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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **BAIL APPLN. 2226/2016**

SHUBHAM SRIVASTAVA

..... Petitioner

Through: Ms. Saahila Lamba and Mr. Tarun
Khanna, Adv.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Rajat Katyal, APP with SI
Praveen Kumar, PS Mandawli

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER

20.02.2017

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The petitioner has preferred the present regular bail application under Section 439 Cr PC to seek bail in case FIR 293/2016 registered under Section 376/506/328 IPC and section 4 of POCSO Act at PS Mandawli. The petitioner, who is 19 years of age, is in judicial custody since 26.07.2016. The charge sheet stands filed and the matter is now fixed on 28.02.2017 for arguments on charge.

The submission of learned counsel for the petitioner is that the alleged act, in any event, was consensual inasmuch, as, the prosecutrix has stated in the FIR that she had known the petitioner for a few months through facebook and both were residing in the same locality. Even in her statement

recorded under Section 164 Cr PC, she has described the petitioner as her boy friend.

Learned counsel for the petitioner further submits that the incident alleged is to be that of 15.07.2016. However, even thereafter the prosecutrix had met the petitioner on 18.07.2016, which would not have been the case had it been a case of use of force against the will of the prosecutrix. Learned counsel has also submitted that the reason given by the prosecutrix for consuming acid on 19.07.2016 was that she feared that her school teacher who had seen the prosecutrix with the petitioner on his motor cycle may disclose the said fact to her mother, since the principal had called the mother and the prosecutrix to the school on the said date. Learned counsel submits that the FIR was made only on 25.07.2016 and the same is, therefore, belated and an afterthought. She further submits that the petitioner is a 19 year old young boy and he has already remained in custody for over six months. His career and future life would be affected in case he is detained in custody any further pre-trial.

She has placed reliance on the judgment of Bombay High Court in ***Sunil Mahadev Patil v. State of Maharashtra***, ABC 2016 (I) 34 Bom decided on 03.08.2015 and in particular on paras 9 to 12 of this decision, which read as follows:

“9. In view of the increasing offences against the women especially of rape, the legislature and judiciary both found it obligatory to deal these offences with severe punishment and women can be protected if the laws are made rigorous. Therefore, report of Justice Verma Committee was accepted and necessary and significant amendments were made in these two sections. A wrong doer is to be punished, guilty is to be convicted. However, at the stage of bail, the Court has to

consider prima facie under what circumstances the offence is committed by the accused. In the Criminal law, the Court cannot ignore the intention or motive behind the act and that is an important factor in the commission of offence so also to decide the quantum of sentence at the end of trial, so in the case of bail.

10. The offence of rape can be distinguished on the basis of the intention of the accused. There are incidents of rapes committed by gang like the case of Nirbhaya or Maya Thagi or Mathura which cannot be forgotten by Indian Society. So also rape committed in a savage manner or repeatedly by a single accused. There are some instances of rape which take place as a man wants to satisfy his lust and animal within him overpowers his reason. There are instances of rape where a man and a woman both are in love with each other and get involved into sexual relationship due to either physical or psychological need and in such type of rape, there is no violence which exists in other types of rape.

11. Today teenagers are exposed to more sex related issues and lot of material is also available to them to know the sexual relationship between a man and a woman. Because of their impressionable age, girls and boys both may tend to get provoked and there can be a curious and very compelling demand of the body to get into such kind of relationship. Sexual urge differs from person to person and there cannot be any mathematical formula in respect of sexual behavioral pattern of teenagers, as biologically whenever the child turns into puberty, the child starts understanding his or her sexual needs. The nature of response depends on the upbringing, peer pressure, how civilized the environment is etc. Sex requires proper physical and emotional preparation, as it results in many physical and emotional consequences. This is all considered as a sexual maturation. Therefore, some sects with view to regularize sexual behaviour of the community have acknowledged this biological factor and therefore, the early age marriages are performed in some religions or communities.

Taking into consideration this social and biological factors, the law makers have considered the age of 15 as a age of consent when the marriage is performed. Taking into consideration this background, the trial Judge has to pass an order of bail in such cases.

12. The overall considerations while deciding such applications can be summed up as - When a boy and a minor girl are in love with each other and chose to live together without consent of their parents, then the following factors are to be considered: (i) What is the age of the prosecutrix, who is minor. (ii) Whether the act is violent or not. (iii) Whether there are antecedents or not. (iv) Whether the offender is capable of repeating the Act or not. (v) Whether there is likelihood of threats or intimidation, if at all the boy is released. (vi) Whether any chance of tampering with the material witnesses when their statements are recorded. (vii) It is also to be taken into account in such cases that a boy in his early 20's deserves to get employment and to plan, stabilize and secure his future”.

She has also placed reliance on the order passed by the Rajasthan High Court in ***P.D. Bohra v. Unknown***, decided on 26.03.2014, where the prosecutrix was around 15 years of age, but had consented to the sexual act and in that background, the High Court had released the accused on bail.

She has also placed reliance on photographs of the petitioner and the prosecutrix to submit that they have affection towards each other.

On the other hand, Mr. Katyal has argued that the statement of the prosecutrix as found in her complaint which led to the registration of the FIR and her statement recorded under Section 164 Cr PC, are both consistent. In both her statements, she has claimed that the petitioner had forcibly established physical relations with her against her will and despite her opposition. He, therefore, submits that the decisions in ***Sunil Mahadev***

Patil (supra) cannot be relied upon since that was a case of elopement of the minor girl with the accused, whereafter they had even got married. Consent for establishment of sexual relation was, therefore, implied in that case, which cannot be said about in the present case. He further submits that merely because the prosecutrix may have met the accused on 18.07.2016 does not imply that when the prosecutrix was sexually assaulted, she had given consent. The prosecutrix had also consumed acid on account of the ignominy attached to the physical relations forcibly established by the petitioner with her.

Having heard learned counsels and perused the record, I am not inclined to grant relief to the petitioner at this stage. The prosecutrix appears to be a minor of 16 years studying in 10th grade. The statement of the prosecutrix as found in the FIR and her statement recorded under Section 164 Cr PC are both consistent inasmuch, as, she has claimed that the establishment of physical relation by the petitioner was forcible and against her wish. She stated that the petitioner forced himself upon her despite her opposition.

In such type of cases, it is judicially recognised that some amount of delay may occur on account of the embarrassment that the prosecutrix and her family members face upon the disclosure of the offence in the complaint. Moreover, on account of the fact that the prosecutrix had consumed acid on 19.07.2016, she was hospitalised till 23.07.2016 and the complaint was made on 25.07.2016.

It would not be appropriate for me, at this stage, to comment on the circumstances in which the prosecutrix may have met the petitioner on 18.07.2016 and consumed acid on 19.07.2016 as the same may adversely

affect the defence of the petitioner. The same would be premature at this stage as well.

Reliance placed on *Sunil Mahadev Patil* (supra) is misplaced inasmuch, as, that was a clear case of elopement of the minor girl with the accused, whereafter they even got married. Thus, her consent to establishment of physical relations with the accused was implied. The same cannot be said in the facts of the present case at this stage looking to the nature of allegations.

No doubt, the petitioner is a young person aged 19 years, but releasing him on bail at this stage may prejudice the trial since the prosecutrix is also a minor girl and her evidence has not yet been recorded.

In these circumstances, it is directed that in case the Trial Court frames charges against the petitioner, the statement of prosecutrix shall be recorded without any delay, and whereafter it shall be open to the petitioner to apply for bail afresh. The Trial Court shall proceed to hear arguments on the aspect of charge on the next date, and no adjournment shall be sought or granted by the Trial Court.

Dasti.

VIPIN SANGHI, J

FEBRUARY 20, 2017

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