

291 IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRA-S-1444-2024
Date of decision: 29th April, 2024

Shamsher

...Appellant(s)

Versus

State of Haryana and others

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. Pradeep Duhan, Advocate for the appellant.
Mr. Neeraj Poswal, AAG, Haryana.
Mr. Lokesh Sharma, Advocate for respondents No. 2 and 3.

MANISHA BATRA, J (ORAL):-

The instant appeal has been filed under Section 14-A of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for brevity ‘SC/ST Act’) by the appellant against the order dated 28.03.2024 passed by the Court of Learned Additional Sessions Judge, Bhiwani in case arising out of FIR No. 377 dated 17.12.2023 registered under Sections 346, 328, 376(2)(n) and 506 of Indian Penal Code, 1860 (for short ‘IPC’) and Sections 3(2)(v) of Prevention of Atrocities against Scheduled Caste and Scheduled Tribes Act, 1989 (for short ‘SC/ST Act’), whereby an application for grant of pre-arrest bail as filed by the appellant had been dismissed.

2. Brief facts of the case relevant for the purpose of disposal of this appeal are that the aforementioned FIR was registered by the

complainant 'S' (name withheld) who is the father of the prosecutrix 'T' (name withheld) alleging therein that the prosecutrix who was working at a Beauty parlour, run by Poonam Bishnoi wife of the appellant, had not come back home in the night of 17.12.2023. Even the appellant could not be connected through mobile phone and was missing. On the basis of this complaint, initially, a case under Section 346 of IPC was registered. The prosecutrix came back home at her own on 31.01.2024 and recorded her statement under Section 164 of Cr.P.C. to the effect that the appellant had allured and had induced her to go alongwith him on the pretext that he would open a beauty parlour for her. She was taken to Hisar wherein a live-in-relationship document was got signed from her. Thereafter, they had gone to Chandigarh and had stayed in a hotel. She alleged that appellant had given some medicine to the prosecutrix on consuming which, she felt dizziness and then the appellant had committed rape upon her and that thereafter, also she was given some medicines by the appellant on daily basis and was repeatedly ravished and was then left at Hisar on 31.01.2024. On the basis of this Statement, offences under Sections 328, 376(2)(n) and 506 of IPC were added. During the course of investigation, offence under Section 3(2)(v) of SC/ST Act was also added as the prosecutrix belonged to scheduled caste category. The investigation is under way. The appellant had moved an application for grant of pre-arrest bail before the Court of learned Additional Sessions Judge, which had been dismissed and hence, the present appeal.

3. It is argued by learned counsel for the appellant that the

prosecutrix is a major, (adult female) who had voluntarily left her home at her own with the appellant without any pressure on his part. They had executed a live-in agreement. The prosecutrix along with the appellant and family members of some friend of the appellant visited Rajasthan thereafter and they had also gone to a temple. She had voluntarily stayed with him for a period of over one and half months and had herself left on 31.01.2024 without assigning any reason and had lodged FIR in this case. It is argued that it was a case of consensual relationship and the prosecutrix after parting ways with the appellant at her own, had falsely involved him in this case.

4. It is further argued that the prosecutrix was in the habit of exploiting males and previously also she had got registered an FIR bearing No. 93 dated 27.03.2021 registered under Sections 341, 354-A and 506 of IPC and Section 3 (1)(w)(i) of SC/ST Act at Police Station Siwani, which was subsequently found to be false and a cancellation report was submitted. It is argued that the ingredients for commission of offence of rape were not at all attracted neither the provisions of SC/ST Act were attracted. Custodial interrogation of the appellant is not required. He is ready to join the investigation. The Court of learned ASJ while dismissing his application for grant of anticipatory bail did not take into consideration all these material facts and with these broad submissions, it is argued that the impugned order be set aside, the appeal be accepted and he be extended benefit of pre-arrest bail.

5. *Per contra*, it is argued by learned State counsel assisted by

learned counsel for the complainant that there are serious and specific allegations against the appellant who by inducing the prosecutrix on the pretext of opening a beauty parlour for her had taken her to Hisar and had got her signatures procured on some papers relating to live-in-relationship and by making the prosecutrix consume medicines containing some stupefying/intoxicating substance, he had ravished her repeatedly. He had even taken her gold ornaments and sold the same and it was he who had left her at Hisar on 29.01.2024. Therefore, it is argued that the appeal does not deserve to be allowed.

6. I have heard learned counsel for the parties at considerable length and have gone through the record carefully.

7. The prosecutrix in this case was aged about twenty years as on 17.12.2023 when she left her home along with the appellant. She stayed with him for a period of over one and half months. The case as set up by the prosecution is that the appellant had induced her to go with him on the pretext of getting opened a beauty parlour for her. She was a grown up female. It can be reasonably presumed that she had sufficient intelligence to understand the significance of the act which she was doing by accompanying him without bothering to give information to her parents or any other family members. It is also not her case that she was an illiterate person or that she had appended her signatures to Annexure A-1 (live-in agreement) without reading the contents of the same or under any mis-representation. Though she also took a plea that the appellant used to keep her in the state of

intoxication by administering some intoxicating substance to her regularly during the period of her stay with him but neither any medical evidence has been brought on record to show that the same nor any test was got conducted by the prosecutrix.

8. Further Annexure A-3 (colly) which are photographs of the prosecutrix showing her to be roaming around with the appellant and some other persons including males and females in the premises of Balaji Temple at Salasar. She is even shown to be wearing *chura* (traditional bangles to be worn at the time of marriage) in her arms. Obviously, she was knowing that the appellant was a married person as she was working in the beauty parlour of his wife itself. It is also not a case where any promise to marry the prosecutrix had been given by the appellant. A grown up girl of her age had the capability to freely exercise choice between resistance and assent as it is presumed that she knew the consequences of the act which was committed by going along with a married person like the appellant and staying with him for about a period of one and half months. If actually, the appellant had forcibly committed sexual inter-course with her then, she could have resisted and could have tried to flee but no such efforts seem to have been made by her, rather her own version shows that the appellant continued to have physical relations with her on several occasions during the period when she stayed with him. All this *prima facie* goes to show that they took a conscious decision to live together, obviously, because of the fact that they were in some consensual relationship. The consent as given by the prosecutrix to the

appellant to have physical relationship with her can certainly be presumed to be a tacit consent, if not direct one.

9. Section 375 of IPC defines the expression 'rape', it sets out certain circumstances. The circumstance relevant for the purpose of this case is the second that a male subjecting a female to sexual inter-course without her 'consent' commits offence of rape. The term 'consent' as mentioned in explanation 2 of this Section means an unequivocal voluntarily agreement when the woman by words, gestures any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act. Section 90 of IPC is also relevant as per which 'consent' given by a person under fear of injury or under a misconception of fact, and if the person doing the act knows, or has reason to believe that the consent was given in consequence of such fear or misconception, is not consent. The term consent with regard to the Section 375 of IPC involves active under circumstances action and consequences of the proposed act. In the instant case, in view of the discussion as made above, it cannot be stated that the prosecutrix had accompanied and stayed with the appellant under any misconception of fact and had allowed him to establish physical relations with him under that misconception. Even if, for the sake of arguments, it is assumed that the appellant had induced her on the pretext of getting a beauty parlour opened for her that cannot be considered as a circumstance which amounts to misconception of fact.

10. As such, the question that it was a case of consensual

relationship or a rape itself is a debatable issue in this case. Though this Court while considering this appeal cannot go into the merits of the case and cannot determine this fact as it is for the trial Court to decide that question on the basis of thorough assessment of the evidence to be produced before the trial Court. However, as per the discussion as made above, I am persuaded to hold that *prima facie* it appears to be a case of consensual relationship having turned sour due to some reason and as such, the question as to applicability of provisions of Section 376(2) (n) of IPC as well as Section 3(2)(v) of SC/ST Act is certainly debatable. It is well settled proposition of law that anticipatory bail could be granted if a prima faice case for commission of an offence under the provisions of SC/ST Act is not made out or if it can be shown that the allegations were false. Reference in this regard can be held to '***Dr. Subhash Kashinath Mahjan Vs. State of Maharashtra (2018) 6 SCC 454***'. With these observations but without meaning to make any comment on the merits thereof, it is held that the order dated 28.03.2024 passed by learned trial Court is liable to be reserved and the appeal deserves to be allowed. The impugned order is set aside, the appeal is accordingly allowed, subject to appellant's surrendering before the Arresting Officer/Investigating Officer of the case within a period of fifteen days from today and subject to furnishing personal/surety bonds to his satisfaction and he will also comply with usual terms and conditions laid down under Section 438(2) of Cr.P.C. and subject to compliance of following conditions by the appellant:-

- (i) He shall appear before the Investigating Officer as and when required.
- (ii) He will not make any contact with the prosecutrix or other material witnesses during the course of trial and will not visit the vicinity where the prosecutrix resides.
- (iii) He will not tamper with the evidence or intimidate the witnesses.
- (iv) He will not leave the country without permission of the trial Court.

11. In case of violation of any of the above conditions, the jurisdictional Court shall be empowered to consider the application for cancellation, if any, and pass appropriate orders in accordance with law.

12. Since the main appeal has been allowed, pending application if any is rendered infructuous.

[MANISHA BATRA]
JUDGE

29th April, 2024
Parveen Sharma

- | | | |
|-------------------------------|---|-----|
| 1. Whether speaking/ reasoned | : | Yes |
| 2. Whether reportable | : | Yes |