



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

CRIMINAL APPEAL NO. 30 OF 2024

APPELLANT: Amit s/o Sunil Malewar,
Aged about 29 years, Occupation : Private
Service, R/o Abhyankar Nagar,
Tumsar, District Bhandara.

...V E R S U S...

RESPONDENTS 1] State of Maharashtra,
through Bajaj Nagar, Police Station at
Nagpur.

2] XYZ the victim the crime registered
at Police Station Bajaj Nagar, Nagpur.
Crime No. 372/2023.

Mr. S.G. Karmarkar, counsel for appellant.
Mr. Nitin Autkar, APP for Respondent No.1.
Mr. Javed Shaikh, counsel for respondent No.2.

CORAM : **URMILA JOSHI-PHALKE, J.**
DATE : **22/03/2024**

ORAL JUDGMENT :

1. **Admit.** Heard finally with the consent of learned
counsel appearing for the parties.
2. By preferring this appeal, the appellant has
challenged the order passed by the Additional Sessions Judge-9
and Special Judge, Scheduled Caste and Scheduled Tribes

(Prevention of Atrocities) Act, 1989, whereby the application for anticipatory bail of the present appellant is rejected.

3. The appellant is apprehending the arrest at the hands of police as crime No.372/2023 registered under Section 376(2)(n) of the Indian Penal Code, 1860 along with Sections 3(1)(s), 3(1)(w)(i) and 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the Act of 1989').

4. The allegation against the present appellant is on the basis of report lodged by the victim who is 25 years old, who alleged that she got an acquaintance with the present appellant in the month of June-2021, through the Instagram Account. Thereafter, friendship was developed between them which resulted into a love affair. She further alleged that on the promise of marriage, she was subjected for sexual assault by the present appellant. On the basis of said report, the Police have registered the crime.

5. Learned counsel for the appellant submitted that no offence is made out against the appellant under the provisions of the Act, 1989. From the recitals of the FIR, it reveals that there was a consensual relationship between the victim and the present

appellant. The victim is a grown-up lady and aware about the consequences of her consent, there was a friendship which resulted into the love affair and out of love affairs, there was a consensual relationship. Mere promise of marriage is not sufficient to attract the offence under Section 376 of the IPC. The recitals of the FIR itself shows that out of love affairs, they came together and there was a physical relationship. In view of that, immediate custodial interrogation of the present appellant is not required. The present appellant has cooperated with the investigating agency after he has been protected by granting ad-interim protection.

6. The learned APP and learned counsel for respondent no.2 have strongly opposed the appeal on the ground that considering the allegation, which is of a serious nature, and custodial interrogation of the present appellant is required. It is further submitted that on the false promise of marriage, the victim was subjected for sexual assault, and therefore, the application for grant of anticipatory bail by way of dismissing the appeal is required.

7. After hearing learned counsel for the appellant, learned APP for the State and learned counsel for respondent

No.2. On perusal of the FIR, it nowhere reveals that the appellant was knowing that the victim belongs to Scheduled Tribes. From recitals of the FIR, it further reveals that the friendship was developed between the victim and the present appellant which resulted into the love affair and out of love affair, there was physical relationship. The recitals of the FIR shows that on the promise of marriage, the appellant has subjected her for sexual assault. Now, it is well settled that mere breach of promise is not sufficient to attract the provisions of Section 376 of IPC. In case of **Sonu @ Subhash Kumar Vrs. State of Uttar Pradesh and another**, reported in **(2021) 18 SCC 517**, the Hon'ble Apex Court held that this Court has repeatedly held that consent with respect to Section 376 of the IPC involves and active understanding of the circumstances, actions and consequences of the proposed act. An individual role makes a reasonable choice to act after evaluating various alternative actions (inaction) as well as various possible consequences flowing from such action or inaction, consent to such action. In the case of **Shambhu Kharwar Vrs. State of Uttar Pradesh and another, reported in 2022 SCC On-Line SC 1032**, the Hon'ble Apex Court dealt with this issue and held that to summarize the legal position that emerges from the above cases,

the consent of a woman with respect to Section 376 of the IPC must involve an active deliberation towards the proposed act. To establish whether the "consent" was vitiated by the "misconception of fact" arising out of promise to marry, two propositions to establish. The promise of marriage must have been false promise, could have been given in bad faith with bad intention adhered to at the time it was given. The first promise itself must be of immediate grievance or adhered to direct nexus to the woman's residence to engage in the consensual act. In view of the observations of the Hon'ble Apex Court at this stage, from the recitals of the FIR and the investigation papers reveals that physical relationship was out of consent, due to the love affair between them. Considering the fact that whether the consent was obtained misconception of the facts or it was a false promise is of a matter of evidence. At this, custodial interrogation of the present appellant is not required. In view of that, prayer of the present appellant for grant of anticipatory bail deserves to allowed.

8. The next submission of the learned APP is that as the victim belongs to the Scheduled Caste and the provisions of the Atrocities Act are made applicable, the bar under Section 18 is attracted. Now, it is also well settled law that, where the prima

facie case is not made out, the bar under Section 18 or 18-A is not attracted. The Hon'ble Apex Court in the case of **Prathvi Raj Chauhan Vrs. Union of India and others, reported in (2020) 4 SCC 727** has observed that the bar under Sections 18 and 18-A of Act, 1989 have no application where prima facie case is not made out, however, for evaluating prima facie case, custody of the appellant is not required.

9. In view of observations and considering the recitals of the FIR, at this stage, appellant has made out the case to grant him the anticipatory bail, and the bar under Section 18-A is not attracted. Accordingly, I proceed to pass the following order:

ORDER

- a) The criminal appeal is **allowed**.
- b) The order passed by the learned Additional Sessions Judge-9 and Special Judge, Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 in Criminal Bail Application No. 3437/2023 dated 12/01/2024 is hereby quashed and set aside.
- c) In the event of his arrest, the appellant – **Amit s/o Sunil Malewar** shall be released on anticipatory bail, in connection with Crime No. 372/2023 registered with Police Station Bajaj Nagar, Nagpur for the offence punishable under Sections 376(2)(n) of the

Indian Penal Code, 1860 and under Sections 3(2)(v), 3(1)(s), 3(1)(w)(1) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, on executing PR Bond in the sum of Rs. 25,000/- with one solvent surety in the like amount.

- d) The appellant shall attend the concerned Police Station as and when required for the investigation purpose and shall cooperate with the investigating agency.
- e) The appellant shall not induce, threat or promise to any witnesses, who are acquainted with the facts of the present case.

The Criminal Appeal is **disposed of** accordingly.

[URMILA JOSHI-PHALKE, J.]