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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.14 OF 2019

Mr.Amit Sadanand Shelar] ..Appellant.

vs.

State of Maharashtra] ..Respondent.

Mr.Tanveer Nizam and Mariam Nizam and Shruti Kelji for the Appellant.

Mrs.Megha Bajoria, appointed Advocate for Respondent No.2

Mrs.M.M. Deshmukh, APP for the State.

**CORAM : INDRAJIT MAHANTY &
A.M. BADAR, JJ.**

DATE : 25th July, 2019.

ORAL JUDGMENT : (PER : A.M.BADAR, J.)

1] Heard. Admit. Heard finally by consent of parties.
This appeal under Section 14A of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (for short "SCST Act") is filed by the appellant (original accused) challenging the order dated 31st December, 2018 passed by the learned Sessions Court, Thane, in Anticipatory Bail Application No.3199 of 2018, thereby,

rejecting his claim for anticipatory bail in Crime No. I-222/2018 for offences under Section 376(2)(c)(J)(n), 328, 323, 504, 506 of the Indian Penal Code and amended Rule 3(12) of the SCST Act (sic) registered with Police Station CBD, Navi Mumbai.

2] During the course of hearing of this appeal, upon being questioned by this Court the Investigating Officer who happens to be the Assistant Commissioner of Police, Turbhe Division, Navi Mumbai, communicated to the Court through the learned APP that upon re-examination of the matter, the amended provisions of the SCST Act are added to the case diary of the crime in question. Now, according to the prosecution, the offences alleged against the appellant are under Section 376(2)(c)(j)(n), 328, 323, 504, 506 of the Indian Penal Code as well as under Section 3(12) of the SCST Act.

3] Heard the learned counsel for the appellant. He submits that the FIR unerringly points out that whatever was happening between the appellant and the first informant was with consent and this fact is reflected from the text messages exchanged between the parties. He placed on record transcripts of the recorded conversation between the appellant and the first informant. It is argued that the FIR was lodged belatedly after about 18 months and that too when the husband of the first informant suspected something foul.

4] Learned counsel further argued that bare perusal of relevant sections of the SCST Act invoked against the appellant reveals that no such offences are attracted even after accepting the material collected

by the prosecution and therefore, bar of either Section 18 or Section 18A of the SCST Act, 1989 is not attracted to the case in hand.

5] Learned APP opposed the appeal by contending that screen shots obtained from the cellphone of the victim of the crime in question incriminates the appellant and the FIR as well as the screen shots from the cellphone of the victim indicates commission of offence under Section 376 of the Indian Penal Code as well as the SCST Act by a public servant. Therefore, considering the fact that the first informant belongs to Scheduled Caste, he is not entitled for bail in view of the bar under Section 18 and 18A of the SCST Act.

6] We have also heard learned appointed advocate for respondent No.2/first informant on the case of the State. She relied on the contention of the Learned APP and supported the impugned order dated 31st December, 2018 rejecting the claim for anticipatory bail of the appellant.

7] We have also perused the case diary.

8] At the outset, it needs to be point out that respondent No.2/first informant is a married lady aged about 31 years. Her husband is working in a nationalised bank. She is working as a Police Constable in the police department from the year 2009. The FIR which came to be lodged by her setting the criminal law in motion on 16.11.2018 reveals that she became acquainted with the appellant who happens to be Police Sub Inspector attached to the Vashi Police Station.

9] It is revealed from the FIR that the appellant who was promoted as the Police Sub Inspector was helping the First Informant in her studies for getting promotion. It is averred in the FIR by the Respondent No.2/First Informant that the appellant had committed rape on her from March 2017 to October 2018, on various occasions in his vehicle, at Bhushan Lodge, in a room at Satyam Heights, Kharghar, at his own house as well as at hotel Sitrank Orange etc.

10] The First informant averred that the first such incident happened in the car of the appellant after the appellant drugged her drink in the car. Thereafter she was molested under the threats that the appellant had recorded the act in his cellphone and he will make it viral. Lastly, the First Informant/Respondent No.2 alleged that on 13th November, 2018, the appellant demanded sex from her in his car. When she refused, the appellant had beaten her black and blue. She suffered bleeding nose, apart from bleeding injuries to all her extremities. Her husband questioned her about those injuries and then she disclosed everything to him. Thereafter, she lodged report.

11] Though the first informant has alleged that she suffered bleeding injuries, in her medical examination conducted on 18th November, 2018, the Medical Officer has not noticed any external injury on the body of the first informant/Respondent No.2.

12] The first informant is serving as Police Constable in police department. She happens to be an adult married woman and having a son. Her age which is 31 years is relevant at this juncture. If these facts

stated in he FIR are considered in the light of several text messages exchanged between the parties, prima-facie, we are of the opinion that the case in hand is a case of consent. Consent as understood in law is as an act of reason accompanied with deliberations, mind weighing, as in balance, the good and evil on both sides. It means an active will in the mind of a person to permit doing of the act complained of. Will as understood is one's own voluntary act. This is a case of a married women of 31 years of age, indulging in sexual relations with her colleague on several occasions at lodge, hotels, rooms and house of the appellant, without disclosing the said fact either to her husband or to the police, though she was having tons of opportunities to do so. On the contrary, the messages exchanged between the parties indicate that lastly the First Informant / respondent No.2 suspected that her husband is monitoring her mobile and ultimately, on 16th November, 2018 the FIR came to be lodged. Subsequently, the medical examination was conducted, but report of medical examination on this aspect is negative. Explanation to Section 3(1)(w) makes it clear that unequivocal voluntary agreement either by words, gesture or in the form of non verbal communication communicating willingness to participate in a specific act amounts to consent.

13] Learned APP has placed on record report of forensic examination of cell phone of the appellant. This report does not show that the said cell phone was containing any obscene clip involving the appellant or the respondent No.2. The case diary reveals that initially the First Informant was not ready to handover her cellphone to the Investigator. She informed that she will collect the incriminating material in the pen-

drive and handover the same to the investigating agency. However, she did not comply. The Investigator then wrote a letter to her to deposit her cell phone and then she sent a letter intimating the fact that her mobile phone was lost during train journey. The APP has reported that the First Informant had lodged report in respect of theft of mobile with police station to that effect.

14] On the background of facts of the case which we have reproduced earlier, the explanation to Section 3(1)(w) of the SCST Act will have to be kept in mind in order to ascertain as to whether the penal provisions of SCST Act invoked by the prosecution are applicable to the case in hand. Prima-facie we are of the opinion that the act was consensual in nature and therefore is not attracting the bar of Section 18 or 18A of the SCST Act. So far as the other provisions of the SCST Act invoked by the prosecution are concerned, those deal with punishment and not offences.

15] Though the prosecution alleges about printouts of the screen-shot from cell phone of the First Informant incriminates the appellant, that cell phone was not produced before the Investigator. The appellant is contending that with some Application in cell phone, such screen-shots can be created.

16] Major part of investigation seems to be over. Custodial interrogation of the appellant in the light of evidence available on record is not at all warranted. In this view of the matter, we are unable to agree with the findings of the learned Special Judge to the effect that

there is possibility of absconding of the appellant if he is granted anticipatory bail. Ultimately, the appellant is also a Police Sub Inspector and as such it cannot be held that there is possibility of his absconding. Hence, the order :

ORDER

1] Criminal Appeal No.14 of 2019 is allowed.

2] The impugned order dated 31st December, 2018 passed by the learned Special Judge, Thane, in Anticipatory Bail Application No.3199 of 2018 is quashed and set aside.

3] The application for anticipatory bail moved by the Appellant/accused in Crime No.I-222/2018 registered with Police Station CBD Belapur and which is being investigated by the Assistant Commissioner of Police, Turbhe Division, Navi Mumbai is allowed.

4] In the event of arrest of the appellant, in the subject crime, he be released on bail on executing PR Bond of Rs.15,000/- and on furnishing a surety in the like amount.

5] The appellant/accused shall not make any inducement, threat or promise to any person acquainted with the facts of the accusation against him so as to dissuade him from disclosing such facts to the court or to any Police officer.

6] The appellant shall attend the Investigating Officer as and when called for the purpose of investigation.

7] The appellant shall not tamper with the prosecution evidence in any manner.

8] Needless to mention here that the observations are prima-facie in nature and shall not have any bearing on the trial of this case.

[A.M. BADAR, J]

[INDRAJIT MAHANTY, J]