

**(2008) 09 BOM CK 0083**

**In the Bombay High Court**

**Case No :** Criminal Writ Petition No. 179 of 2008

Dilip Pathak

APPELLANT

Vs

The State of Maharashtra and Vijaya Punawad

RESPONDENT

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**Date of Decision :** 01-09-2008

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 227  
Penal Code, 1860 (IPC) — Section 376

**Citation :** (2008) 09 BOM CK 0083

**Hon'ble Judges :** B.R. Gavai, J

**Bench :** Single Bench

**Advocate :** S.S. Jadhavar, for the Appellant; K.G. Patil, Assistant Public Prosecutor, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

B.R. Gavai, J.—By way of present petition, the petitioner challenges the order dated 22.10.2007 vide which the application filed by the present petitioner for discharge u/s 227 of Cr.P.C. has been dismissed.

2. The petitioner at the relevant time was working as Senior Clerk at Tahsil Office, Dharmabad, who was incharge of Food & Civil Supplies department. It is the contention of the petitioner that he was a member of the raiding party which had effected raids on three shops and that the complaints were registered against those shop owners in view of the said raids. It is also his contention that certain complaints were also registered at his instance against some shop owners under the provisions of Essential Commodities Act. It is the contention of the petitioner that one Vijaya w/o Dashrath Punawad had filed a false complaint against him in the office of Superintendent of Police, Nanded alleging therein that the applicant had helped her in availing the benefits of "Sanjay Gandhi Niradhar Yojana" and in return thereof had demanded sexual relationship with her. It is further stated in the complaint that complainant had physical relationship with the applicant and due to that she became pregnant. It is further alleged that

petitioner also tried to commit rape on her daughter Sarita. It is further alleged in the complaint that on being enquired about the same, Sarita poured kerosene on her person and set her on fire. However, due to threats given by the petitioner, she did not lodge complaint with the police. On the basis of this allegation, a chargesheet has been filed against the petitioner and the case stands committed to the court of learned Sessions Judge. It is submitted by the petitioner that since there is no material against him, he has filed application for discharge u/s 227 of Cr.P.C. The same is rejected. Hence the present petition.

3. Shri. Jadhavar, learned Advocate for the petitioner submits that the petitioner has been falsely involved in the present case at the instance of persons who were affected by the raids carried out by him. It is submitted that complaint filed by respondent No. 2 is false. He further submits that prosecution has also conducted D.N.A. test in which it is found that the child born to respondent No. 2 is not of the petitioner. He further submits that there are inconsistencies in the statement of the complainant so also her daughter.

4. He further submits that even if it is held that the petitioner had sexual relationship with the complainant, it will have to be held that it was with the consent of the prosecutrix and as such the applicant would not be guilty of Section 376 of Indian Penal Code. In support of this submission, he relied on the judgment of Uday Vs. State of Karnataka, . He further submits that even if the prosecution conducts the trial, there is not even remote possibility of the petitioner being convicted and as such the present case is a fit case for discharging the accused. In support of this, he relies on the case of Dilawar Balu Kurane Vs. State of Maharashtra, .

5. Shri. K.G. Patil, learned A.P.P. appearing for the State submits that the learned trial court has rightly rejected the application of the petitioner. He submits that unless the complainant prosecutrix enters the dock and her evidence is recorded, the question regarding whether her evidence is truthful or not cannot be gone into. He submits that whether the complaint is false or not can only be considered at the stage of trial and as such the application as has been made, has rightly been rejected by the trial court.

6. From the perusal of the chargesheet it would reveal that F.I.R. is registered on the basis of complaint addressed by respondent No. 2 to the Superintendent of Police. Copies thereof are also endorsed to the various authorities. She states in the said complaint that she was widow and therefore, under Sanjay Gandhi Niradhar Yojana, she was entitled to the pension. She therefore, contacted the petitioner with regard to the said pension. The petitioner treated her well. She states that her work was done and thereafter again she had gone to meet him for expressing her gratitude. She states that the petitioner offered her tea and thereafter told her that she should come to his room and do household work for which she would be paid Rs. 300/-. She further states that she went to the house of petitioner. On 5th or 6th day, while she was washing the clothes, petitioner came to the house from office on the pretext of forgetting the keys. She states

that the petitioner told her that her husband had died, she is young and beautiful and therefore, she should keep physical relations with him and that he will take care of education of her daughter and her future. She further states that thereafter she could not refuse to the petitioner and the relationship developed with consent of each others. She further stated that due to this, she became pregnant.

7. In so far as second incident is concerned, she stated that the petitioner also told Sarita, daughter of respondent No. 2 to come to his house for study. However, he tried to behave in the same manner. She asked Sarita about the same, on which Sarita poured kerosene on her person. She further states that due to the threats given by the petitioner, she could not lodge the complaint in the police station. Her statement is recorded on 8.10.2006.

8. The statement of the daughter of respondent No. 2 was initially recorded on 23.2.2006 in which she has stated that she had received burn injuries due to the explosion of the stove. However, in subsequent statement dated 13.10.2006 she has supported the version given by her mother.

9. From the chargesheet it is clear that the charge which is framed against the present petitioner is only in so far as it pertains to the allegations of the respondent No. 2 regarding sexual intercourse with her. In so far as the second incident regarding attempt by the petitioner to have relations with the daughter of respondent No. 2 and she setting herself on fire is concerned, the petitioner has not been charged for the said charge. It appears that there is no material on record. The incident has occurred on 23.2.2006. The statement of Sarita was immediately recorded and she had clearly stated she had accidentally caught fire due to explosion of the stove. She had stated that at that time her friend Jyoti, her landlord and the neighbours had extinguished the fire. It therefore, appears that the prosecution has not framed any charge against the petitioner with respect to the said incident.

10. The only question therefore, that needs to be considered is whether the application of the present petitioner for discharge from the charge punishable u/s 376 of I.P.C. on the basis of allegation of having committed rape on respondent No. 2 needs to be allowed or not?

11. Taking into consideration the nature of allegations, the petitioner was directed to implead the complainant prosecutrix as a party respondent. She has been duly served with notice of this Court. However, she has not appeared either in person or through counsel. Therefore, the allegations of the petitioner that she has lodged false complaint at the behest of the persons who are aggrieved by the raids carried out by the petitioner is concerned, stands unchallenged. From the statement of the prosecutrix, the only incriminating material which can be said to be against the present petitioner is as such.

Lateron, after some days, as my grants of Niradhar yojana were sanctioned, I had gone to Tehsil Office to express my gratitude for Shri Pathak. He asked me

to sit on the chair and he ordered for tea. After having tea, he said that he would pay me Rs. 300/- P.M. for the work of washing clothes and utensils. I thought it to be a great support for me. I started going to his house for household work. For 4-5 days Shri Pathak behaved with me properly. On 6th day, when I was washing clothes, he came to his house and said that he had forgotten his keys. He then started saying, "your husband has expired. You are young and beautiful. You keep physical relations with me." He, then assured that he shall bear the educational expenses of my daughter and shall help me life long. Therefore, by considering the circumstances and as he had helped me in getting grants of Niradhar Yojana, I gave my consent to keep these relations. Both of us continued physical relations and as a result of this, I became pregnant.

It could thus be seen that even according to the prosecutrix who is aged 35 years, the prosecutrix had herself given consent to have sexual intercourse with the petitioner since the petitioner had done her work of Sanjay Gandhi Niradhar Yojana. She further states that she also decided to have relations since the petitioner had promised her to provide for education of her daughter as well as future of the complainant. It could thus be seen that taking averments of the complainant at its face value, she, on her own accord accepted the gesture of the petitioner to have relationship since he had done the work of Sanjay Gandhi Niradhar Yojana and since he had promised to take care of herself and her daughter. It would further be seen that she has specifically stated that she had become pregnant due to present petitioner. However, immediately after the complaint was made, the blood samples of the petitioner, respondent No. 2 and the baby born to respondent No. 2 were sent for D.N.A. test to the Central Forensic Science Laboratory, C.B.I. New Delhi. The report dated 26.12.2006 clearly states that the D.N.A. profile of respondent No. 2 is consistent as biological mother of the baby boy. It also clearly states that the D.N.A. profile of petitioner is not consistent as biological father of the baby boy.

12. Leave apart the said D.N.A. report, for considering as to whether taking allegations of prosecutrix at its face value, whether the present petitioner can be convicted for offence punishable u/s 376 of Indian Penal Code or not?, it would be gainful to refer to the observations of Apex Court in the case of Uday Vs. State of Karnataka, ;

The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, is permitted only to a person with whom one is in deep love. It is also not without significance that the

prosecutrix stealthily went out with the appellant to a lonely place at 12 O'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.

13. In the present case, it can clearly be seen that prosecutrix herself has stated that she has agreed to have sexual intercourse with the petitioner as he had done her work of Sanjay Gandhi Niradhar Yojana and had promised to provide for future of the prosecutrix and her daughter. In view of the aforesaid pronouncement of law by the Apex Court, it is clear that taking the allegations of the prosecutrix at its face value, the conviction of the present petitioner for offence punishable u/s 376 of I.P.C., is not possible. Apart from the aforesaid statement, there is no material in the chargesheet so as to connect the present petitioner with the said offence punishable u/s 376 of Indian Penal Code.

14. The Apex Court, in the case of Dilawar Balu Kurane Vs. State of Maharashtra, observed thus;

In exercising powers u/s 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction u/s 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial (See Union of India v. Prafulla Kumar Samal and Anr.

1979 (3) SCC 5).

15. As already discussed hereinabove, except the statement of prosecutrix, there is no material on record to connect the petitioner with the crime in question. Even if the said statement is taken at its face value, in view of the law laid down by the Apex Court in the case of Uday (cited supra), there is no possibility of the petitioner being convicted u/s 376 of the penal code. There is no material on record to connect the present petitioner with crime in question. The complaint which is a typed complaint addressed to the Superintendent of Police has been lodged after a period of about 2 years from the period when the relationship between petitioner and the respondent No. 2 is alleged to have commenced. The allegations of the petitioner that he has been framed at the instance of the persons against whom the raids were carried out, has also gone unchallenged. Not only this but the D.N.A. reports also falsifies the version of respondent No. 2. In view of this position, I find that no purpose would be served in making the present petitioner undergo the rigour of trial. I find that this is a fit case that continuation of criminal proceeding would amount to an abuse of process of law. I am, therefore, inclined to allow the petition.

16. The petition is allowed. Rule is, therefore, made absolute in terms of prayer Clause "B".