



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

CRIMINAL APPLICATION (APL) NO. 1675 OF 2023

Shubham Vilas Rojatkar,
Age – 24 years, Occ. Service,
R/o Jalgaon Jamod, Tq. and District
Buldhana

...Applicant

// VERSUS //

1. State of Maharashtra,
through Police Station Officer, Civil
Lines, Akola
2. Victim/Complainant XYZ,
through Police Station Officer, Civil
Lines, Akola, Tq. and District Akola

... Non-applicants

Shri N.R.Shiralkar, Advocate for the applicant.
Shri M.K.Pathan, APP for the non-applicant no.1/State.
Ms. Apurva Kolhe, Advocate for the non-applicant no.2.

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

DATED : 22nd JULY, 2024.

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

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

2. Present application has been filed under Section 482 of the Code of Criminal Procedure for quashing the charge-sheet No. 220 of 2023 arising out of First Information Report vide Crime No. 218 of 2023 (Session trial No. 198 of 2023) pending before the Sessions Judge, Akola for the offence punishable under Section 376, 376(2)(n) and 506 of Indian Penal Code.

3. Heard Shri N.R.Shiralkar, learned Advocate for the applicant, Shri M.K.Pathan, learned Additional Public Prosecutor for the non-applicant no.1/State and Ms. Apurva Kolhe, learned advocate for the non-applicant no.2.

4. It has been vehemently submitted on behalf of the applicant that the applicant was in love relationship with the non-applicant no.2 since 2018 and both were studying at Jalgaon Jamod. The non-applicant no.2 used to text and call the applicant using phone of her parents. When the non-applicant no.2 was caught by her parents while calling with the applicant, they confronted with both of them and gave stern warning. They asked them not to see each other. Despite the same, the non-applicant no.2 used to call the applicant by using different mobile phones from her friends and relatives. She started conversation with the applicant voluntarily. Non-applicant no.2 moved to Akola in rented room for further studies. However, she used to call the applicant to meet her. Thereafter, they had established physical relationship, it was voluntary. Non-applicant no.2 used to give false reasons and excuse to the landlord when she used to meet the applicant which indicates that it

was her voluntary act. When it was found by the parents of the non-applicant no.2 that she is still contacting the applicant, they took her to the police station on 8th May, 2023 and on inquiry by the police, the applicant had disclosed that everything was done under mutual consent. No further action was taken at that time by the police. However, it appears that the parents forced upon the police to record the First Information Report on 22nd June, 2023. The ingredients of the offence under Section 375 of IPC are not attracted when the things are voluntary. Even the statement of the victim under Section 164 of the Code of Criminal Procedure does not reveal any details, therefore, it would be futile exercise to ask the applicant to face the trial.

5. Per contra, learned Additional Public Prosecutor vehemently submitted on behalf of the non-applicant no.1/State that since the charge-sheet is filed and evidence is collected, though there may be statements regarding love relationship or friendly relationship that does not mean that the non-applicant no.2 had given a consent for the physical relationship. It was under the promise to marry and threat to make their photographs viral. Therefore, it is not a free consent. Since the charge-sheet is now filed and the case is pending before the appropriate Court, let the applicant face the trial. Learned advocate for the non-applicant no.2 has made similar submissions.

6. Before turning to the facts, we are required to consider the law on this point. In order to attract the offence under Section 375 of the Indian Penal Code, forcible sexual intercourse has to be established and if

it is proved that the consent is vitiated, then it cannot be considered as a consent. In 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”.

7. We may also take note of the decision in the case 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. In the decision of 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.

8. Recently in Sheikh Arif .Vs. State of Maharashtra 2024 (4) SCC 463, it has been observed “In view of the provisions of Section 375 of IPC, if the victim of the alleged offence of rape is not under 18 years of which, maintaining a sexual relationship with her consent, is not an offence. As held by this Court in *Anurag Soni* (supra), if the consent of the victim is based of misconception, such consent is immaterial as it is not a voluntary consent. If it is established that from the inception, the consent by the victim is a result of false promise to marry, there will be no consent, and in such a case the offence of rape made out”.

9. Thus, after taking note of the legal position, we would consider the facts of the case before us. Of course taking into

consideration the fact that the present application is under Section 482 of the Code of Criminal Procedure and the material i.e. before us is the chargesheet, its scrutiny is limited to the extent of whether the facts disclose the offence or not. Scrutiny in the form of deep assessment is not expected.

10. Perusal of the First Information Report lodged by the non-applicant no.2 would show that the non-applicant no.2 was aged 19 years, when the FIR was lodged. Since the FIR was lodged on 21st June, 2023 but then she says that she was having friendship with the applicant since 2018-2019 at that time they used to meet each other, call each other, chat with each other used to exchange photographs etc. That means at that time she was minor, but she says that after she passed out 12th exam, she was shifted to Akola for the preparation of NEET exam. Her father had taken a room on rent but in the meantime, the applicant and herself were not on talking terms. Cousin sister of the applicant met her in September, 2022 and told her that she should speak with the applicant on phone and thereafter, the non-applicant no.2 gave a phone call to the applicant. She then told her address of Akola. She thereafter states that the applicant came to Akola and took her to one temple which is in the outskirts of Akola. They talked with each other and then he left her near the house. It happened three to four times. The first incident thereafter is stated in January, 2023 and she has specifically stated that when the applicant came to Akola, he told that they should go to Shegaon and therefore on her wish she accompanied him to Shegaon. The word used by her is “माझ्या मर्जीने” (on my wish). The applicant took her to hotel of which she

was not aware of the name and even the location. They had shown their Adharcard to the hotel authorities and went inside the room and thereafter she says that when he had started to come near her, she refused but then he told that he want to perform the marriage with her and if she does not listen, then he would make their photographs viral. Then she says that due to fear she succumbed to pressure and then they had sexual relationship and thereafter it so happened 8 to 10 times and each time she was taken from Akola to Shegaon and in the same hotel, where the applicant had established physical relationship with her. Thereafter, she says that on the harassment of the applicant, she disclosed the fact to her parents and then the FIR was lodged.

11. Thus, it can be seen that act of physical relationship had taken place only six months prior to the FIR and not since 2018. In January, 2023 the girl was major, though she had stated that in January, 2023 when first physical act was established she had not voluntarily given consent but it is to be noted that she had gone to the hotel as per her own wish with the applicant. She could have said no to go to any room of the hotel by predicting as to what can happen and thereafter for about 8 to 10 times then she had gone with the applicant at the same place in the same hotel before establishing the relationship.

12. At this stage, it is to be noted from the record that in her statement under Section 164 of the Code of Criminal Procedure which is only of two small paragraphs, it is stated that the accused has sexually harassed her, they used to talk with each other as friend but he has

forcibly thrust the relationship on her. No details were given in the said statement. Her supplementary statement is nothing but repetition of the contents of the FIR. The statement of said persons working in the hotel/ the guest house would show that the applicant and the non-applicant no.2 used to visit their hotel and they have given entries in respect of four dates in the register and it is said that they both had given their Aadhar cards. If the statements of the parents of the non-applicant no.2 are considered, then it can be seen that they were aware about the friendship of the applicant and the non-applicant no.2 and they had objected to the same. After the non-applicant no.2 was shifted to Akola, they were keeping watch on the activities of the non-applicant no.2 by contacting the landlady, and the friend of the applicant. When it was found that the non-applicant no.2 was with the applicant, they had made enquiry about the same with the non-applicant no.2 and she had given false answers. This indicates that the girl was establishing the relationship with the applicant voluntarily. Even, the relatives of the non-applicant no.2 whose statements were recorded, they were also contacting the non-applicant no.2 and to them also the non-applicant no.2 had given false answers. Now, it appears that under the pressure from the relatives, the non-applicant no.2 has lodged the report. In other words, the material that has been collected shows that the physical relationship between the applicant and the non-applicant no.2 was consensual and therefore does not attract the ingredients of the offence under Section 375 punishable under Section 376 of the Indian Penal Code. The observations in Pramod Pawar (supra) are certainly applicable here, therefore taking into

consideration these facts, the case definitely covered under the parameters in the *State of Haryana v. Bhajan Lal; 1992 AIR 604* and therefore the powers under Section 482 of the Code of Criminal Procedure deserve to be applied in the present case. Hence, we pass the following order.

- i. The Criminal Application is allowed;
- ii. The charge-sheet No. 220 of 2023 arising out of FIR No. 218 of 2023 i.e. Sessions Trial No. 198 of 2023 pending before the District and Sessions Judge, Akola for the offence punishable under Sections 376, 376(2)(n) and 506 of the Indian Penal Code stands quashed and set aside against the applicant Shubham Vilas Rojatkar;
- iii. Rule is allowed in aforesaid terms.

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