



\$~2

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

Pronounced on: 12.07.2023

+ **BAIL APPLN. 2125/2023**

KANWAR NITISH ALIAS NITISH KANWAR Petitioner
Through: Mr. Rahul Sharma and Mr.
Kshitij Goel, Advs.

versus

STATE OF NCT OF DELHI Respondent
Through: Mr. Amit Sahni, APP for the
State with SI Jyoti, Police
Station Mehrauli.
Mr. Sanjiv Sharma, Adv. for
complainant along with
complainant in person.

CORAM:
HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

CRL.M.A. 16718/2023(exemption)

1. Allowed, subject to all just exceptions.
2. Application stands disposed of.

BAIL APPLN. 2125/2023 & CRL.M.A. 16719/2023(interim protection)

3. This is an application filed under Section 438 CrPC seeking anticipatory bail in FIR No.290/2023 registered under Sections 376



IPC and Section 4 of Dowry Prohibition Act, 1961 registered at Police Station Mehrauli.

4. The allegations as borne out from the FIR are that pursuant to the proposal of marriage made by the petitioner's family, the prosecutrix met the mother of the petitioner on 28.01.2023. After matching of the horoscopes, the date of engagement was fixed on 15.04.2023. The function of engagement was attended by about 200 relatives from both sides.

5. On 19.04.2023, the petitioner and his relatives took prosecutrix to Mehndipur Balaji for overnight stay where on the assurance of marriage, the petitioner established sexual relations with the prosecutrix. Thereafter, on 22.04.2023, the mother of the prosecutrix spoke to the grandmother of the petitioner and the marriage of the petitioner with the prosecutrix was fixed on 09.12.2023.

6. In the meanwhile, on 05.05.2023, the petitioner came to attend the birthday party of younger brother of the prosecutrix at about 06:00 p.m. He was already drunk and he forcibly established physical relations with the prosecutrix after taking the prosecutrix to her room. Since the petitioner was heavily drunk, the prosecutrix, her brother and sister-in-law (brother's fiancée) went to drop him. While the brother of the prosecutrix was driving and his fiancée was sitting by his side, the petitioner again had sexual relations with the prosecutrix asking her brother to look ahead. Later, on 20.05.2023 the petitioner by sending a message called off the engagement.

7. Subsequently, the prosecutrix made a complaint on 22.05.2023 before the CAW Cell, Saket. Thereafter, the petitioner through his



counsel issued a legal notice to the prosecutrix on 25.05.2023 stating the reasons to call off the engagement and proposing to return/exchange the gifts presented by two families to each other.

8. Sequel to above, a complaint dated 06.06.2023 was made by the prosecutrix on the basis of which FIR in question was registered on 07.06.2023.

9. The learned counsel for the petitioner submits that the incident of 05.05.2023 alleged in the FIR that the petitioner made physical relations with the prosecutrix on the backseat of the car while her brother was driving the said car, is not even mentioned in the complaint made by the prosecutrix to CAW Cell on 22.05.2023, besides the same being implausible.

10. He submits that the complaint was made by the prosecutrix on 22.05.2023 only after the message was sent by the petitioner on 20.05.2023 expressing that it will not be possible to continue the relationship as the petitioner strongly thinks that the prosecutrix won't be able to adjust in his family.

11. He submits that in response to the message sent by the petitioner on 20.05.2023, the prosecutrix never stated that the petitioner has spoiled her life. Rather, the uncle of the prosecutrix sent a threatening message - "*wait and watch...??*"

12. He further submits that the last incident of making physical relations by the petitioner with the prosecutrix is of 05.05.2023 which is highly improbable and the other incident alleged is of 19.04.2023. The prosecutrix was medically examined only on 07.06.2023. Therefore, even presuming the allegations to be correct, the alleged



mark opined by Doctor in the MLC to be a bite mark on the chest and breast of the prosecutrix could not be taken as a bite mark since the bite mark could not have remained intact and visible almost two months after the alleged incident.

13. He further submits that the family of the petitioner as well as that of the prosecutrix, were involved in finalizing the alliance and fixing their engagement. The function of engagement was performed at Lilywhite Hotel, Chattarpur, Delhi, which was attended by the relatives of both sides. The date of marriage was also fixed. Therefore, it cannot be said that the petitioner made any false promise of marriage.

14. He also relies upon the decision of the Hon'ble Supreme Court in ***"Pramod Suryabhan Pawar vs. State of Maharashtra and Anr."*** (2019) 9 SCC 608, more particularly paragraphs 14, 16 and 18 of the aforesaid decision, which reads as under:-

"14. In the present case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled.....

XXXX

XXXX

XXXX

XXXX

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.....

XXXX

XXXX

XXXX

XXXX

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.

15. The learned counsel for the petitioner also refers to paragraph 24 of the decision of Hon’ble Supreme Court in **“Deepak Gulati vs. State of Haryana”** (2013) 7 SCC 675, which has also been referred to in Pramod Suryabhan Pawar (*supra*). The said paragraph 24 reads thus:

“...24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The “failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term “misconception of fact”, the fact must have an immediate relevance”. Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the



other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.”...

16. He further submits that the petitioner has cooperated with the investigation during the time he was granted interim protection by the Court of Additional Sessions Judge and has already handed over his mobile phone to the IO. He further submits that the petitioner undertakes to join further investigation as and when required by the IO.

17. *Per contra*, Mr. Amit Sahni, learned APP for the State submits that the prosecutrix was medically examined and perusal of the MLC shows that the prosecutrix had bite mark on her chest and breast.

18. Mr. Sahni, further submits that even if the complaint made to the CAW Cell did not mention the incident of 05.05.2023 but the said fact is mentioned in the FIR, as well as, in the statement of the prosecutrix recorded under Section 164 CrPC. He further submits that the FIR, apart from the incident of 05.05.2023, also speaks of a previous incident of 19.04.2023, when the petitioner established sexual relations with the prosecutrix during their visit to Mehndipur Balaji by making a false promise to marry her.

19. He further submits that the petitioner has two mobile sets and the second mobile set is yet to be recovered, therefore, the custodial interrogation of the petitioner is warranted.

20. I have heard the learned counsel for the petitioner, as well as, the learned APP for the State and have perused the record.



21. It is the case of the prosecution itself that the alliance of the petitioner with the prosecutrix was approved by the family of the petitioner after the prosecutrix met petitioner's mother on 28.01.2023. The engagement was fixed after horoscopes of the petitioner and the prosecutrix matched. The engagement function that was organized at Lilywhite Hotel, Chattarpur on 15.04.2023, was attended by 200 relatives from both sides. Even the date of marriage was fixed as 09.12.2023.

22. The reason for calling off the marriage is not relevant at this stage.

23. However, in the given circumstances, even presuming the allegation of sexual relations being established by the petitioner with the prosecutrix on the promise of marriage to be correct, it cannot be said that the petitioner had no intention to marry the petitioner from the inception or that the petitioner had made any false promise of marriage to deceive the prosecutrix.

24. It is apt to refer to the observations of the Hon'ble Supreme Court in *Anurag Soni v. State of Chattisgarh*, (2019) 13 SCC 1, which reads as under:

"12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have



committed the rape as defined under Sections 375 IPC and can be convicted for the offence under Section 376 IPC.”

25. In *Deepak Gulati v. State of Haryana, (2013) 7 SCC 675*, also the Hon’ble Supreme Court observed that there is a distinction between mere breach of a promise and not fulfilling a false promise.

The relevant observations made reads as under:

“21.... There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused;”

26. In view of the above, I am of the opinion that the petitioner has made out a case for grant of anticipatory bail. Accordingly, it is directed that in the event of arrest, the petitioner be released on bail on his furnishing personal bond in the sum of Rs. 25,000/- with one surety of the like amount to the satisfaction of the arresting officer/IO/SHO concerned, further subject to the condition that the petitioner will join investigation as and when directed by the Investigating Officer.

27. The petition stands disposed of.

28. Copy of order be uploaded on the website of this court.

29. Order *dasti* under signatures of the Court Master.

VIKAS MAHAJAN, J

JULY 12, 2023/dss