

HON' BLE DR. JUSTICE B. SIVA SANKARA RAO

CRIMINAL PETITION No.4825 of 2018

ORDER:

This criminal petition is filed under Section 438 Cr.P.C. by the petitioner/ A1 in Crime No.115 of 2018 of Malkajgiri Police Station, Rachakonda District, registered for the offences punishable under Sections 376, 417 and 420 I.P.C.

2. Heard learned counsel for the petitioner, learned Public Prosecutor representing the 1st respondent-State and learned counsel for the 2nd respondent-de facto complainant.

3. The contentions of the learned counsel for the petitioner are that the petitioner is innocent and falsely implicated for not committed any offence, much less, offence of rape or cheating to register the above crime for the said offences at the instance of the de facto complainant, leave about the failure to keep the promise to marry is not an offence from both majors from said physical relationship of conjugal life even for years and the fact that out of their love and affection, marriage was scheduled to be performed on 17.04.2018 and post marriage reception on 28.04.2018 and failed due to the adamant attitude of the daughter of the de facto complainant is not a ground attributing offence of cheating or rape, the de facto complainant's daughter, the

victim herself embraced to Islam in Dubai and the marriage is broke not from non-fulfillment of the promise given by him to marry but otherwise from her attitude, thereby, no offence is made out and he is entitled to the concession of bail. It is also the contention that the learned XVI Additional District and Sessions Judge, Malkajgiri, Ranga Reddy District, dismissed CrI.MP.No.1306 of 2018, on 13.04.2018, without perusing the facts properly and from investigation at nasal stage.

4. The learned Public Prosecutor opposed the bail application saying there is a *prima facie* accusation for the offences of rape and cheating and the petitioner does not deserve, leave about the other petitioners are not before this Court, any concession of bail much less anticipatory bail from the seriousness of the offence of the victim faces practically, a civil death.

5. Heard both sides and perused the expressions placed reliance by both sides, more particularly, the expression in Deepak Gulati v. State of Haryana¹, placed by the learned counsel for the petitioner.

6. The F.I.R. reads that the de facto complainant by name, Swapna Chanda, is the mother of the victim, Pinky Chanda,

¹ (2013) 7 SCC 675

who is aged about 25 years. The petitioner/ A1 by name, Safdar Abbas Zaidi and the victim, Pinky Chanda fell in love and she was embraced to Islam community at his instance and their acquaintance gradually developed into love affair under the promise of marry and with that, they even participated for a long period of sexual intercourse including by embracing her into Islam to see that there will not be any further hurdles to the marriage and the date of marriage already fixed that was to be performed on 17.04.2018 with post marriage reception on 28.04.2018 that was fixed prior to December, 2017. However, it was cancelled saying he was not going to marry her and it was at that time with a pretense that her name in the legal documents to be changed Hindu name to Muslim name as after conversion they christened her again Pinky Chanda to Fatima Zehra saying for marriage purpose and she was thereby cheated and to take action.

7. The undisputed facts are that the petitioner and daughter of the de facto complainant were lived in Dubai and were employees. The only contention is that they were staying at separate venues, though working and meeting together. It is also not in dispute that he had sexual intercourse with her. There were e-mail chattings right from December, 2014 and e-mail chatting particularly at page

No.122 of the material papers supplied with the bail application shows he asked the victim as to she was pregnant through him or not. The chat says pregnant won't hang anything and the earlier chat says exchange of abuses between them and not to have further sex and his further chat says he was cheated by her pretense she was pregnant and as if aborted. Even from this he had sexual intercourse with her is an admitted case of him from e-mail exchanges.

8. The core contention of the learned counsel for the petitioner is that mere voluntary participation in sexual intercourse is not an offence of rape and it will not give under any of the exceptions or explanations to the definition of Section 375 I.P.C. to attract the offence under Section 376 I.P.C. including so called Parts 2, 4 and 5 r/w explanation (2) out of seven descriptions as to what constitutes rape.

9. As pointed out by the learned Public Prosecutor before going into the legal position, coming to the facts, the very embracing her to Islam community was long back and for the purpose of marriage and subsequent to that they had sexual intercourse and his question that she was pregnant or not that itself shows he had sexual intercourse with her. It is leave about she pretended falsely as if pregnant without that or not, as the very e-mail messages show after her conversion

into Islam community for the purpose of marriage, he had sexual intercourse with her clearly shows it is not with her consent to have the sexual intercourse as a message but for on the pretense of marriage even embraced to Islam that itself shows, it is not a voluntary consent within the meaning of Section 39 r/ w 90 I.P.C.

10. In Deepak Gulati (supra), it is categorically held that the consent given under misconception of fact from which there is sexual indulgence by accused with victim's consent given under misconception of fact, that falls within the ambit of rape. Consent obtained from victim by making false promise of marriage amounts to cheating or deception which leads to misconception of fact. But the distinction should be made between not fulfilling false promise by accused and mere breach of promise occurring due to circumstances beyond his control. Even this principle is very clear that if it is the breach of marriage is not in his control it is an exception otherwise under the promise he had sexual intercourse it is definitely a rape. The expression vividly discussed the gravity of the psychology and physical harm the woman suffers and degrades and defiles victim's soul, honour and dignity and leaves a permanent scar on life from such crime being that to be viewed seriously.

11. Coming to another Single Judge expression of this Court while granting regular bail on 08.02.2017 in CrI.P.No.662 of 2017 (Pendram Venkatesh's case) referred Kaini Rajan v. State of Kerala² and Akshay Manoj Jaisinghani v. State of Maharashtra³, the observations therein read that in Kaini Rajan's case, there is an observation of *prima facie* case for the offence of rape not made out and in Akshay Manoj Jaisinghani's case it was held referring to Mahesh Balkrishna Dandane v. State of Maharashtra in A.B.A.No.27 of 2014 dated 12.03.2014 as under:

"This Court has already held in the case of *Mahesh Balkrishna Dandane v. State of Maharashtra*, ABA No. 27 of 2014 decided on 12.3.2014, that to satisfy the sexual urge is a free decision of every major individual irrespective of gender. Thus, promise to marry in any manner, cannot be a condition precedent to have sex. However, the behavioural pattern and psyche of Indian society has to be taken into account while dealing with this issue. Since many generations, virginity of a woman is considered precious and there is a moral taboo that it is a responsibility of a woman to be a virgin at the time of marriage. However, today, the young generation is exposed to different interactions with each other and is well informed about sexual activities; similarly, the late marriages and economic independence are also relevant factors. The society is trying to be liberated but carries baggage of different notions of morality wherein sex before marriage is a matter of censure and hence, it is a hush-hush subject. In fact, it is an issue before the social thinkers to educate and guide the society. Under such circumstances, a young woman who is in love with a boy forgets that to have sex is her option like her counterpart but somehow

² (2013) 9 SCC 113

³ 2017 (1) R.C.R. (Criminal) 715

refuses to take the responsibility of her decision. If at all she has indulged into sexual activities even on a promise to marry, the girl may land up emotionally and physically in a pathetic situation after break up. To marry someone is a matter of choice. It cannot be imposed on anybody. Only because two individuals are sexually involved with each other, it is not compulsory for them to marry. Initially, a boy and a girl genuinely may want to marry and are true to their emotions and establish sexual relationship, however, after some time, they may find that they are not mentally or physically compatible and one decides to withdraw from the relationship. Under such circumstances, nobody can compel these two persons to marry only because they had sexual relationship. It is necessary to have a healthy, objective and legal approach towards these incidents. There may be moral bonding between the two persons when they indulge into sexual activities with promise to marry and it is also a fact that ultimately women only can remain pregnant and therefore, she suffers more than the man. However, in law, this cannot be labelled in any manner as a rape.

It is, by referring the same as paragraph No.5 of the order in CrI.P.No.662 of 2017 granted regular bail. In Pendam Venkatesh's case with reference to those facts, what observed by another Bench of this Court was that having regard to the above and since all the material witnesses were already examined, the request of petitioner therein can be considered in allowing the regular bail.

12. Leave about the fact that the facts are entirely different and the case on hand is not even for regular bail, and the regular bail and anticipatory bail cannot be at par as per the settled law including from the expression of the Apex Court in

Siddharam Satlingappa Mhetre v. State of Maharashtra⁴ referring to the Constitution Bench expression of the Apex Court in Gurbaksh Singh Sibbia Etc vs State of Punjab⁵, here, at the cost of repetition what the Apex Court observed in the above case is if two majors agreed and freely participated in the sexual intercourse, it is not an offence of rape. Here, from the very F.I.R. contents and the statement of victim the accused lured her, promised to marry and enjoyed her sexually, but for that she could not have been consented; from which it is an offence of rape under Section 375 IPC for no free consent as contemplated by Section 39 IPC as also observed by this Court in 2015 (2) ALT CrI. 239. BPK v. State of Telangana referring to several expressions of the Apex Court including Deelip Singh Vs. State of Bihar⁶, State of H.P. Vs. Mango Ram⁷, Deepak Gulati Vs. State of Haryana⁸, Yedla Srinivasas Rao Vs. State of A.P.⁹, Pradeep Kumar Verma Vs. State of Bihar¹⁰ and State of UP Vs. Naushad¹¹.

13. Having regard to the above, the petitioner is not entitled to the concession of anticipatory bail and the fact that he is an employee and likelihood of losing job if arrested

⁴ (2011) 1 SCC 694

⁵ (1980) 2 SCC 565

⁶ 2005 (1) ALD Cri 65 (SC)=2005 (1) SCC 88

⁷ 2000 (7) SCC 224

⁸ 2013 (3) ALT (CrI) 339 SC

⁹ 2007 (1) ALT (CrI) 61 (SC)

¹⁰ 2008 (2) ALT (CrI) 445 (SC)

¹¹ 2014 (1) ALD CrI 634 (SC)

cannot even be considered to outweigh over the sufferance of victim.

14. In the result, this Criminal Petition is dismissed. It is needless to say there is no *res judicata* for the bail application. If at all in future any bail application is filed by the petitioner from any changed circumstances, the same may be considered on own merits.

15. Consequently, miscellaneous petitions, if any shall stand closed.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 09.07.2018
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L.R. Copy to be marked -yes



* HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

+ CRIMINAL PETITION No.4825 of 2018

09-07-2018

Between:

Safdar Abbas Zaidi

...petitioner

Vs.

The State of Telangana and another

... Respondents

Counsel for the petitioner : Sri P.Venugopala Rao

Counsel for Respondent No.1: learned Public Prosecutor

Counsel for Respondent No.2 : N.Avaneesh

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>Head Note:

? Cases referred:

¹ (2013) 7 SCC 675

² (2013) 9 SCC 113

³ 2017 (1) R.C.R. (Criminal) 715

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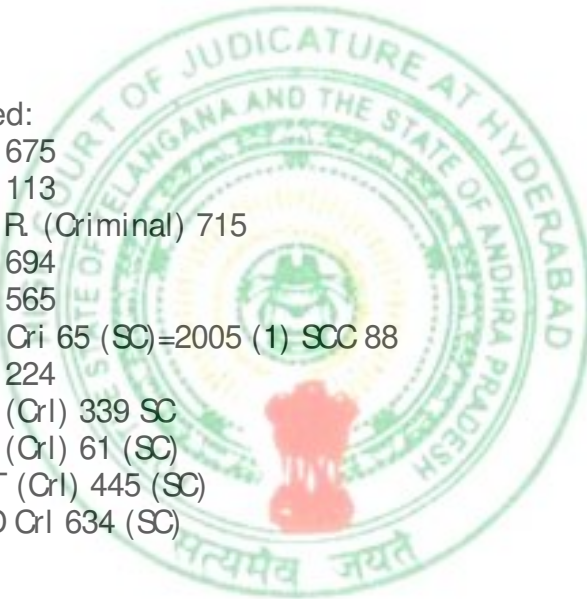
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IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

CRIMINAL PETITION No.4825 of 2018

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Safdar Abbas Zaidi

...petitioner

Vs.

The State of Telangana and another

... Respondents

DATE OF JUDGMENT PRONOUNCED: 09.07.2018

SUBMITTED FOR APPROVAL:

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

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|---|---|---------|
| 1 | Whether Reporters of Local newspapers may be allowed to see the Judgments? | Yes/ No |
| 2 | Whether the copies of judgment may be marked to Law Reports/ Journals | Yes/ No |
| 3 | Whether Their Ladyship/ Lordship wish to see the fair copy of the Judgment? | Yes/ No |

