

\$~13

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

+ BAIL APPL 1803/2020

PAWAN KUMAR

..... Petitioner

Through: Mr.Dalip Kumar Santoshi, Advocate.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Dr.M.P.Singh, APP for State along
with IO SI Shiv Singh
(M-9540453470), P.S. Neb Sarai
Delhi.

Mr.Rahul Garg, Advocate for the
complainant along with the
complainant/prosecutrix in person.

CORAM:

**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI
(VIA VIDEO CONFERENCING)**

ORDER

%

17.08.2020

1. The present bail application has been filed on behalf of the petitioner seeking regular bail in FIR No.358/2019, registered under Section 376 IPC at Police Station Neb Sarai, Delhi.
2. Learned counsel for the petitioner submits that the petitioner as well as the prosecutrix are aged about 27 years and 25 years respectively. About 4 months prior to lodging of the FIR, the prosecutrix met the petitioner through Facebook after which relations developed between them. He has referred to various joint photographs in this regard.
3. He submits that the petitioner is falsely implicated as both the prosecutrix and the petitioner entered into physical relationship with their

own will and consent. He has referred to the statement of the prosecutrix recorded under Section 164 Cr.P.C wherein she has stated that she was called by the petitioner to a hotel in Noida where physical relations were made on the promise of marriage. She has specifically stated that the physical relations were made with her consent. As per the allegations, the physical relations were again established with the consent of both the parties at the petitioner's house and the hotel room. On 30.09.2019, the prosecutrix was again called by the petitioner to an OYO room booked by him. She informed him that she was not having her periods and the petitioner promised to talk to his mother. The petitioner went to Himachal Pradesh with his sister and thereafter, avoided the prosecutrix. The petitioner told the prosecutrix that he wanted to marry another girl. She asked the petitioner to meet but he refused and blocked the prosecutrix on his phone. The prosecutrix told her mother about the entire facts after which her family members went and met the petitioner's family however, they were asked to leave. On 17.10.2019, on petitioner's asking, the prosecutrix went to meet him in the hotel room where physical relations were made against her will.

4. It is also submitted that initially, the prosecutrix was working in a SPA. On petitioner's advice, she got a new job in Jor Bagh, Delhi and it is the petitioner who used to take the prosecutrix on his scooty.

5. So far as allegations of false promise of marriage is concerned, it has been submitted that the prosecutrix herself stated that the petitioner had asked for a time period of 1 year to get married as being the sole bread earner, he wanted his younger sister to get married first.

6. Lastly, it was submitted that the petitioner is in judicial custody since 19.03.2020 and since the charge-sheet in the present case has been filed, the

petitioner is no more required for the purpose of investigation.

7. Dr. M.P. Singh, learned APP for the State, duly assisted by the learned counsel for the complainant, has vehemently opposed the bail application. It is submitted that the physical relations were entered into on the promise of marriage given by the petitioner. It is also submitted that during the investigation, the fact of the petitioner's visit to the hotel in Noida on the alleged date of incident has been verified. On instructions, it has been submitted that although allegation of pregnancy and abortion have been levelled but the same could not be substantiated as oral pills were stated to be used.

8. I have heard the learned counsel for the petitioner as also the learned APP for the State, duly assisted by the learned counsel for the complainant.

9. In Pramod Suryabhan Pawar v. State of Maharashtra and Another reported as **2019 9 SCC 608**, the Supreme Court made the following observations:

"12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action.....

xxx

xxx

xxx

16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations,

there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act....

xxx

xxx

xxx

18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act.

xxx

xxx

xxx

21. The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The Appellant's failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in

the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellant's promise of marriage. Therefore, even if the facts set out in the complainant's statements are accepted in totality, no offence under Section 375 of the Indian Penal Code has occurred."

10. The petitioner as well the prosecutrix are mature adults and both are stated to be aged about 27/25 years. The physical relations were established on number of occasions spread over many months. They were made even after the petitioner had shown his reluctance to marry the prosecutrix. At one stage, the prosecutrix in her statement recorded under Section 164 Cr.P.C. had stated that the physical relations were made with her consent.

11. Keeping in view the totality of the facts and circumstances and the fact that both the petitioner and the prosecutrix are majors and the charge-sheet has been filed, the application is allowed and the petitioner is admitted to bail, on his furnishing a personal bond in the sum of Rs.50,000/- with one surety of the like amount to the satisfaction of the concerned Jail Superintendent/Duty M.M. and subject to the following further conditions:-

- (i) The petitioner shall not leave the NCT of Delhi without prior permission of the concerned Court.
- (ii) The petitioner shall remain in touch with the IO SI *Shiv Singh*, P.S.

Neb Sarai on his mobile number: 9540453470 or the SHO, P.S. Neb Sarai on his mobile number: 8750870835 on the first Monday of every month.

(iii) The petitioner shall remain available on his mobile number: 9599678281, which he undertakes to keep operational at all times during the period of trial.

(iv) In case of change of address or contact details, the petitioner shall promptly bring it to the notice of the IO and the concerned Court.

(v) The petitioner shall regularly appear before the Trial Court.

(vi) The petitioner shall not directly or indirectly get in touch with the prosecutrix or the prosecution witnesses and shall not make any effort to tamper with the evidence.

12. The application stands disposed of accordingly.

13. A copy of this order be communicated to the concerned Jail Superintendent.

14. Nothing stated herein above shall be construed as an expression on the merits of the case. The observations are only *prima facie* and have been made to dispose of the present bail application.

MANOJ KUMAR OHRI, J

AUGUST 17, 2020

‘dc’