

IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH

217

CRM-M No.55508 of 2023  
Date of Decision: 21.03.2024

Mohit ... Petitioner

Versus

State of Haryana and another ... Respondents

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Dr. Anmol Rattan Sidhu, Sr. Advocate,  
with Mr. Raghav Gulati, Advocate,  
for the petitioner.

Mr. Neeraj Poswal, AAG, Haryana  
for the respondent-State.

None for respondent No.2.

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MANISHA BATRA, J.(Oral)

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

| FIR No. | Police Station                       | Sections                        |
|---------|--------------------------------------|---------------------------------|
| 0175    | Sector14, District Gurugram, Haryana | 376 (2) (n), 377 and 406 of IPC |

2. The facts relevant for the purpose of disposal of this petition are that the aforementioned FIR was registered on 07.06.2023 on the basis of statement recorded by the prosecutrix “P” (name withheld) alleging therein that she was a divorcee and was living with her daughter and used to do private job. On 05.01.2022 while she was going to some company for giving some interview, the petitioner who was known to her previously made a call to her. During conversation, he told her that he could secure a job for her. Two days thereafter, the petitioner called her

**Neutral Citation No.2024:PHHC:041771**

at a hotel in Gurugram for the purpose of providing a job for her. She was made to go into a room of the said hotel wherein he offered some cold drink to her, on drinking which, she had become unconscious. On regaining consciousness, she came to know that the petitioner had committed act of sexual intercourse with her. She started crying and then the petitioner pacified her and promised her to perform marriage with her by saying that a petition for divorce was pending between his wife and himself. She alleged that thereafter, by giving promise to marry her, he maintained physical relationship with her several times by calling him to different hotels and thereafter, they had started living in a rented accommodation.

3. As per the further allegations, the petitioner had extracted lot of money from the prosecutrix on the pretext of treatment of his ailing father. He also persuaded her to invest her money in a firm which he was opening in his name and all her savings and even a motorcycle which was in her name was taken by him. She alleged that the petitioner used to give sleeping pills to her daughter so that she did not wake up in the night time and had performed act of carnal intercourse against the order of nature with her several times. While alleging that on 28.03.2023, he left her company by taking away, all the documents relating to the firm which was opened by him, the details of the account of that firm and the money, the cash amount and the gold ornaments kept in the house and prayed for taking action against him. After registration of FIR, investigation proceedings were initiated. The prosecutrix was medically examined. Her statement under Section 164 of Cr.P.C. was also recorded. The present petitioner was arrested on 05.07.2023. After completion of necessary investigation and

**Neutral Citation No.2024:PHHC:041771**

usual formalities, challan was presented against him and presently, he is facing trial for commission of aforementioned offences. He had moved an application for grant of bail before the learned trial Court but the same had been dismissed.

4. The present petition has been filed by the petitioner on the grounds and it is argued by his counsel that he has been falsely implicated in this case. Infact, the relationship between the prosecutrix and himself was totally consensual. She was well aware of the fact that he was a married person and there could be no question of any promise of marriage having been given by him to the prosecutrix. The parties had been living in a live-in-relationship also and their relationship had turned sour subsequently. The ingredients for commission of offence of rape were not at all been made out. The testimony of the victim has been recorded and, therefore, there are no chances of his intimidating her. The trial is likely to take time. No useful purpose would be served by keeping him in custody any more and, therefore, it is argued that he deserves to be given concession of bail.

5. Status report has been filed by the respondent-State as per which after conducting thorough investigation in the matter, the allegations as levelled against the petitioner had been found to be correct. He had also suffered disclosure statement admitting his involvement in the subject crime. Most of the prosecution witnesses have since been examined and there is nothing on record to show that there would be any undue delay in conclusion of the trial. With these broad submissions, it is argued that the petitioner does not deserve to be extended benefit of bail.

6. I have heard learned counsel for both the sides at considerable

**Neutral Citation No.2024:PHHC:041771**

length and have gone through the record.

7. The offence of 'rape' is defined under Section 375 of IPC and it sets out certain circumstances. Relevant for the purpose of this case, is the second circumstance that a male subjecting a female to sexual intercourse without her consent, commits offence of rape. As per Explanation-2 of Section 375, 'consent' means an unequivocal voluntary agreement when the women by words, gestures or any form of verbal or non verbal communication, communicates willingness to participate in the specific sexual act. At this stage, it will also be relevant to refer to Section 90 of IPC, as per which a '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. It is well settled proposition of law that the 'consent' with respect to Section 375 of IPC, involves an active understanding of the circumstances, actions and consequences of the proposed act.

8. In the instant case, the respondent No.2 is a mature female and is a divorcee. Though she has alleged that the petitioner had firstly committed rape upon her in the month of January 2022 by calling her in a hotel on the pretext of providing her some job, by administering some intoxicating substance to her thereby making her unconscious. As per her further version, the petitioner had thereafter promised to perform marriage with her and had disclosed that a petition for divorce was pending between his wife and himself. Meaning thereby that the victim since the very beginning was aware that the petitioner was a married person. The plea

**Neutral Citation No.2024:PHHC:041771**

taken by her that he had promised to marry her cannot be stated to be having any substance in view of the fact that there is nothing on record to show at this stage that she had got the fact verified that the petitioner had filed any petition seeking divorce from his wife. Thereafter, she had voluntarily lived with the petitioner at a common place in live-in-relationship. Obviously, she had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. She freely succumbed to the overtures of the petitioner and exercised a choice to be with him and physical relationship with him for a period of six months. She must have known the consequences of the act particularly in the circumstance that the factum of the petitioner being a married person was very much within his knowledge. The option exercised by her to maintain continuous physical relationship with the petitioner makes it a debatable question as to whether her consent was in consequence of any misconception of fact or was freely exercised. The act of the prosecutrix of not reporting the first act of subjecting her to sexual intercourse by the petitioner indicates that it was a consensual act. It is well settled proposition of law that there is distinction between rape and consensual sex. The claim of the petitioner is that no promise to marry had ever been given by him to the prosecutrix as his marriage was subsisting. The victim had started living with the petitioner and having sexual relationship with him for a period of six months and had lodged the complaint only when he is alleged to have left her by extracting money from her and by taking documents relating to the firm opened by him, money as well as gold ornaments kept in the house on 28.03.2023. Though in the deposition made by her before the Court, she has reiterated the allegations in

Neutral Citation No.2024:PHHC:041771

the FIR. However, it is only after the thorough assessment and evaluation of the evidence produced on record that a conclusive finding as to the truthfulness of the allegations as levelled by the prosecutrix can be given, but having regard to the facts and circumstances of the case, it cannot be stated on the basis of the material available on record that the prosecutrix had given her consent for sexual relationship with the petitioner under misconception of any fact. The petitioner is in custody since 05.07.2023. The trial is likely to take time. There are no chances of his intimidating the prosecutrix as she already stands examined. Considering the kind of the relationship between the petitioner and the prosecutrix, it cannot be said with any certitude that the promise of marriage allegedly given by the petitioner had any direct nexus to her decision to engage in sexual acts with him.

9. Upon a conspectus of the foregoing consideration but without meaning to make any comments on the merits of the case lest the same prejudice the case of the prosecution, this Court is persuaded to admit the petitioner to bail subject to his furnishing personal/surety bonds to the satisfaction of the learned trial Court. The petition stands allowed.

21.03.2024  
manju

(MANISHA BATRA)  
JUDGE

|                           |        |
|---------------------------|--------|
| Whether speaking/reasoned | Yes/No |
| Whether reportable        | Yes/No |