



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.3237 OF 2023

Amit Rama Zende
Age: 40 years, Occu.: Agri.,
R/o. Kakanagar, Sanja Road,
Tq. And Dist. Osmanabad.

.. Applicant

Versus

1. The State of Maharashtra
Through Investigation Officer,
Police Station, Anandnagar,
Tq. And Dist. Osmanabad.

2. X. Y. Z.

.. Respondents

...

Mr. M. A. Tandale, Advocate for the applicant.
Mr. S. A. Gaikwad, APP for respondent No.1/State.
Mr. Akash D. Gade, Advocate for respondent No.2 (Appointed through Legal Aid).

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**CORAM : SMT. VIBHA KANKANWADI &
SANJAY A. DESHMUKH, JJ.**

**RESERVED ON : 04 JULY 2025
PRONOUNCED ON : 28 JULY 2025**

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

. Present application has been filed for quashing the proceedings in Charge-sheet No.87 of 2022, pending before the Chief Judicial Magistrate, Osmanabad arising out of the FIR vide Crime No.185 of 2022 dated 26.06.2022 registered with Anandnagar Police Station, District Osmanabad for the offences punishable under Sections 376(2) (n), 307, 324, 323, 504, 506 read with Section 34 of Indian Penal Code.

2. Heard learned Advocate Mr. M. A. Tandale for the applicant, learned APP Mr. S. A. Gaikwad for respondent No.1/State and learned Advocate Mr. Akash D. Gade, who is appointed through Legal Aid, for respondent No.2.

3. Learned Advocate appearing for the applicant has taken us through the entire charge-sheet including the FIR and submits that the FIR has been lodged with ulterior motive and suppression of facts. He relies on the affidavit filed by respondent No.2 before this Court at the time of bail application, wherein she has stated that she had given the FIR due to misunderstanding. In fact, there was an agreement between the applicant and herself in respect of live-in relationship for a period of one year. During the course of live-in relationship there was sexual intercourse between them and, therefore, it cannot be stated to be a rape as defined under Section 375 of the Indian Penal Code. The relationship was consensual in nature. Now, the mother of the informant/prosecutrix has also supported the FIR, but she was also party to the agreement which was in fact entered into between the prosecutrix, her mother and the wife of the present applicant. It would be an abuse of process of law, if the applicant is asked to face the trial.

4. He relies on the decision in ***Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra and Ors.***, [AIR 2019 SC 327], wherein it is

observed that :-

“There is a clear distinction between rape and consensual sex. The Court, in such cases, must very carefully examine whether complainant had actually wanted to marry victim or had *mala fide* motives and had made a false promise to this effect only to satisfy his lust, as later falls within ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If accused has not made promise with sole intention to seduce prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where prosecutrix agrees to have sexual intercourse on account of her love and passion for accused and not solely on account of misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If complainant had any *mala fide* intention and if he had clandestine motives, it is a clear case of rape. Acknowledged consensual physical relationship between parties would not constitute an offence under Section 376 of Indian Penal Code.”

He also relies on the decision in ***Ajeet Singh v. State of Uttar Pradesh and Ors., [2024 ALL SCR (Cri.) 325]***, wherein it has been held that relationship between the appellant and the victim was consensual relationship which culminated in marriage. Therefore, it cannot be said that there is sufficient ground for proceeding against the appellant on allegations of rape, made in the FIR and, therefore, the FIR was

quashed.

5. Per contra, learned APP as well as learned Advocate Mr. Akash D. Gade, who is appointed through Legal Aid, strongly opposed the application and submit that from the entire FIR, it cannot be stated that there was consent on the part of respondent No.2 for sexual intercourse. Rather the present prosecutrix states that her services were taken by the applicant as maid servant since five months prior to the FIR. She states that she was treated properly for about a month and, thereafter, the applicant started abusing her. He had then assaulted her with stick, but since she was in need of money, she had not disclosed anything to anybody. The first incident occurred four months prior to the FIR when she was mopping the floor in the new house of the applicant. She states that she was taken forcibly to the bedroom and the applicant had committed forcible sexual intercourse with her and threat was given to her. Thereafter also, on several occasions, he had forcible sexual intercourse with her by giving threats. Even she was not allowed to step out of the house. The last act stated to be committed on 22.06.2022 and then she states that around 9.30 p.m. on 24.06.2022 when she told applicant and his family members that she has no intention to stay with them, they should clear her salary, at that time, the applicant assaulted her and tried to strangle her. On the next day, the mother of the prosecutrix had come to meet her, at that time, she disclosed everything.

Her mother was accompanied by her friend and they both had taken her and admitted to hospital. The medical record of the prosecutrix shows the injuries on her person. So also, the medical certificate shows that there were in all nine injuries on her person when she was examined on 25.06.2022. The statements of mother and her friend Sarika are supporting the FIR and, therefore, this is not a fit case where this Court should exercise its powers under Section 482 of the Code of Criminal Procedure.

6. The fact which is on record cannot be denied that there appears to be an affidavit filed by the informant before this Court, when the bail application of the applicant was pending. However, it is to be noted that even in the grounds, the applicant is stating and the prosecutrix is also stating that there was a written agreement between the informant and applicant. It is stated to be in respect of live-in relationship for a period of one year. It is then stated that the prosecutrix had agreed to stay in the house of applicant for a period of one year and during that period, she was supposed to give birth to the child from the applicant and the said child would be the child of the applicant. The applicant states that he had given some amount to the prosecutrix and at one place, it is described as 'consideration amount'. We are constrained to look into that document, as reference of the same was made part of the affidavit. A photocopy of that agreement was produced, which shows that the

agreement appears to have been between the mother of the prosecutrix, prosecutrix and the wife of the present applicant. In that agreement, it is stated that the prosecutrix would stay with the applicant from 17.01.2022 to 17.01.2023 in the form of live-in relationship (wrongly described as लिव्ह अँड लाईव्ह relationship) and then it is stated that if there would be son or daughter born to the prosecutrix, the custody of the same would be given to the applicant and it is stated that some amount has been given. It is also stated that the prosecutrix will not claim any right over the child that will be born out of the relationship. This agreement is against public policy, rather it amounts to agreement of surrogacy which is not legalized in India. It is hard to believe that such agreement can be entered into by the wife of the applicant, whereby she was in a way parting with her husband. No sane married lady would do it in such way. The prosecutrix appears to be an illiterate rustic lady. She states that she was married about 11 years prior to the FIR and she had one son and one daughter from her husband, but since last three years prior to the FIR, she was living separately i.e. with the mother due to quarrels between herself and husband. This shows that she was in need of money and under the pretext of giving money, it appears that such illegal document has been got executed from her. It cannot be stated that it is a live-in relationship agreement that was executed by understanding the consequences in law. *Prima facie* we are of the opinion that such

consent under an illegal document cannot be a consent under Section 90 of Indian Penal Code. Under such circumstance, the affidavit that was got executed from the prosecutrix will have to be then got explained at the time of trial. It will not be out of place to mention here that there are two more photocopies of documents those have been produced and may be along with the affidavit that was filed by the prosecutrix in bail petition or these two documents are produced by the petitioner, which are stated to have been executed by the prosecutrix and her mother on 21.06.2022 and 24.06.2022. Taking into consideration the writing and the contents, it appears that they have been got executed deliberately. Of course, this is our *prima facie* opinion. Certainly, the documents on record would definitely show that the prosecutrix had sustained injuries at the time of her medical examination and the friend of her mother is also supporting the narration. Therefore, there is *prima facie* evidence against the applicant in the present matter.

7. The ratio laid down in both the decisions relied by the learned Advocate for the applicant are not applicable to the present case as regards facts are concerned. However, in ***Dr. Dhruvaram Murlidhar Sonar (Supra)***, it has been observed that :-

“14. Section 375 defines the offence of rape and enumerates six descriptions of the offence. The first Clause operates where the women is in possession of her senses and,

therefore, capable of consenting but the act is done against her will and the second where it is done without her consent; the third, fourth and fifth when there is consent but it is not such a consent as excuses the offender, because it is obtained by putting her, or any person in whom she is interested, in fear of death or of hurt. The expression "against her "will"" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of.

15. Section 90 of the Indian Penal Code defines "consent" known to be given under fear or misconception:

Section 90:

Consent known to be given under fear or misconception.--A consent is not such a consent as it intended by any Section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.

Thus, Section 90 though does not define "consent", but describes what is not "consent". Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of

intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances.”

8. Therefore, as aforesaid, when the surrogacy in such form is prohibited i.e. rather soliciting the surrogacy by making the payment of amount is against the public policy, it was not a free consent. Hence, no case is made out for exercise of powers under Section 482 of the Code of Criminal Procedure. The application therefore stands rejected.

[SANJAY A. DESHMUKH]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm