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

+ **BAIL APPLN. 1012/2023**

SUMIT GUPTA

..... Applicant

Through: Adv. Shafiq Khan & Ram
Sewak Mishra.

versus

THE STATE

..... Respondent

Through: Mr. Pradeep Gahalot, APP
for the State with SI
Lovely Priyanka, PS
Connaught Place.

CORAM:

HON'BLE MR. JUSTICE AMIT MAHAJAN

ORDER

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26.02.2024

1. The present application is filed under Section 438 of the Code of Criminal Procedure, 1973 ('CrPC') seeking pre-arrest bail in FIR No. 17/2023 dated 28.01.2023, for offence under Section 376 of the Indian Penal Code, 1860 ('IPC'), registered at Police Station Connaught Place.

2. The FIR in the present case was registered at the behest of complainant / prosecutrix, who is a divorcee alleging that she met the applicant on Facebook and the applicant had also portrayed himself to be a divorcee. Both of them, subsequently, started talking to each other initially on Facebook messenger and then they exchanged numbers and started talking on WhatsApp. It is alleged by the complainant that on 19.02.2021, the applicant had insisted her to meet at a restaurant at Connaught Place. She further alleged that she was administered intoxicated cold drink and started feeling dizzy and thereafter, the applicant took her in his car to a lonely place, where he allegedly sexually assaulted her. It is further alleged that on the pretext of having obscene videos / pictures, the applicant made forcible physical relations

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with her on several occasion that is, in October 2021, February 2022 and July 2022 on the assurance of marriage. This led to registration of the present FIR.

3. During the investigation, the complainant was medically examined and, statement of the complainant under Section 164 of the CrPC was recorded, wherein she corroborated the allegations made by her in the complaint.

4. The learned counsel for the applicant submits that the applicant has been falsely implicated in the present case, and the complainant and the applicant were known to each other. He submits that the alleged incident is stated to have taken place on 19.02.2021, and the FIR came to be registered almost 2 years later that is, on 28.01.2023. He submits that the applicant was not even in Delhi on the day of the alleged incident, since he was away to Mumbai along with his wife and daughter.

5. He submits that there has been delay in the registration of the present FIR and no sufficient explanation has been given by the complainant for the same. He submits that the messages exchanged between the applicant and the complainant clearly demonstrates that both of them were in friendly terms with each other.

6. He submits that the applicant is the sole bread-earner of the family and has clean antecedents.

7. *Per contra*, the Additional Public Prosecutor for the state opposes the present application and submits that there are serious allegations against the applicant and the complaint given by the complainant is supported by the statement recorded under Section 164 of the Cr.P.C.

8. The applicant, by order dated 28.03.2023, in the present case was granted interim protection, subject to him joining the
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investigation as and when directed by the Investigating Officer. It is pointed out that in relation to an incident that is, alleged to have happened on 19.02.2021, the FIR came to be registered almost two years later that is on 28.01.2023. This Court by order dated 28.3.2023 recorded as under :

“More importantly, counsel points-out that though the FIR narrates in detail that the alleged relationship between the petitioner and the prosecutrix began around 13.02.2021, and the incident that is subject of the offence happened on 19.02.2021, the fact is that the petitioner was not even in Delhi on that day, since he was away to Mumbai alongwith his wife and daughter. In evidence thereof, the petitioner has placed on record a travel certificate dated 22.03.2023 issued by Air India, which certifies that the petitioner alongwith his wife and daughter had travelled from Delhi to Mumbai on 16.02.2021. The petitioner has also placed on record a boarding-pass of Air Asia, to show that he returned from Bombay to Delhi on 20.02.202. Counsel submits that this is also confirmed by the status report/reply filed by the Investigating Officer before the learned ASJ, which not only verifies the petitioner’s travel to Bombay but also his location as evidenced by the CDRs and the CAF relating to the petitioner’s cell phone.”

9. While determining the parameters in granting pre-arrest bail, the Hon’ble Supreme Court in ***Siddharam Satlingappa Mhetre v. State of Maharashtra : (2011) 1 SCC 694*** held as under:

“112.

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;



(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

10. It is not denied that the prosecutrix had known the applicant for a long period of time. The allegations made by the prosecutrix are that the applicant had administered intoxicated cold drink whereafter, allegedly, the applicant sexually assaulted the prosecutrix. The date of the alleged incident is stated to be 19.02.2021 by the prosecutrix. As noted earlier by this Court, the applicant on the said date was not in Delhi. During the proceedings before this Court, the learned counsel for the applicant has pointed towards the reply filed by the State before the learned Trial Court wherein it was stated that the prosecutrix had inadvertently mentioned the date of the alleged incident as 19.02.2021 at Teddy Boy Connaught Place instead of 13.03.2021 at Mansa Park.

11. There is clearly an improvement over the statement which led to registration of the present FIR. The same, at this stage,



appears to be an afterthought after the applicant points to the lacunae, and would be tested during the trial. It is settled law that if relationship does not work out, the same cannot be a ground for lodging an FIR for the offence punishable under Section 376 of the IPC.

12. It is not in doubt that mere statement of the prosecutrix is sufficient for establishing the offence of rape. The statement made by the prosecutrix does not require corroboration, if the same inspires confidence.

13. The Hon'ble Apex Court in ***Pramod Suryabhan Pawar v. The State of Maharashtra & Anr. : (2019) 9 SCC 608***, has summarised the legal position when a woman complains of the sexual intercourse on a false promise of marriage. It was held as under:

“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.”

14. It is not denied that the prosecutrix had known the applicant and was meeting him on regular basis on her own will.

15. Whether the consent of the prosecutrix was vitiated by misconception of fact arising out of promise to marry, cannot be established at this stage, and would be a matter of trial.

16. It is apparent that the prosecutrix is a literate person and even prior to the alleged incident, was meeting the applicant on regular basis.

17. It is not in doubt that order for grant of pre-arrest bail



cannot be passed in a routine manner so as to allow the accused to use the same as a shield. At the same time, it cannot be denied that great amount of humiliation and disgrace is attached with the arrest. In cases where the accused has joined investigation, cooperating with the Investigating Agency and is not likely to abscond, the custodial interrogation should be avoided.

18. It is not in dispute that the offence as alleged is heinous in nature. However, it cannot be lost sight of the fact that the object of jail is not punitive but to secure the presence of the accused during the trial. The prosecutrix was in a physical relation much prior to filing of the complaint, the same whether was consensual or was on pretext of marriage which was false since the very inception would be established after the trial.

19. It is also pertinent to note, as pointed by the learned counsel for the applicant, that there is inordinate delay of more than two years in registration of the FIR, which stands unexplained by the prosecution. The FIR was registered on 28.01.2023 whereas the alleged incident for the first time took place on 19.02.2021. The chargesheet in the present case stands filed. The issue whether the applicant had forcible relations with the complainant, is a matter of trial. It is not disputed that the applicant has joined the investigation and is cooperating with the same.

20. The Hon'ble Apex Court in the case of ***Mohd. Asfak Alam v. State of Jharkhand : (2023) 8 SCC 632*** has observed as under:

“15. What appears from the record is that the appellant cooperated with the investigation both before 8-8-2022, when no protection was granted to him and after 8-8-2022, when he enjoyed protection till the filing of the charge-sheet and the cognizance thereof on 1-10-2022. Thus, once the charge-sheet was

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filed and there was no impediment, at least on the part of the accused, the court having regard to the nature of the offences, the allegations and the maximum sentence of the offences they were likely to carry, ought to have granted the bail as a matter of course. However, the court did not do so but mechanically rejected and, virtually, to rub salt in the wound directed the appellant to surrender and seek regular bail before the trial court. Therefore, in the opinion of this Court, the High Court fell into error in adopting such a casual approach.

16. The impugned order of rejecting the bail and directing the appellant, to surrender and later seek bail, therefore, cannot stand, and is hereby set aside. Before parting, the Court would direct all the courts seized of proceedings to strictly follow the law laid down in Arnesh Kumar [Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273 : (2014) 3 SCC (Cri) 449 : (2014) 8 SCR 128] and reiterate the directions contained thereunder, as well as other directions.”

21. It is not disputed that the applicant has joined the investigation and the chargesheet has already been filed. There are no chances of the applicant fleeing from justice or tampering with evidence. The apprehension, even otherwise, can be taken care of by putting appropriate conditions. It is trite law that where the court is of the view that the accused has joined the investigation and he is fully cooperating with the investigating agency and is not likely to abscond, custodial interrogation should be avoided since, a great ignominy, humiliation and disgrace is attached with arrest. [Ref : **Bhadresh Bipinbhai Sheth v. State of Gujarat : (2016) 1 SCC 152**]

22. In view of the aforesaid settled principles, and the fact that the applicant has been on interim protection and during this period, there is no allegation of him trying to influence the witnesses or the prosecutrix, this Court considers it apposite that in the event of arrest, the applicant be released on bail on



furnishing a personal bail bond for a sum of ₹50,000/- with one surety of the like amount to the satisfaction of the concerned SHO, subject to the following conditions:

- a. The applicant shall join and cooperate with further investigation as and when required by the Investigation Officer (IO);
- b. The applicant shall not contact/intimidate the prosecutrix in any manner;
- c. The applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer;
- d. The applicant shall provide his mobile number to the concerned IO and keep it operational all the times, and
- e. The applicant shall in case of change in his residential address, and/or mobile number, intimate the concerned IO.

23. It is clarified that the observations made in the present order are for the purpose of deciding the present pre-arrest bail application, and should not influence the outcome of the Trial and should not be taken, as an expression of opinion, on the merits of the case.

24. The present application is allowed in the aforementioned terms. Pending application also stands disposed of.

AMIT MAHAJAN, J

FEBRUARY 26, 2024

“SK”/UG/KDK