



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

CRIMINAL APPLICATION (APL) NO. 1460 OF 2023

Mayur S/o Ramdhan Gaderao

Aged 30 years, Occ: Service,

R/o Township, Part-7, New Naroda,

Ahmedabad, Gujrat

...Applicant

// VERSUS //

1. State of Maharashtra,
through Police Station Officer, City Kotwali,
Amravati, District Amravati

2. XYZ (Victim) In Crime No. 261 of 2023
Police Station Officer, Kotwali City,
Amravati.

... Non-applicants

Shri S.S.Shingane, Advocate for the applicant.

Shri S.S.Doifode, APP for the non-applicant/State.

Shri I.V.Tambi, Advocate for the non-applicant no.2.

CORAM : SMT. VIBHA KANKANWADI, AND
MRS. VRUSHALI V. JOSHI, JJ.

ORAL JUDGMENT : [PER : SMT. VIBHA KANKANWADI, J.]

Reserved on : 27th June, 2024

Pronounced on : 5th July, 2024

Rule. Rule made returnable forthwith. Heard finally by
consent of the parties.

2. The present applicant is the original accused against whom the First Information Report (FIR) vide Crime No. 261 of 2023 for the offence punishable under Sections 376(2)(n), 500 and 506(B) of Indian Penal Code (in short hereinafter referred as “IPC”) has been registered on the basis of the FIR lodged at the behest of the non-applicant no.2 with Kotwali Police Station, Amravati, District Amravati. By invoking inherent powers of this Court under Section 482 of the Code of Criminal Procedure, the applicant has prayed the said FIR be quashed and set aside.

3. Heard Shri S.S.Shingane, learned advocate for the applicant, Shri S.S.Doifode, learned Additional Public Prosecutor for the non-applicant/State and Shri I.V.Tambi, learned advocate for the non-applicant no.2.

4. It is vehemently submitted on behalf of the applicant that, perusal of the FIR would show that the non-applicant no.2 is a married lady. Her marriage was solemnized on 13th June, 2018 but there was marital discord and therefore finding that she has been subjected to cruelty. The non-applicant no.2 had filed an offence under Section 498-A of the Indian Penal Code against her husband. The present applicant is stated to be related with the cousin brother of the non-applicant no.2, who came to know about the marital discord of the informant and then they came in contact with each other, it resulted in love relationship between them. They were chatting on Facebook as well as WhatsApp. It is then stated in the First Information Report that the applicant used to

promise the informant that after she gets divorce, he would perform marriage with her. On 4th November, 2019, the applicant had called her near Amravati Bus Stop and they had stayed in a guest house near the bus-stop for about three days and then she says that the sexual intercourse had taken place between them. Thereafter also till 2022, they used to be talking with each other but thereafter she asked the applicant to perform the marriage but he refused and therefore she did not talk with him for about 3 to 4 months. The applicant opened a fake account and started messaging to her from 12th August, 2022 but she could get that it is a fake account. She asked him about the same and he asked for pardon and gave message on her Facebook that he is ready to perform marriage with her. But she lost the faith in him and therefore refused to perform marriage with him. Thereafter, the applicant had gave threats to kill her on Facebook and thereafter made their photographs viral and defamed her and therefore she lodged the report.

5. Learned advocate for the applicant submitted that the above contents of the First Information Report would clearly show that there was love affair between them and sexual intercourse was outcome of consent. The fact that they stayed in the guest house for a period of three days would clearly indicate that relationship was consensual. The non-applicant knew consequence of her action. Therefore, the offence under Section 376(2)(n) of IPC is not made out. The ingredients of Section 500 of IPC are not attracted. So also, Section 506(2) of IPC is concerned. It would be futile exercise to ask the applicant to face the trial and therefore he prayed for quashing the FIR.

6. Learned Additional Public Prosecutor as well as learned advocate appointed to represent the cause of non-applicant no.2 strongly opposed the application. The non-applicant no.2 has filed the reply to the application which is parawise and she had denied the contents of the application which are against her. She has tried to give more details in the reply than the FIR and also annexed the photocopy of an agreement of divorce allegedly executed between the non-applicant no.2 and her husband before the notary. She has also gave a photograph stating that during the applicant's stay at Amravati between 4th November, 2019 to 6th November, 2019, the physical relationship was forcibly thrashed upon her on the pretext of marriage. At that time the applicant had put Sindoor on her forehead and Mangalsutra around her neck. It was indication or action by giving false assurance to marry in future. She has also given WhatsApp chat photocopies. Learned APP as well as learned advocate for the non-applicant thereby submit that the consent obtained by the applicant is not a free consent. Already informant was undergoing the trauma regarding marital discord and the applicant wanted to extract the situation. Therefore when the consent is not voluntary, the offence under Section 376(2)(n) of IPC is made out, so also other sections.

7. Learned advocate for the applicant has relied upon Naim Ahamed Vs. State (NCT of Delhi), 2023 SCC Online SC 89, wherein when it was found prosecutrix who herself was a married woman having three children, could not be said to have acted under the alleged false promise or could not have given consent under misconception to have sexual relationship, the accused was acquitted. He further relied on the

decision of Pramod Suryabhan Pawar Vs. State of Maharashtra and another; 2019(9) SCC 608, wherein it is observed that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. The complainant and the appellant met regularly, travelled great distances to meet each other, resided in each other's houses on multiple occasions, engaged in sexual intercourse regularly over a course of five years and on multiple occasions then it was held that it cannot be said that acts fulfil or occurred offence under Section 375 of IPC punishable under Section 376 of IPC was attracted. Further reliance on the same ratio is on the decision of this Court in Vinay S/o Pradeep Chawhare Vs. State of Maharashtra and another in Criminal Application No. 143 of 2021 decided on 16th September, 2021.

8. Learned advocate for the non-applicant no.2 has relied on the decision of XYZ Vs. State of Gujarat and another; (2019) 10 SCC 337, which is Three Judge Bench judgment of the Hon'ble Supreme Court wherein the decision in Pramod Pawar cited (supra) was considered and it was observed "whether in a give case power under Section 482 of the Code of Criminal Procedure is to be exercised or not depends on the contents of the complaint and the material placed on record". Note was taken of the provision of Section 114(A) of the Indian Evidence Act which deals with the presumption as to absence of consent in certain

prosecution for rape and therefore the order of quashing the FIR was set aside and the accused was directed to appear before the police station and co-operate with the investigation. He further relied on the decision of the Anurag Soni Vs. State of Chhattisgarh; (2019) 13 SCC 1, wherein note was taken of Section 90 of the Indian Penal Code, which deals with the consent known to be given under fear or misconception. It was observed that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Section 375 of the IPC and can be convicted for the offence under Section 376 of the IPC. On the similar line the reliance has been placed on record of Navneet S/o Ashok Bangalkar Vs. State of Maharashtra and another in Criminal Application No. 853 of 2021 decided on 22nd December, 2021.

9. Here, it is to be noted that the offence is still under investigation. FIR is not an encyclopedia and therefore only on the basis of FIR all the details may not be coming forward. Here, the non-applicant no.2 has clearly stated in the FIR as to what was the reason of the marital discord or how she came in contact with the applicant. She has stated that there was chat between her on the Facebook as well as WhatsApp since December, 2018. Therefore, if retrieved or available,

those chats would be piece of evidence as what was the promise made by the applicant to her. No doubt the FIR discloses that the alleged act of sexual intercourse had taken place between 4th November, 2019 to 6th November, 2019 and during that period they had resided in a guest house near Amravati Bus Stop. She has specifically stated that the applicant had given her promise to marry. Now, in her reply along with evidence she has come with a case as to what was the promise and how the applicant had reacted. Of course it would be part of evidence as to whether that photograph was taken during that period or not. No doubt at that time there was no legal divorce between the non-applicant no.2 and her husband and even the alleged agreement (photocopy) appears to be a notarized document which cannot be accepted as a legal divorce, though it is stated in that there is a custom of taking divorce on a document. Though the non-applicant no.2 is a married adult lady, she has specifically come with a case that there was a promise to marry by the applicant and therefore she had given consent. Even if the consent was given, whether it was voluntary or not, will have to be considered at the time of trial. Unless there is a free consent it cannot be said to be an act of consensual marriage. The delay in lodging FIR and absence of consent are the points, which can still be explained.

10. As regards Naim Ahamed (supra), it is the decision in criminal appeal wherein entire evidence was before the Hon'ble Supreme Court. When the prosecution evidence is before the Court then it would be easy to assess the evidence. In Pramod Pawar (supra) also it has been observed thus :

18. To summarise the legal position that emerges from the above cases, the “consent” of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the “consent” was vitiated by a “misconception of fact” arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman’s decision to engage in the sexual act.

11. Further in Three Bench judgment of the Hon’ble Supreme Court in *XYZ* (supra), it has been clarified that exercise of powers under Section 482 of the Code of Criminal Procedure would depend upon the contents of the complaint and the material placed on record. Here, in this case except the FIR, the applicant has not placed on record any other material which would indicate that the act was consensual. Non-applicant no.2 is rather explaining as to under which circumstance alleged consent was taken from her. She was not bound to disclose those facts but when the applicant wants to get rid of prosecution at the threshold, she is constrained to disclose which she otherwise would not have at this stage. The ratio in *Anurag Soni* (supra) is also required to be considered here.

12. For the aforesaid reasons, we are of the opinion that the contents of the FIR per se do not allow us to come to a conclusion at this stage that the act was consensual and therefore no offence is attracted under Section 375 of Indian Penal Code punishable under Section 376 of Indian Penal Code. As regards defamation is concerned, to whom the photographs and other material was made viral would depend on the act of collecting the evidence and *prima facie* it appears that the threat to kill

has been given on Facebook chat. In fact, we are of the opinion that for alleged allegations regarding opening of a fake account on Facebook, also there is need to have investigation. Therefore, this cannot be a fit case to exercise inherent powers under Section 482 of the Code of Criminal Procedure. Accordingly, the Criminal Application No.1460 of 2023 stands rejected.

13. In view of above, Rule stands discharged.

[MRS. VRUSHALI V. JOSHI, J.] [SMT. VIBHA KANKANWADI, J.]