



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.1815 OF 2021

1. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Nanded,
Taluka and District Nanded.

2. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Taluka and District Nanded.

.. Applicants

Versus

1. The State of Maharashtra
Through the Officer Incharge,
Shivajinagar Police Station,
Nanded, Dist. Nanded.

2. XYZ

.. Respondents

...

Mr. R. S. Deshmukh, Senior Counsel i/b Mr. D. R. Deshmukh, Advocate for the applicants.

Mr. A. M. Phule, APP for respondent No.1/State.

Mr. R. G. Nirmal, Advocate h/f Mr. S. S. Gangakhedkar, Advocate for respondent No.2.

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**CORAM : SMT. VIBHA KANKANWADI &
R. W. JOSHI, JJ.**

**RESERVED ON : 14 NOVEMBER 2024
PRONOUNCED ON : 06 DECEMBER 2024**

ORDER (Per Smt. Vibha Kankanwadi, J.) :-

. Present application has been filed under Section 482 of the Code of Criminal Procedure for quashing the Sessions Case No.85 of 2021 pending before the learned Additional Sessions Judge, Nanded arising out of the First Information Report vide Crime No.362 of 2019 dated 26.09.2019 as well as the Charge-sheet bearing No.101 of 2020 i.e. proceedings in Regular Criminal Case No.601 of 2020, for the offences punishable under Sections 376(n)(2), 506 read with Section 34 of Indian Penal Code.

2. Heard learned Senior Counsel Mr. R. S. Deshmukh instructed by learned Advocate Mr. D. R. Deshmukh for the applicants, learned APP Mr. A. M. Phule for respondent No.1/State and learned Advocate Mr. R. G. Nirmal holding for learned Advocate Mr. S. S. Gangakhedkar for respondent No.2.

3. Learned Senior Counsel appearing for the applicants has taken us through the charge-sheet and the documents produced by the applicants. He submits that perusal of the FIR would show that the alleged incidents or relationship appears to be from 01.09.2017 to 16.09.2019 and even a male child has been born out of the relationship and if we consider the birth certificate of

the child which was born to respondent No.2 on 15.08.2018, then present applicant No.1 has been shown to be the father of the child and it was never objected by applicant No.1. The applicant contends that it is a consensual relationship and there was no element of rape or there was any forceful act on the part of applicant No.1. Applicant No.2 has been unnecessarily roped by contending that she had given some juice to respondent No.2 when respondent No.2 had gone to the house of the applicants in September 2017 and in that juice, there was some intoxicant. She states that due to the said intoxicant, the prosecutrix felt giddiness and thereafter, applicant No.1 had committed rape on her. Learned Senior Counsel has also taken us through the photographs, which have been produced by the applicants. Those photographs have not been denied by respondent No.2. It appears from those photographs that she was happy when they were staying together. Even she had taken part in the festivals at the house of applicants and the prosecutrix, who was having son from her earlier marriage, was also seen to be happy with the applicant No.1. When the relationship was consensual, it cannot be stated that there were such circumstances attracting the ingredients of the offence under Section 375 of the Indian Penal

Code.

4. Learned APP as well as learned Advocate for respondent No.2 objected the application and submitted that now the charge-sheet is filed and there is evidence against the applicants. Respondent No.2 has explained as to how she came in contact with applicant No.1 and how he had gained her faith. However, he has misused the said faith by giving threat to make the video viral. The consent has been obtained and, therefore, her consent is not a free consent as contemplated under Section 90 of the Indian Penal Code. Learned Advocate for respondent No.2 relied on the decision in ***Ganga Singh Vs. State of Madhya Pradesh, [AIR 2013 SC 3008]***, wherein it is stated that the prosecutrix, who is the victim of the crime, her evidence need not require any corroboration and her evidence has to be considered as having same weight as is given to a injured witness. When the accused is not raising plea that the sex was with consent, finding that the sexual intercourse was with consent cannot be recorded in absence of plea and, therefore, it would be premature to hold that the relationship between applicant No.1 and respondent No.2 was consensual.

5. At the outset, we would like to say that the observations from **Ganga Singh (Supra)** were in appeal. After considering the evidence that was adduced, those observations have been made. As regards the position of law is concerned, definitely, if the accused has not raised any plea that the sex was with consent, then such finding should not normally arise. However, in the present case, the plea has been taken by applicant No.1 that his relationship with respondent No.2 was with consent and they were in joint cohabitation for a long time. Even he has lent his name to the son. Though it appears that applicant No.1 was already married, respondent No.2 in her FIR does not utter a single word. She says that she herself and applicant No.1 were serving in the same department and prior to September 2017, she had the occasion to go to the house of the applicants once or twice. She says that she had dispute with her husband and present applicant No.1 had helped her in court matter against her husband. We are also required to take into consideration the conduct of the informant. If the first alleged act was of the year September 2017, which she says that it was by way of intoxicating her, then even after she became pregnant from applicant No.1 she has not lodged any report. Merely by saying

that she was threatened or was under fear that she would be defamed, she cannot just put an excuse. Further, she is not explaining as to why she allowed the name of applicant No.1 to be recorded as the father of the son born to them. She also alleges that applicant No.1 had extracted amount of Rs.1,00,000/-, took gold ornaments from her, still she has not taken the step of lodging FIR against him and these incidences appear to have taken place somewhere in March 2018. She has given the same reason that she was threatened to defame and it was stated that video would be made viral. She also states that when amount of Rs.1,00,000/- was demanded, amount of Rs.65,000/- was given and then she had given amount of Rs.40,000/- which was her salary of April and May 2018. Thereafter, on 15.08.2018, the son was born. She then states that she was threatened by both the applicants that the said son be given to them and when she refused, lastly the threat was given to kill her on 16.09.2019.

6. From the contents of the FIR it can be seen that as regards applicant No.2 – the mother is concerned, whatever the act is stated to be done it was in September 2017, when she says that some juice was given having intoxicant and thereupon she felt giddiness. It is hard to believe that a mother would help son to

commit rape on a lady in such a fashion and then the victim/prosecutrix would keep quiet and allows the child from such rapist/delivered. It appears that the applicants have produced some photographs to show that respondent No.2 was happy, but we do not want to go into those photographs, as the burden is on the applicants to prove. We would like to rely on the observations from ***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 fulfill or occurred offence under Section 375 of IPC punishable under Section 376 of IPC was attracted.” We would also like to rely on the decision in ***XYZ Vs.***

State of Gujarat and another, 2019 (10) SCC 337, wherein the three Judge Bench of the Hon'ble Supreme Court, after referring to the decision in ***Pramod Pawar (Supra)***, observed that "whether in a given case power under Section 482 of the Code of Criminal Procedure has to be exercised or not depends on the contents of the complaint and the material placed on record." Therefore, the facts are required to be considered to arrive at a conclusion as to whether they disclose the offence under Section 375 of the Indian Penal Code or not.

7. Taking into consideration all the events those have been quoted and also the fact from the documents which have been produced by the applicants that he has transferred some amount in the account of respondent No.2 way back in the year 2017-2018 as well as the photographs, it would be unjust to ask the present applicants to face the trial. Another important point to be noted is that there is non cognizable offence lodged by present respondent No.2 on 15.09.2019 wherein it is stated that her relationship with applicant No.1 is that of husband and wife and when applicant No.1's wife had raised dispute and assaulted her, respondent No.2 had told about the said fact to her. Copy of the said N.C. complaint is produced, which is not disputed by

respondent No.2. Under such circumstance, we are of the opinion that the relationship between applicant No.1 and respondent No.2 appear to be of consensual nature. No offence is made out under Section 375 of Indian Penal Code. Therefore, case is made out to exercise the powers under Section 482 of the Code of Criminal Procedure as the case squarely comes within the parameters laid down in ***State of Haryana vs. Ch. Bhajan Lal and others, [AIR 1992 SC 604]***. We, therefore, proceed to pass following order :-

ORDER

1. Criminal Application stands allowed.
2. The proceedings in Sessions Case No.85 of 2021 pending before the learned Additional Sessions Judge, Nanded arising out of First Information Report vide Crime No.362 of 2019 dated 26.09.2019 and the Charge-sheet bearing No.101 of 2020 i.e. proceedings in Regular Criminal Case No.601 of 2020 for the offences punishable under Sections 376(n)(2), 506 read with Section 34 of Indian Penal Code, stand quashed and set aside as against the present applicants.

[R. W. JOSHI]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm