

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

Date of decision: 01st JUNE, 2021

IN THE MATTER OF:

+ **BAIL APPLN. 539/2021 & CRL.M. (BAIL) 170/2021**

DIVAKAR CHOUDHARY ... Petitioner
Through Ms. Tanya Agarwal and Mr. Kamlesh
Kumar Mishra, Advocates
versus

STATE OF NCT OF DELHI Respondent
Through Ms. Kusum Dhalla, APP for the State
Ms. Rakhi Dubey, Advocate for the
complainant

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This petition under Section 438 Cr.P.C is for grant of bail to the petitioner in the event of arrest in FIR No. 836/2020 dated 17.12.2020, registered at Police Station Samaypur Badli, Delhi for offences under Sections 376/323/509/34 IPC.

2. The FIR has been registered on the following averments made by the prosecutrix:

a) It is stated by the prosecutrix that she was introduced to the petitioner herein in May, 2017 by her aunt and since then they were friends. It is alleged that the petitioner used to call the prosecutrix and they used to meet like normal friends. It is stated that one day in October, 2018 the petitioner called the prosecutrix to Karol Bagh,

outside his office and proposed marriage to her but she refused. It is stated that despite refusal, the prosecutrix and the petitioner used to talk regularly on phone. It is stated that during this period the petitioner told the prosecutrix that if she does not marry him, he will die. It is stated that fearing that the petitioner might kill himself the prosecutrix gave her consent to marry to the petitioner. It is stated in the complaint that on 13.04.2019, the petitioner called the prosecutrix to a Shiv temple at Siraspur by telling her that he intends to marry her. It is alleged that when the prosecutrix reached the temple there was no priest and no arrangement was made by the petitioner for the marriage. It is stated that at the temple the petitioner put vermilion on the forehead of the prosecutrix and told her that they have got married. It is stated that when the prosecutrix questioned the petitioner about the so-called marriage the petitioner told her that marriages in temples are conducted in this fashion only. It is stated that the prosecutrix took photographs of both of them but later the petitioner deleted the photographs from the phone of the prosecutrix stating that if somebody sees these photographs they would be in trouble. It is stated that the petitioner tried to establish physical relationship with the prosecutrix which she refused and despite her refusal the petitioner established physical relations with her stating that she is his wife now and it is his right to have physical relations with her. It is alleged in the complaint that the petitioner established physical relationship with the prosecutrix several times till February,

2020. It is alleged that in March, 2020 the prosecutrix asked the petitioner as to for how long will they meet like this, without the knowledge of their family members, and she asked the petitioner to tell everyone in his family about their relationship. It is stated that the petitioner refused to tell his parents about their relationship and stated that he did not have any relations with the prosecutrix and he also denied the factum of their marriage and the fact that there was any physical relationship between them. It is stated that in April, 2020 the prosecutrix revealed their relationship to the petitioner's family members and the petitioner's parents assured the prosecutrix that they will get them married but later on the parents of the petitioner and the petitioner went back on their words. It is stated that when the prosecutrix told the petitioner that she would register a case of rape against him if he did not marry her; she was again assured that the petitioner will marry her by 14.08.2020. It is stated that the petitioner started avoiding the prosecutrix and did not get married to her on 14.08.2020. It is further alleged that the petitioner started threatening the prosecutrix that he would implicate her in a false case. It is stated that the prosecutrix established physical relations with the petitioner herein because he promised to marry her. It is stated that the prosecutrix had not registered a case against the petitioner earlier because her parents dissuaded her from filing a complaint fearing social repercussions. It is further stated that since the petitioner has

now completely gone back on his promise to marry the prosecutrix, she is filing the instant complaint.

b) Apprehending arrest the petitioner filed an application for anticipatory bail under Section 438 Cr.P.C, being Bail Application No.444/2020, before the Additional Session Judge, North Rohini Courts, which was dismissed by an order dated 22.12.2020.

c) The petitioner filed another application for anticipatory bail under Section 438 Cr.P.C, being Bail Application No.217 /2021, which was also dismissed by an order dated 01.02.2021 by the learned Additional Session Judge, Rohini Courts, Delhi.

d) Thereafter the petitioner has filed the instant application for grant of bail under Section 438 Cr.P.C.

3. Ms. Tanya Agarwal, learned counsel for the petitioner contends that the prosecutrix has alleged that the petitioner established physical relations with her till February, 2020 but the FIR was lodged in December, 2020. The prosecutrix has not given any reason for the delay but for the saying that her parents were not supporting her. The learned counsel for the petitioner also draws the attention of this Court to a Facebook post of the prosecutrix, dated 13.04.2018, wherein she has posted “*Got Married*” whereas in the FIR it is stated by the prosecutrix that the alleged marriage took place on 13.04.2019. It is further argued by the learned counsel for the petitioner that the FIR itself shows that the prosecutrix had refused to marry the petitioner when the petitioner proposed her in October, 2018 and yet there is a Facebook post dated 13.04.2018, that the prosecutrix got married. The learned counsel for

the petitioner, therefore, states that there is a serious inconsistency in the statement of the prosecutrix inasmuch as in a Facebook post the prosecutrix states that she got married on 13.04.2018 while in her complaint she has stated that the marriage took place on 13.04.2019. The learned counsel for the petitioner states that the petitioner worked as a Sales Associate at "Westside" Karol Bagh from 08.10.2017 till 16.07.2020. On the date of alleged marriage i.e. 13.04.2019, the petitioner was in his office and he has also sought for a report from the office of Westside to demonstrate that on 13.04.2019 he was present in the office. It is further contended that the prosecutrix is a graduate and is from Delhi and she is not a rustic or naive lady. The learned counsel for the petitioner contends that a reading of the FIR would show that the prosecutrix knew very well that just putting vermilion on the forehead does not amount to marriage. It is therefore contended by the learned counsel for the petitioner that this itself demonstrate that there was no misconception of fact and even if physical relationship was established between the petitioner and the prosecutrix, it was due to her own free will. The learned counsel for the petitioner further contends that the prosecutrix threatened the petitioner that she will file a criminal case against him if he does not marry her by August, 2020. It is further contended by the learned counsel for the petitioner that the petitioner filed an application under Section 156 (3) Cr.P.C for direction to the police to register a case against the prosecutrix contending that the prosecutrix is harassing him and threatening to file a case of rape against him. She further contends that only after the petitioner filed this complaint against the

prosecutrix has the prosecutrix filed the present FIR against the petitioner and therefore the FIR is only for the purpose of harassing the petitioner and put pressure on the petitioner to accede to the demands of the prosecutrix. The learned counsel for the petitioner states that the petitioner has joined investigation and has handed over his phone to the Police. She contends that there is no need for any custodial interrogation because nothing remains to be recovered from him. It is also contended by the learned counsel for the petitioner that the petitioner has roots in the society and he will not flee from justice. The learned counsel for the petitioner places reliance on a judgment of this Court dated 29.07.2010 in **CRL.M.C No.3877/2009** titled as Harish Kumar v. State, wherein in similar circumstances FIR has been quashed by this Court. Reliance has also been placed on order dated 20.08.2020, passed by this Court in **BAIL APPLN.1700/2020**, titled as Pushp Raj Yadav v. State, wherein this Court in similar circumstances has granted anticipatory bail to the petitioner therein.

4. Ms. Rakhi Dubey, learned counsel for the prosecutrix contends that the very fact that the petitioner put vermilion on the forehead of the prosecutrix shows a positive commitment from him towards the marriage and the petitioner and the prosecutrix had physical relationship between April, 2019 to February, 2020 because of the promise to marry and once that promise was broken the prosecutrix tried her level best to ensure that the petitioner marries her and approaching Police was the only last resort. It is contended that the prosecutrix filed a complaint dated 25.05.2020 stating that the prosecutrix and the petitioner had physical relations between them

and their families have agreed to get them married by August, 2020 and if the petitioner and his parents went back on their promise then action should be taken against them. The learned counsel for the prosecutrix strenuously contends that the petitioner belongs to a conservative family and that she did not lodge an FIR earlier only because her parents have been dissuading her from doing so, fearing social repercussions.

5. Ms. Kusum Dhalla, learned APP for the State contends that after filing of the FIR the petitioner did not join investigation and he joined the investigation only after this Court granted protection to him. It is further stated that the prosecutrix has stated that the phone which was handed over by the petitioner was not the phone which was used for taking photographs of the alleged fake marriage. However, the Status Report states that even the phone submitted by the prosecutrix does not contain the photo of the alleged fake marriage. It is stated that the phones have been sent to the FSL. It is contended by Ms. Kusum Dhalla, learned APP for the State, that the allegations in the FIR are of very serious nature and the investigation is at a nascent stage. It is stated that the custodial interrogation of the petitioner is required to unearth the truth, to recover the deleted photographs of the false marriage and therefore the petitioner ought not to be granted anticipatory bail.

6. After arguments the matter was posted for orders on 13.05.2021. On 10.05.2021, Ms. Tanya Aggarwal, learned counsel for the petitioner filed written submission on behalf of the petitioner. On 13.05.2021, Ms. Rakhi Dubey, learned counsel for the prosecutrix stated that she has not received a

copy of the written submission, the learned counsel for the petitioner was directed to supply a copy of the written submission to the counsel for the prosecutrix and the matter was adjourned to 17.05.2021. On 17.05.2021, learned counsel for the prosecutrix stated that she also wants to file a reply to the written submission filed by the petitioner. In her reply Ms. Rakhi Dubey, learned counsel for the prosecutrix submitted that the petitioner had emotionally blackmailed the complainant and created a drama of performing marriage with the complainant in the temple and made her believe that the petitioner is her husband and he forcefully established physical relations with her. It is also contended by Ms. Rakhi Dubey that the Facebook account of the complainant was hacked in March-April, 2020 and the complainant has not been able to access her Facebook account. Ms. Rakhi Dubey places reliance on the judgment dated 09.04.2019 of the Supreme Court in **CRIMINAL APPEAL No. 629/2019** titled Anurag Soni v. The State Of Chhattisgarh. Reliance has also been placed on a judgment passed by this Court in **Bail Application No.501/2019** titled Varun Kumar v. State of Delhi. It is stated by the learned counsel for the prosecutrix that physical relations were established by the petitioner on the false pretext of marriage and, but for the marriage, the complainant would never have consented to have sexual relations with the petitioner herein.

7. Heard Ms. Tanya Aggarwal, learned counsel appearing for the petitioner, Ms. Rakhi Dubey, learned counsel appearing for the prosecutrix and Ms. Kusum Dhalla, learned APP appearing for the State and perused the material on record.

8. The parameters for granting anticipatory bail have been succinctly laid down in Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694, wherein the Supreme Court has observed as under:

“112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of

Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

113. *Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.*

114. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualise all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the Judge concerned, after consideration of the entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the Judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the Court of Session or the High Court is always available.”

(emphasis supplied)

9. The prosecutrix is a graduate and she herself stated that there was no proper marriage. The prosecutrix stated in the FIR that she took photographs on her phone at the time of the marriage but the petitioner deleted the photographs. The phone of the prosecutrix had been sent to the FSL. The FIR does not state that the petitioner took any photographs from his phone. In view of this, the objection of the prosecutrix and the State that custodial interrogation of the petitioner is required to retrieve the phone from which the petitioner took photographs of the alleged fake marriage cannot be accepted because other than the mere *ipse dixit* there is nothing to show that the petitioner had any other phone at the time of the alleged fake marriage. On the mere *ipse dixit* that the petitioner put vermilion on the forehead of

the prosecutrix without there being anything to establish this fact that such an incident had taken place the petitioner cannot be denied protection under Section 438 Cr.P.C. The contention of the learned counsel for the prosecutrix that the Facebook account of the prosecutrix was hacked and that she had not posed anything in April, 2018 regarding her marriage is not believable. This argument is only an afterthought, after this Court had asked the counsel for the prosecutrix regarding the Facebook post. The reliance placed by Ms. Rakhi Dubey on the judgment of Supreme Court in Anurag Soni (supra) is not relevant for the present case because in that case the Supreme Court was dealing with an appeal which was passed after the accused therein had been convicted. In the present case the petitioner has joined investigation on several occasions. He has given his mobile phone to the Police and, as stated earlier, the FIR also does not record that the petitioner took any photographs on his mobile, the question of his having any other mobile other than what has been given to the Police cannot be accepted. Nothing else is stated in the Status Report as to what other things are to be recovered from the petitioner. No doubt the offence against the petitioner is extremely serious but the questions as to whether there was a promise to marry? Whether the petitioner put vermilion on the forehead of the prosecutrix? Whether the petitioner's parents had agreed for the marriage or not? Whether the prosecutrix believed that she and the accused had in fact married? Whether the prosecutrix, who is a graduate, had no reasons to believe that she had married the petitioner? Whether the petitioner had any intention not to marry the prosecutrix right from the beginning i.e.

before establishing physical relationship? These are all matters which can only be decided in trial. The case of the prosecutrix that the consent for physical relationship was given only because of a commitment by the petitioner that he would marry her and that that promise was fake right from the beginning can only be established when the prosecutrix steps into the witness box and leads evidence.

10. The petitioner herein has no criminal antecedents. Investigation in the matter is more or less complete, statements of the parents of the prosecutrix and the parents of the petitioner have been recorded under Section 161 Cr.P.C. Mobile phone of the prosecutrix and the petitioner are already in the custody of the Police. Nothing is left to be recovered from the petitioner therefore no purpose would be served in taking the petitioner in custody.

11. Taking into account the facts and circumstances of this case, this Court is inclined to grant anticipatory bail to the petitioner on the following conditions:

- a) The petitioner shall furnish a personal bond in the sum of Rs.50,000/- with two sureties of the like amount out of which one of them should be the relative of the petitioner, to the satisfaction of the Trial Court.
- b) The petitioner is directed not to leave NCT of Delhi without prior permission of the Court.
- c) The petitioner shall join investigation as and when called for.
- d) The petitioner is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.

e) The petitioner shall give his address to the IO and if he changes the address he shall intimate the same to the IO.

f) The petitioner shall not, directly or indirectly, contact or pressurize the prosecutrix, her family members or any other witness. In case any complaint is received from the prosecutrix that the petitioner is trying to contact her and trying to put pressure on her then the protection granted by this Court shall stand cancelled.

6. It is made clear and needless to state that the observations made in this order are only for the purpose of grant of bail and not on the merits of the case.

7. Accordingly, the bail application is disposed of along with the pending application with the abovementioned observations.

SUBRAMONIUM PRASAD, J.

JUNE 01, 2021

Rahul