

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

CRIMINAL PETITION No.8407 of 2018

Between:

Safdar Abbas Zaidi

..Petitioner

and

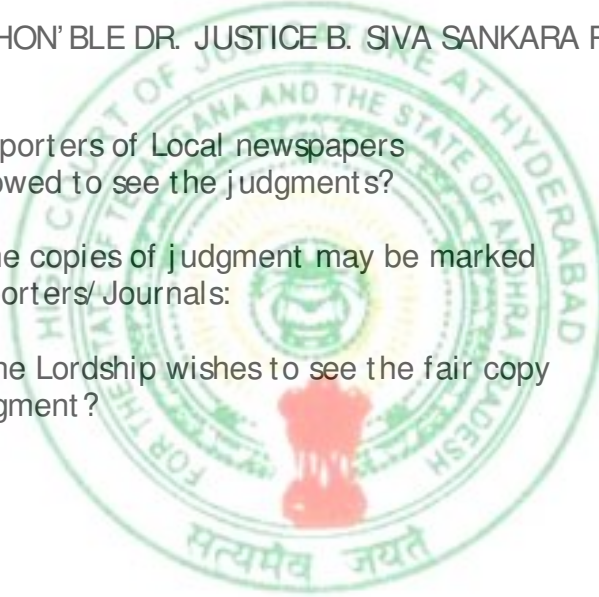
The State of Telangana,
Through SHO, Malkajgiri Police Station,
Rachakonda

.....Respondent

Date of Judgment pronounced on : 27-08-2018

HON' BLE DR. JUSTICE B. SIVA SANKARA RAO

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 Reporters/ Journals: : Yes/ No
3. Whether The Lordship wishes to see the fair copy
Of the Judgment? : Yes/ No



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< GIST:

> HEAD NOTE:

! Counsel for the petitioners : Sri Sarosh Bastawala

^ Counsel for the respondents : Learned Addl.Public Prosecutor

? Cases referred

1. (2013) 9 SCC 113
2. (2014) 5 SCC 678
3. (2000) 7 SCC 224
4. (2005) 1 SCC 88
5. (2011) 1 SCC 694
6. (2016) 1 SCC 152
7. (2007) 7 SCC 413
8. (2016) 4 SCC 140
9. AIR (1984) SC 718
10. (2003) 4 SCC 46
11. 1958 CrI.L.J. 563
12. (1841) 9 C&P 722
13. ILR(1913) 36 Mad 453
14. AIR 1963 Bombay 74
15. 1984 CrI.L.J.1535
16. 1885 29 CHD 459
17. (2014) 5 SCC 678
18. (2015) 2 ALT CrI. 239
19. 2013 3 ALT CrI.339 SCC
20. 2007 1 ALT CrI.61SCC
21. 2014 1 ALD CrI.634 SCC
22. 2013 12 SCC 710

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO
Criminal Petition No.8407 of 2018

ORDER :

The petitioner, a private employee, resident of Burg Dubai, by name Safdar Abbas Zaidi represented by his father Khaleem Akthar Abid Zaidi as G.P.A. holder maintained the present anticipatory bail application in Cr.No.115 of 2018 of Malkajgiri Police Station, Rachakonda district, Telangana State, registered for the offences punishable under Sections 376, 417 and 420 IPC. Earlier with self-same array, he filed anticipatory bail application in CrI.P.No.4825 of 2018 and the same was by detailed order running in 15 paragraphs with 9 pages ended in dismissal on 09.07.2018 with observation of the same not a bar for future bail application from showing of any changed circumstances, no doubt to consider on own merits and that he is not entitled to the concession of anticipatory bail from the propensity of the crime which prima facie makes out the offence alleged u/ sec.376 IPC among others and thereby the contentions of he is an employee and likelihood of loosing job if he is arrested cannot be outweighed in the consideration over the sufferance of the victim.

2. After said dismissal order dt.09.07.2018, the present anticipatory bail application is filed within one month on 08.08.2018 with 8 paragraphs of averments by reproducing the complaint in gist, the ingredients of Section 376IPC and expressions of the Apex Court in Kaini Rajan Vs. State of Kerala¹, and Vinod Kumar Vs. State of Kerala², referring to earlier expressions in State of HP Vs. Mango Ram³ and Deelip Singh Vs. State of Bihar⁴ besides the guidelines for anticipatory

¹ (2013) 9 SCC 113

² (2014) 5 SCC 678

³ (2000) 7 SCC 224

⁴ (2005) 1 SCC 88

bail laid down at para-112 of *Siddharam Satlingappa Mhetre Vs. State of Maharashtra*⁵ and *Bhadresh Bipinbhai Sheth Vs. State of Gujarat*⁶ and ultimately at paras-7 and 8 of the bail application stated there is no specific averments in the occurrence of rape or any other averment of any possible date or time it had occurred and the conduct of the defacto-complainant and her mother (not arrayed therein) as 2nd respondent to the bail application is systematically paranoid, and shows pattern of distress and suspiciousness such that the others motives are interpreted as malevolent and such persons are known to harbour severe antagonism and such persons suffering with paranoid personality disorder, and individuals with this disorder are generally difficult to get along with and often have problems with close relations because of their excessive suspiciousness and hostility and unable to collaborate well with others at work and their combative and suspicious nature may elicit a hostile response in others, which then serves to confirm their original expectations. They are often rigid, and critical by they never accept criticism about themselves, and this causes significant impairment in academic, occupational and/or social functioning. It is further submitted that he is never in India and the question that he is absconding in misleading does not arise.

3. In fact, in the bail application from the earlier dismissal order referred supra to the date of filing supra as to any worth changed circumstances mentioned. Even in the course of hearing nothing could be brought to the notice of the Court of any changed circumstances but for placed reliance in addition to the decisions referred supra in the bail application, the expressions of the Apex Court in *Pradeep Kumar Verma*

⁵ (2011) 1 SCC 694

⁶ (2016) 1 SCC 152

Vs. State of Bihar⁷, Tilakraj Vs. State of Himachal Pradesh⁸ and a single judge expression of Maharashtra High Court in anticipatory bail application No.2221 of 2016, dt.09.01.2017 in Akshay Manoj Jaisinghani Vs. State of Maharashtra.

4. The learned Public Prosecutor opposed the bail application saying neither any merits to review the order of dismissal of the anticipatory bail application by this Court in the previous month nor worth changed circumstances even mentioned though not *res judicata* for bound to disclose any worth changed circumstances rather mentioning anything as if a changed circumstance to maintain a subsequent bail application which is a pre-requisite even for the Court to entertain and that there is a prima facie accusation as concluded earlier and the petitioner/ A.1 no way deserves concession of anticipatory bail, leave about the A.2 obtained regular bail is not a ground to grant anticipatory bail to A.1-the main perpetrator of the crime and in the larger interest of the society.

5. Heard both sides and perused the material on record.

6. There is no quarrel on the scope of the anticipatory bail for granting or refusal more particularly from the expression of the Apex Court in Siddaram supra and even from the decision of the Apex Court in Bhadresh supra where it is observed that the Court is not concerned with the feasibility of the framing of charge or merits thereof in considering the application of the grant of anticipatory bail as that would be a matter before the trial Court for arriving of a finding of the evidence and once charge is framed, the question for consideration by the Court an application for anticipatory bail at post-charges stage is

⁷ (2007) 7 SCC 413

⁸ (2016) 4 SCC 140

whether in the circumstances of the case, appellant is entitled to anticipatory bail or not. It was observed regarding the principles that the Court has to come to a conclusion from the verification of the FIR as to false or frivolous complaint or genuine including of investigative, fairness besides gravity of charge and role of accused in evaluating the facts of the case in exercising discretion to grant or refuse besides other criteria is not likelihood of absconding or not cooperating with the investigation but for that no special case need be made out for anticipatory bail but for imposing any necessary conditions, leave about power of the Court if at all to cancel whenever required any such concession of bail if granted and that thereby there are no other inflexible guidelines or straitjacket formula that can be provided for grant or refusal of anticipatory bail other than nature and gravity of the accusation and role of the accused and intensities of the accused and possibility of fleeing from justice or any possibility or likelihood of repeating the same or other crime so that balance be struck between free and fair investigation and personal liberty in taking care of any apprehension or threat to victim or possibility of interfering with the witnesses or tampering the evidence or material etc. There the facts are of the alleged rape occurred 17 years ago in 2001 and no charge so far framed and the charge u/ sec.376 is added only in the year 2013 and not earlier in saying entitlement to the concession of anticipatory bail with reference to it even the offence u/ sec.376 is added for further investigation more than 12 years after registration of the crime.

7. Now coming to the accusation against the petitioner with propensity of the crime concerned, the earlier dismissal order in Crl.P.No.4825 of 2018, dt.09.07.2018 in detail dealt with at paras-6 and 7. Now coming to the contentions in the present second anticipatory

bail application at para-2 what is mentioned as “*changed circumstances are evidenced from the fact that the Gandhi hospital stated that the evidence of sexual assault cannot be ruled out, but however the medical examination report for sexual assault dt.10.02.2018 (wrongly mentioned as 10.02.2012) states that ‘opinion reserved pending availability of reports of the sample sent.’*” It is in fact not a new material even. It is further averred the victim did not report to police but the defacto-complainant-cum-her mother. In this regard, a perusal of the Case Diary clearly shows the victim was even examined as a witness and her version corroborates to the contents of the report on material aspects at least if not, with more details. So far as the report of the occurrence in setting criminal law in motion concerned, there are no conventional protocols as held by the Constitution Bench of the Apex Court wayback in *R.S.Naik Vs. A.R.Anthuley*⁹.

8. So far as the legal position on the scope of Section 376 IPC including from the decision placed reliance concerned, no doubt, learned Single Judge of the Bombay High Court in *Akshay Manoj Jaisinghani supra*, on facts of the victim aged 21 years became a friend of accused and when he invited her for celebrations of his birthday, she attended along with friends and spent 2.5lakhs for gifting gold chain, mobile phone of Samsung Company, laptop, hair straitjacketner and clothes to him and he promised her to marry and when she went to his house later having promised her to marry, he had sexual intercourse and later took her to various hotels under said promise to marry and had sexual intercourse without her consent. He consumed liquor drugs at the time of sexual intercourse and when she informed about their relationship to the parents of the accused who did not react and later

⁹ AIR (1984) SC 718

she realised that she was pregnant out of sexual relationship with him and when she informed him so, he advised to go for termination and against her will, he administered her pills however it was not successful. Nearly one and half month later, he had forcible intercourse with her and later she went to Dubai to her parents where she had medical check up and found pregnancy was not terminated and she returned back to India and when contacted the accused he abused her and threatened saying she should not give any complaint against him to police. It was observed that a major and educated woman concerned, she is supposed to be fully aware of the consequences of having sexual intercourse with a man before marriage and consent obtained by fraud or inducement is one of the necessary ingredients in such an event to attract Section 376 IPC with some material to believe that she was induced by the accused. It was observed that sexual urge is a free decision of any major individual irrespective of gender and promise to marry cannot be a condition precedent to have sex, though behavioural pattern and psyche of Indian society to be taken into account in dealing with the issue and ultimately anticipatory bail was granted therein.

9. So far as Pradeep Kumar supra concerned, it was against dismissal of the discharge application by the trial Court and also by High Court with single line order without proper consideration when approached the Apex Court, it remitted the matter without expression of any opinion on merits for fresh consideration, where the charges framed were for the offences punishable under Sections 376 and 406 IPC. The Apex Court in fact referred Uday Vs. State of Karnataka¹⁰ and Deelip Singh supra. There, on facts, the observation was that the trial Court failed to note while framing charges u/ secs. 376 and 406 IPC, of

¹⁰ (2003) 4 SCC 46

the lady victim accepted that whatever physical relationship with the accused were there with her consent and she was married to the accused. That being so, the question of any offence punishable under Section 376 IPC does not arise was the observation in so remitting.

10. So far as the application of Section 375 and 376 IPC concerned, referring to the two earlier expressions supra, it was observed in Pradeep Kumar supra that though the crucial expression in Section 375 IPC defines 'rape' as 'against her will', the consent defined in section 90 IPC is not in positive terms but what cannot be regarded as consent is explained and it is firstly on the point of view of the victim and secondly on the point of view of accused and misconception of fact is one of the parameters of no consent. Where it envisages from the second part of Section 90 IPC of accused to have knowledge or reason to believe the consent of the victim was in consequences of fear or injury or misconception of fact.

11. With that by referring to Deelip Singh supra where at paras- 17 to 19, the Apex Court observed at page-99 of *consent u/ sec. 90 cannot be considered as exhaustive definition of consent for the purposes of IPC and the normal connotation and concept of consent is not intended to be excluded*. In Stroud's Judicial Dictionary it is defined consent as 'an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side'. Jowitt, while employing the same language added that consent supposes three things a physical power, a mental power and a free and serious use of them. Hence if the consent is obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence etc., it is to be treated as a delusion, and not as a deliberate and free act of the mind.

12. In Udaya supra, the Apex Court at page 53 para-12 observed as *'the Courts in India have by and large adopted these tests to discover whether the consent was voluntary or whether it was vitiated so as not to be a legal consent'* and the same was referred later in Deelip Singh supra and further observed in Deelip Singh supra that as held by Panjab High Court in Rao Harnarain Singh Sheoji Singh Vs. the State¹¹ on the expression of 'consent' in the context of Section 375IPC by Hon'ble Tec Chand J. at para-7 of difference between consent and submission and however consent involves submission but consent does not follow and the mere fact of submission does not involve consent thereby. The proposition is virtually repetition of what was stated by Coleridge J in R Vs Day¹².

13. It was also observed of mere fact of helpless resignation in the face of unfavourable compulsion, non-resistance and passive giving in, cannot be deemed to be consent. The 3JB of the Apex Court in Mangoram supra at para-13 at page 213 held that consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the consequences and merely quality of the act, but after having fully exercised the choice between the resistance to and assent, where there was consent or not, is to be ascertained only on careful study of relevant circumstances.

14. It also referred in Division Bench expression of Madras High Court in N. Jaladu, Re¹³. that misconception of fact is not a consent agreeing under Section 90 IPC in dealing with a kidnap case where the parents consent was taken under a false representation of taking the minor girl for a festival, however later the marriage was performed with

¹¹ 1958 CrI.L.J. 563

¹² (1841) 9 C&P 722

¹³ ILR(1913) 36 Mad 453

first accused by the second accused who had taken the girl, in saying there was no consent in observing misconception of fact is brought enough to include of cases where consent is obtained by misrepresentation, misrepresentation should be regarded as leading to misconception of the facts with reference to which the consent is given.

15. It also referred to the judgment of Bombay High Court where the view of the Madras High Court accepted, by Division Bench in Parshottam Mahadev Patharphod Vs. State of Maharashtra¹⁴ of consent given pursuant to a false representation that the accused intends to marry the victim could be regarded as consent given in misconception of fact and thereby no consent u/ sec.90 IPC within the meaning u/ sec.375IPC. It also referred the subsequent Calcutta High Court expression in Jayanti Rani Panda Vs. State¹⁵ on facts the victim alleged that the accused came to her house and had intercourse many a time allegedly kept in a secret with her parents as not believable of the alleged intercourse on the promise to marry, but for otherwise voluntary with consent.

16. It also referred a Chancery Court expression in Edgington Vs. fitzmaurice¹⁶ para-8 referred in Jayanti Rani Panda supra by Calcutta High Court that mis-statement of the intention of the defendant in doing a particular act may be mis-statement of fact, and if the plaintiff was misled by it, action of deceit may be founded in it. In Uday Supra all the case law was referred.

17. From that in Pradeep Kumar supra at para-27 in page 721 observed that a false promise does not come within the meaning of the

¹⁴ AIR 1963 Bombay 74

¹⁵ 1984 CrI.L.J. 1535

¹⁶ 1885 29 CHD 459

consent. Having inclined to agree with this view, but we must add that there is no straitjacket formula for determination whether consent given by the prosecutrix for sexual intercourse is voluntary or whether it is given in misconception of fact and the Court must in each case consider the evidence before it and the surrounding circumstances, before reaching any conclusion, because each case has its own peculiar facts which may have bearing on the question whether the consent was voluntary, or is given in misconception of fact.

18. Thus, from the expressions in Uday, Deelip Singh and Pradeep Kumar supra, each case depends upon own facts and misstatement or misrepresentation is even within the meaning of no consent to constitute the offence of rape.

19. Coming to the expression in Vinod Kumar Vs. State of Kerala¹⁷ what was observed on facts that *consequent sexual indulgement amounted to consensual sexual relationship for which accused cannot be held guilty for rape. If accused was honest or forthright and did not conceal anything, he cannot be convicted for rape.* It is clear from the above that in Vinod Kumar supra, neither new principle laid down nor the earlier principle of law explained or overruled.

20. Coming to the expression in Tilakraj supra, it was also a case where the trial Court acquitted the accused for the offences punishable of rape u/ sec.376 IPC besides the other offences charged u/ sec.417 and 506 IPC whereas the High Court in appeal by State, convicted for the offences u/ sec.417 and 506 IPC and the same when attacked before the Apex Court, the observations that were made therein in setting aside the High Court's reversal finding to the above extent, also with observations

¹⁷ (2014) 5 SCC 678

of double presumption after acquittal for not to interfere with acquittal unless there are findings of perversity in the trial Court's judgment. On facts, it was held that the age of the prosecutrix is 40 years and the accused is 10 years younger to her, that too, she is a Government servant and she was appointed as Protection Officer under the Protection of Women from Domestic violence Act, 2005 and she was in continuous relation with the accused since 2 years prior to the alleged incident that established the physical intimacy and her case on it is under a false pretext to marry. On analysis of the facts from the evidence on record her version proved false. Thereby the conclusions are on factual basis and there is no any new principle of law laid down nor the earlier expressions in this regard referred, including on the scope of Section 375 and 90 IPC.

21. Apart from the above, in the earlier order (CrI.P.No.4825 of 2018), the High Court answering the bail application of the petitioner, referred several expressions in para-12 of the order though not discussed in detail of those with reference to the facts in its saying from the FIR contents and the statement of the victim, it shows that the accused lured her with a promise to marry and enjoyed her sexually, but for that she could not even given consent from which it comes under the offence of rape under Section 375 IPC, for no free consent as contemplated by Sections 39 and 90 IPC as already observed on the scope of law by this Court in Bhumpaka Praveen Kumar Vs. State of Telangana¹⁸, Deelip, Mangoo Ram Supra, Deepak Gulati Vs. State of Haryana¹⁹, Yedla Srinivasa Rao Vs. State of A.P.²⁰, Pradeep Kumar

¹⁸ (2015) 2 ALT CrI. 239

¹⁹ 2013 3 ALT CrI.339 SCC

²⁰ 2007 1 ALT CrI.61SCC

supra and State of UP Vs. Noushad²¹. For that conclusion, the other expression of the Apex Court in Karti Vs.State²² also lends support by almost reiterating the principle laid down in Deelip Singh supra.

22. Having regard to the above, the petitioner is not entitled to the concession of anticipatory bail.

23. In the result, the Criminal Petition is dismissed. Consequently, miscellaneous petitions, if any, pending in this Criminal Petition shall stand closed.

Date:27.08.2018

Note: L.R.copy to be marked.
b/ o.vvr

Dr. B. SIVA SANKARA RAO, J



²¹ 2014 1 ALD CrI.634 SCC

²² 2013 12 SCC 710