HIGH COURT OF TRIPURA
AGARTALA

A.B No.131 of 2020

Shri Chiranjit Dey

.....Applicant(s)

Versus

The State of Tripura

.....Respondent(s)

BEFORE

HON'BLE MR. JUSTICE S.G CHATTOPADHYAY

For the Applicant(s) : Mr. S. Sarkar, Advocate.

For the Respondent(s) : Mr. R.Datta, PP.

O R D E R

17.12.2020

[**1**] This is an application under Section 438 of the Code of Criminal Procedure, 1973,(Cr.P.C herein after) for granting pre arrest bail to the petitioner who is an FIR named accused in Dharmanagar Women P.S Case No. 18 of 2020 under Sections 376, 313, 506 and 509 read with Section 34 of the Indian Penal Code(IPC in short).

[**2**] The genesis of the case is rooted in the complaint of the victim (name withheld) which was submitted by her in the court of the Chief Judicial Magistrate at Dharmanagar on 18.09.2020. In her said complaint, the victim alleged that she

used to work in a shop at Dharmanagar where she met the petitioner in 2018 who was also employed in the same shop. Gradually they developed a cordial relationship between them and in that connection they used to visit each other's home. On 15.01.2020 the petitioner met the victim at her home and in absence of the house inmates committed rape upon her. When the house inmates returned, she told everything to them. A meeting was then held in her house where the petitioner admitted his guilt and assured her that he would marry her. On such assurance of the petitioner the victim did not report the matter to police. Thereafter, they continued with their relationship. The victim also came to know that the petitioner was a married person and he was accused of committing murder of his wife. On 25th April, 2020 she went to the house of the petitioner and stayed there during night. During night the petitioner again raped the victim in his house. When the victim informed his mother about the occurrence she advised her not to report the matter to police because she was going to be their daughter in law within few days. After few days, the victim realized that she conceived owing to her physical relationship with the petitioner. The petitioner advised her for abortion. He bought some tablets for her. After the victim took those tablets for abortion, she

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felt unwell. She was then taken to Dharmanagar hospital on 19.07.2020 where her pregnancy was terminated. After that occurrence the petitioner refused to marry her. She again fell ill and got admitted in a hospital. The petitioner was constantly intimidating her to prevent her from filing any case against him. But she lodged the said complaint in the court of Chief Judicial Magistrate at Dharmanagar on 18.09.2020 which was forwarded to the jurisdictional police station for investigation and report.

[**3**] Based on the complaint, Dharmanagar Women P.S. case No.18 of 2020 under Sections 376,313,506 and 509 read with Section 34 IPC was registered against the petitioner, his mother and another and investigation was taken up.

[**4**] An application under Section 438 Cr.P.C. was then filed on behalf of the accused mother of the petitioner seeking her release on bail which was heard by this court on 10.11.2020 and after appreciation of the facts and circumstances of the case and the materials available in the case diary, she was released on bail on certain conditions.

[**5**] The petitioner who is the prime accused of this case then approached this court for pre-arrest bail under

Section 438, Cr.P.C. Pending submission of the case diary, interim protection was granted in favour of the petitioner vide order dated 03.12.2020 by way of directing that in the event of his arrest he would be released by the investigating officer on his furnishing bail bond of Rs.20,000/- with 2 sureties of the like amount to the satisfaction of the investigating officer subject to certain conditions. The order was made enforceable till 11.12.2020. On 11.12.2020 the investigating officer produced the case diary and the matter was finally heard. Since the order could not be passed on that day, the interim protection was extended till 17.12.2020 i.e. today.

[**6**] Heard Mr.S.Sarkar, learned counsel appearing for the petitioner and Mr.R.Datta, leanred Public Prosecutor representing the state respondent.

[**7**] Mr. Sarkar, learned counsel of the petitioner contends that the case of the victim is doubtful for many reasons. According to Mr.Sarkar there is inordinate delay in lodging the FIR. The occurrence allegedly took place on 15.01.2020 and after about 9 months FIR was lodged and there is no reasonable explanation for such delay in lodging the FIR. Further submission on defence is that admittedly they had love affairs and they used to visit each other's home

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and the last incidence allegedly occurred in the house of the petitioner where the victim had gone on her own volition to stay with him during night. It is contended by Mr. Sarkar that the victim is an adult woman and the physical relationship between them was consented. It is, therefore, submitted by Mr.Sarkar that even if the trial takes place in court, the charge of rape would not be maintainable in this case. In support of his contention, Mr.Sarkar has relied on the decision of the Apex Court in ***Udai Vs. State of Karnataka*** reported in ***AIR 2003 SC 1639*** wherein the Apex Court found that the prosecutrix willingly consented to having sexual intercourse with the accused not because he promised to marry her but because she also desired it. In these circumstances the court found it difficult to impute to the appellant the knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise and acquitted the appellant from the charge of rape. According to Mr. Sarkar, learned counsel, the decision is squarely applicable in the instant case and for this reason charge of rape does not survive against him. Mr.Sarkar, learned counsel of the petitioner, has also relied on the decision of the Apex Court in ***Deepak Gulati vs. State of Haryana*** reported in ***AIR 2013 SC 2071*** wherein the Apex

Court held that consensual sex under promise to marry constitutes rape only if from the initial stage accused had no intention to keep such promise. According to learned counsel, in view of the ratio decided in ***Deepak Gulati***, the petitioner deserves bail in case. Under the said grounds learned counsel urges for granting pre-arrest bail to the petitioner.

[**8**] Mr. Ratan Datta, learned PP has vehemently opposed the bail application. It is submitted by Mr.Datta, learned PP that the petitioner took advantage of the helplessness of the victim and made physical relationship with her on false assurance of marriage and when she conceived, he retreated from his assurance. Further submission on the prosecution is that the past record of the accused does not also entitle him to the benefit of Section 438 Cr.P.C because he is accused of killing his own wife and a case is pending against him on this charge. Mr. Datta further contends that there are adequate incriminating materials available against the accused in the case diary and therefore, his release on bail at this stage will seriously impair the progress of the investigation. Further submission of the prosecution is that consensual sex on false promise of marriage by the accused amounts to consent on misconception of fact which constitutes rape and accused

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cannot be excused in such case. In support of his contention Mr.Datta, learned PP has referred to the decision of the Apex Court in ***Anurag Soni vs. State of Chattisgarh*** reported in ***AIR 2019 SC 1857***. According to Mr. Datta, the materials available on record clearly indicate that the victim consented to the sexual intercourse with the petitioner on misconception of fact resulting from the assurance of marriage given by the petitioner. In such circumstance the accused cannot get rid of the charge of rape. Learned PP argues that two cases including the present case on serious charges entailing severe punishment are pending against the accused and there is every possibility of his jumping bail. Learned counsel, therefore, opposes the bail application.

[**9**] The petitioner in this case is accused of a non bailable offence and the victim has charged him with serious allegations of cheating and rape. It is admitted by the petitioner that he had physical relationship with the victim. But according to him such physical relationship was a consensual relationship between the parties and there was no application of force from his side nor it was done against the consent of the victim. The contentions raised by learned counsel of the petitioner are intricate questions of law and

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fact which can be decided during trial only. It is a settled proposition of law that the power exercisable under Section 438 Cr.P.C. is extra ordinary in character which can be exercised only in exceptional cases. In this regard the Apex Court had succinctly held in ***Adri Dharan Das*** reported in ***(2005) 4 SCC 303*** that ***the power exercisable under Section 438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty, then power is to be exercised under Section 438.***

[**10**] The relevant considerations for grant of anticipatory bail are the nature and seriousness of the accusation, punishment prescribed for such offence, reasonable possibility of the applicant's presence not being secured at the trial, reasonable apprehension of tampering with the witnesses, past records of the accused and the larger public interest. In ***Adri Dharan Das***(supra) the Apex Court further held that arrest is a part of the process of investigation and the court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused

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in a cognizable offence. In para.19 of the judgment observations of the Apex Court in this regard is as follows:

> ***"19. Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well defined and the jurisdictional scope of interference by the court in the process of investigation is limited. The court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence……."***

[**11**] As noted, antecedent of the applicant is one of the prime considerations before the court while exercising power under Section 438 Cr.P.C. While opposing the bail application, the learned Public Prosecutor with reference to the case diary has robustly argued that the petitioner is an accused in another case where he has been charged with Section 304B IPC. The case diary supports the contentions of the learned public prosecutor. It has surfaced from the case diary that the

petitioner and his mother have been charged with the offence punishable under Section 304B read with Section 34 IPC in Dharmanagar Women P.S. case No.2017WDN023 which is pending for trial. Police reports also indicate that the petitioner is very likely to flee away from the jurisdiction of the court to get rid of the trial of these cases pending against him.

[**12**] Anticipatory Bail is, in fact, granted with the limited purpose of giving protection to a person against unnecessary harassment by arrest in appropriate cases where the available materials do not prima facie support the charge against the accused. In the present case the victim is a woman who has brought serious allegations of cheating and rape against the petitioner and the materials available on record prima facie support the charges. Moreover, it has also surfaced that there is another case pending against the petitioner in which he is the prime accused charged under Section 304B IPC. In such circumstances, it would not be appropriate to provide the benefit of custodial immunity in terms of Section 438 Cr.P.C. in favour of the petitioner by way of granting pre-arrest bail to him.

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[**13**] Resultantly, his application for grant of bail under Section 438 Cr.P.C stands rejected.

[**14**] It is clarified that the above observations are made for the limited purpose of deciding this bail application. None of the observations made in this order shall be treated as observations as to the merit of the case and such observations will have no bearing on any bail application at any stage and/or on the trial of the case.

[**15**] With these observations this application stands disposed of. Interim order(s), if any, stands vacated.

Return the CD at once.

JUDGE

Saikat Sarma

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