly he could not have been arrested. The applicant is in jail without any fault, hence the present application.

5. Mr. Rode, learned APP and Mr. Rai, learned counsel for the respondent No.2 victim-wife have strongly opposed the application. Learned APP would submit that the act of sexual intercourse without consent will amount to committing rape. Learned counsel for the respondent No.2 victim-wife submits that the applicant and victim-wife were residing separately for 18 months. The applicant is residing with some other lady. He has suddenly come

to the house of the victim-wife and committed rape and therefore, if he is released on bail, he may commit the same offence again.

6. Having heard both sides, the fact remains that the Exception 2 of Section 375 provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape. At least for the purpose of granting bail, the benefit of the exception must be given to the applicant.

7. Learned counsel for the victim-wife has stated that applicant is residing with some other lady. However, there is nothing on record to show that he is married to another lady. In any case the applicant belongs to Muslim community, where in appropriate cases second marriage is permissible. Be that as it may, on the strength of the Exception 2 to Section 375, the applicant has made out a case for grant of bail. Accordingly, the present application is allowed and the applicant is directed to be released on bail in Crime No.0267 dated 08/10/2022, registered at Police Station Sakharkherda, District – Buldhana, on the following conditions :-

- A) The applicant shall furnish P.R. Bond of Rs.25000/- (Rupees Twenty Five Thousand only) and a surety in the like amount.
- B) The applicant shall not threaten the victim and shall not enter the area where the victim resides.
- C) The applicant shall attend Police Station, Sakharkherda, District Buldhana, in twice a week i.e. on Monday and Friday of every month between 3.00p.m. to 5.00p.m. till filing of charge-sheet.
- D) The applicant shall attend the trial Court on each and every date.
- E) The applicant shall not influence the witnesses in any manner and he shall not try to contact the victim.
- F) The applicant shall not tamper with the evidence.
- G) The applicant shall furnish his address and telephone mobile number(s) to the Investigating Officer. The applicant shall not change the same without permission of the Court.

8. Needless to state that violation of any of the aforesaid condition will lead to cancellation of bail granted to the applicant.
9. Application is allowed in above terms.

JUDGE