

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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CRM-M No.53465 of 2023
Date of Decision: 23.01.2024

Shivam Singh Tomar ... Petitioner

Versus

State of Haryana ... Respondent

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. Ritesh Tomar, Advocate,
for the petitioner.

Ms. Nidhi Garg, AAG, Haryana.

MANISHA BATRA, J.

1. The present petition has been filed under Section 439 of Cr.P.C. seeking regular bail in FIR mentioned below:-

FIR No.	Dated	Police Station	Sections
39	26.04.2023	Women Central Faridabad, Haryana	376 (2) (n), 323 and 506 of IPC

2. Brief facts of the case relevant for the purpose of disposal of this petition are that the aforementioned FIR was registered on the basis of the complaint submitted by the prosecutrix (name withheld) alleging therein that she got married with one “R” (name withheld) at the age of 10 years. Subsequently, her husband had thrown her out of her matrimonial house and now she was running a small shop for the purpose of the livelihood of her children and herself and was living alone. She alleged that she had met the petitioner at her shop who induced her to live with him by giving an assurance that he would look after her children and

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herself and developed physical relations with her. She alleged that when she insisted him to marry her, he started instigating/misleading her husband by conveying wrong things about her. It was the further allegation as made by her that on 04.04.2023, her husband and son tried to even strangulate her by tying a knot with her dupatta. While alleging that the petitioner along with her husband had been physically and mentally harassing her and had also been extending threats to kill her, she prayed for taking penal action against the culprits. After registration of FIR, investigation proceedings were initiated. During investigation, the husband and son of the complainant were found to be innocent and were not arrested and challaned. The petitioner was arrested on 27.04.2023. After completion of necessary investigation and usual formalities, challan was presented in the Court and presently he is facing trial for commission of aforementioned offences.

3. It is argued by learned counsel for the petitioner that he has been falsely implicated in this case. Infact, the marriage between the complainant and her husband subsisted as no valid decree of divorce had been passed between them and she had been living with her husband only in his house. The petitioner and herself were in a consensual sexual relationship for a period of more than one and half years. Subsequently, her family had come to know about their relationship and that is why, she had involved him falsely in this case with motive to extort money from him as well as to harass him.

4. It is further submitted by learned counsel for the petitioner that he is ten years younger to the complainant. He had never made any promise to marry with the complainant as she was already married. The allegations as

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levelled by her against her husband and son in the FIR had been withdrawn by herself by recording a supplementary statement and she got them exonerated whereas the petitioner was falsely implicated. He has also submitted that no specific date, time, place or even year of incident when the alleged offence of rape had been committed by the petitioner has either been mentioned in the FIR or in the sworn deposition as made by the complainant in the Court. Rather her deposition shows that it was purely a case of consensual relationship and no case of commission of offence of rape was made out. While concluding, he has argued that the petitioner is in custody since 27.04.2023. The trial is likely to take time. The statement of the prosecutrix who was the prime witness has already been recorded and there are no chances of his intimidating her or any other witness. Accordingly, it is submitted that he deserves to be released on bail.

5. The respondent-State has filed status report showing that initially a case was registered as against the petitioner as well as husband and son of the prosecutrix but on the basis of statement subsequently recorded by her, her husband and son had not been arrested and challaned. Learned State counsel has, however, opposed the grant of regular bail by arguing that the allegations as disclosed against the petitioner are serious and further that there is likelihood of his influencing or intimidating the witnesses, if he is let out on bail.

6. I have heard learned counsel for the both the petitioner as well as learned State counsel and have gone through the record.

7. The petitioner is alleged to have induced the prosecutrix to enter into sexual relationship with her on the pretext of performing marriage with

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her and is further alleged to have maintained long physical relationship with her for a period of over one and half years. As per the allegations, he thereafter backed out from the promise and rather instigated the husband and son of the prosecutrix due to which they had physically assaulted her and even made attempt to kill her by trying to strangle her. Though in the FIR, she is shown to have claimed that she was living separately from her husband. However, on a perusal of the material placed on record in the form of sworn deposition of the prosecutrix as recorded before the Court during trial of this case and supplementary statement recorded during investigation, it clearly appears that she had never secured any valid decree of divorce from her husband. Meaning thereby that she is a married woman with children. She is aged about 30 years and the petitioner is ten years younger to her. On a perusal of the sworn statement of the prosecutrix, copy of which has been placed on record by the respondent-State itself along with its status report, it is revealed that though in her examination-in-chief, she stated that the petitioner had developed physical relations with her under the pretext of marriage and when she insisted for marriage, he had extended beatings and even threatened to kill her but during the course of cross-examination, she is shown to have admitted that in her statement recorded under Section 164 of Cr.P.C., she had stated that she was married with the present petitioner in a temple and at the time of the said marriage, she had tried to raise alarm but the petitioner had gagged her mouth. She even stated that the said marriage was forcibly solemnized by the petitioner with her and she had stated so in her statement recorded under Section 164 of Cr.P.C. It is apparent therefrom that the plea as taken by her that the petitioner had refused to perform

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marriage with her is prima facie false on the face of the same.

8. Undoubtedly, there are cases where the victim is forced, blackmailed or threatened to enter into physical relationship with a man on the false pretext of marriage with the sole intent to physically exploit the girl but there are also cases where both persons out of their own will and choice develop a physical relationship and when such relationship breaks down due to some reason or the other, the woman involved uses the law as a weapon for vengeance and personal vendetta. The prosecutrix herein is a married woman who has not been legally divorced from her husband though she might be living separately from him. As such, the allegation made by her that any promise was made by the petitioner to marry her does not have any legal efficacy as promise made by a man to a married woman that he would marry her, has no value.

9. Further, it is well settled proposition of law that there is a substantial difference between forcible sexual intercourse amounting to rape as per Section 376 of IPC and consensual sexual relationship wherein the woman maintains sexual relationship with man for quite sometime. Reference in this regard can be made to **Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra and others**, 2019 (1) KHC 403, wherein it was observed by Hon'ble Supreme Court that there is a clear distinction between rape and consensual sex. The question to be considered in such cases is whether the accused had actually wanted the victim to marry or had mala fide motives and had made a false promise to that effect only to satisfy his lust. The former is not rape but the latter will fall within the ambit of cheating or deception. It has also been held that there is a subtle distinction

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between mere breach of a promise and not fulfilling a false promise. If the material prima facie suggests that the prosecutrix agreed to have sexual intercourse on account of her love and passion for the accused and not solely on account of misconception created by the accused, or where the accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having intention to do so, such cases will not fall within the ambit of rape and will have to be considered differently.

10. In this case, the prosecutrix while being already married and having children decided to have a fling with the present petitioner and admittedly they have remained in consensual sexual relationship for a period of more than one and half years. In her sworn statement, she is shown to have admitted that she had been visiting out of station with the petitioner and had been meeting him obviously for the purpose of physical intimacy. It is also noteworthy that allegations do not refer to any particular one incident when her consent was secured by a false promise of marriage but regarding her entire relationship which she had developed with the petitioner over a period of time, despite the fact that she herself was not in a position to accept such a promise being already married. In this backdrop, in my considered opinion, it is highly debatable that the allegations of rape are made out or it is also difficult to assume that there was breach of promise to marry by the petitioner and the consent of the prosecutrix was obtained on the basis of misconception of fact. Merely because now the petitioner is not willing to get married to her, does not change the nature of their consensual acts of physical intimacy to an offence of rape.

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11. After hearing both the sides and on a careful evaluation of the facts and circumstances of the case, I am inclined to take the view that the continued detention of the petitioner is not necessary. He is in custody since 27.04.2023. The trial is likely to take time. Keeping in view the period of incarceration of the petitioner and the above discussed facts and circumstances but without meaning to make any comment on the merits of the case, I allow the petition and the petitioner is ordered to be released on bail subject to his furnishing personal/surety bonds to the satisfaction of learned trial Court.

12. However, at the same time, to elevate the bona fide apprehension raised by the prosecution, it is ordered that the petitioner will not enter into or reside within the vicinity wherein the complainant is residing until the conclusion of the trial of the case, shall not intimidate or attempt to influence the victim or any other material witness, shall not tamper with the evidence. In case of violation of any of above condition, the jurisdictional Court concerned will be empowered to consider the application for cancellation of bail of the petitioner, if required and pass appropriate orders in accordance with law.

23.01.2024
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(MANISHA BATRA)
JUDGE

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No