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

Date of decision: 22.12.2022

+ **BAIL APPLN. 3658/2022**

VIKAS UPPAL

..... Petitioner

Through: Mr Karan Sachdeva, Mr Sanjay
Sharma and Ms Richa Sharma, Advs.

versus

THE STATE NCT OF DELHI & ANR.

..... Respondents

Through: Mr Ajay Vikram Singh, APP for State
SI Deepali, PS-DBG Road
Mr D.M. Bhalla and Mr S.K.Bhalla,
Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is an application seeking anticipatory bail in FIR No. 627/2022 dated 27.09.2022, under Sections 354/376/506/509 IPC and Sections 6/10/12 POCSO Act, registered at Police Station-DBG Road.
2. Mr Sachdeva, learned counsel for the applicant states that in the present case, the FIR is vindictive and is only registered in view of the fact

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that the applicant and his wife are having strained matrimonial relationship and divorce proceedings are going on. The complainant has been very close to her mother and at her behest, the allegations have been levelled against the applicant. Mr Sachdeva further states that in the present case, the bar of 438 (4) Cr.P.C will not be applicable as the allegations of the offence are stated to have happened in the year 2017 and, the FIR has been filed in the year 2022. The amendment in Cr.P.C is of the year April, 2018 where 438(4) Cr.P.C has been included. Mr Sachdeva also states that the complainant had made earlier complaint to the police wherein there was no allegation under Section 376(3) IPC against the applicant..

3. Per contra, Mr D.M. Bhalla, learned counsel appearing for the complainant has opposed the application on the grounds that on the date of the alleged crime, the complainant was 15 years old. The applicant is her biological father. In addition, he states that the bar of Section 438(4) Cr.P.C is retrospective as it is only substantive law which will be prospective and all procedural laws are retrospective.

4. I have heard learned counsel for the parties.

5. The first question which arises is whether there is a bar under Section 438(4) Cr.P.C for filing an anticipatory bail application by virtue of the 2018 amendment? Section 438(4) Cr.P.C reads as under:-

“438. Direction for grant of bail to person apprehending arrest:-

(1)

(2)

(3)

(4) *Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code.*”

6. According to me, Section 376(3) IPC is a penal provision and cannot be retrospective in nature. Section 376(3) IPC was added in the statute books by way of the criminal law (Amendment) Act, 2018. The offence was committed in the year 2017 and in that year Section 376(3) IPC did not exist in the statute books. An accused cannot be charged for an offence which was subsequently added by way of an amendment.

7. Mr Sachdeva has rightly relied upon judgment of High Court of Telangana passed in Writ Appeal No. 1240 of 2018 titled ***‘The Commissioner of Prohibition and Excise v. M.Gajananad and Ors.’*** decided on 24.03.2022 and more particularly para 11 which reads as under:

“11. Hon’ble Sri Justice G.P.Singh in the Principles of Statutory Interpretation, 12th Edition 2010, page 545 under the heading “Penal Statutes” has observed as under:-

“(f) Penal Statutes

Penal statutes which create offences or which have the effect of increasing penalties for existing offences will only be prospective by reason of the constitutional restriction imposed by Article 20 of the Constitution. Even otherwise they are construed prospective “because it manifestly shocks one’s sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment.” Therefore, if an Act creates a new offence it will bring into its fold only those offenders who commit all ingredients of the offence after the Act comes into operation. The same principle has been applied while dealing with a law which affects the power of grant of pardon or remission. Section 433A of the Code of Criminal Procedure, 1973 which requires that where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments, such person shall not be released from prison unless he had served at least fourteen years of imprisonment, has been held to be applicable to sentences imposed after the coming into force of the section and not to person convicted before its coming force. Similar principle has been applied to cases where an offence compoundable when committed was later made non-compoundable. Offence of voluntarily causing hurt by

dangerous weapons punishable under Section 324 of the Penal Code was compoundable with the permission of the court before 23-5-2006 when it was made noncompoundable by Code of Criminal Procedure (Amendment) Act, 2005. In construing this amendment it was held by the Supreme Court that an offence committed before 23-6-2006 could yet be compounded with the permission of the court and the accused acquitted.⁵”

8. When Section 376(3) IPC was not an offence in the year when it is alleged to have been committed i.e. in the year 2017, there cannot be a bar under Section 438(4) Cr.P.C for filing the anticipatory bail. The present petition is thus maintainable.

9. The second question which arises for determination is whether the Applicant is entitled to bail?

10. In the present case, the allegations are against the father of the prosecutrix alleging him having committed rape against her when she was 15 years old.

11. The prosecutrix could not gather enough courage to report the incident and it is only now that she has done so.

12. The FIR has been registered under Sections 354/376/506/509 IPC and under Sections 6/10/12 of the POCSO Act. The allegations are of an extremely serious nature, the applicant is the father of the prosecutrix, the charges in the present case are yet to be framed and the fact of the applicant

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exerting pressure, influence and coercion on the prosecutrix cannot be ruled out. There is also reasonable apprehension of the applicant tampering with the witnesses and extending threats to the prosecutrix. In this view of the matter, I am not inclined to entertain the present anticipatory bail application.

13. For the aforesaid reasons, the present application is dismissed.

14. The reply is taken on record.

DECEMBER 22, 2022

sr

JASMEET SINGH, J

[Click here to check corrigendum, if any](#)

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