



2024:DHC:6883



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% *Date of Decision: 29th August, 2024*
+ **BAIL APPLN. 1775/2024**
SANJAY MALIK ALIAS SANT SEVAK DAS

.....Applicant

Through: Mr. Krishan Kumar, Mr.
S.P. Nangia & Mr. Shivam
Bedi, Advs.

versus

THE STATE OF NCT OF DEHI AND ANR

.....Respondents

Through: Mr. Naresh Kumar
Chahar, APP for the State.
Mr. Vineet Dhanda, Adv.
Amicus Curiae for
prosecutrix with Mr.
Abhishrut Singh & Mr.
Aishani Mohan, Advs.
Prosecutrix through V.C.
SI Rajveer, PS Neb Sarai.

CORAM:**HON'BLE MR. JUSTICE AMIT MAHAJAN****AMIT MAHAJAN, J. (Oral)**

1. The present application is filed seeking regular bail in FIR No.216/2022 dated 06.03.2022, registered at Police Station Neb Sarai for offences under Sections 354/376 of the Indian Penal Code, 1860 ('IPC').

2. The FIR in the present case was registered on a complaint given by the prosecutrix, who is stated to be a foreign national. It is alleged that on 11.10.2019, the prosecutrix had come to New Delhi, India to perform the last rites of her husband. It is alleged that one 'RA', stated to be the friend of the prosecutrix, had given the contact number of the applicant to the prosecutrix

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stating the applicant could help her perform the last rites of her husband.

3. It is alleged that on 12.10.2019, the prosecutrix called the applicant to her place of residence to discuss about the process of the last rites of her husband. It is alleged that the applicant, after the said discussion, sexually assaulted the prosecutrix. It is alleged that the prosecutrix, unable to comprehend the intention of the applicant, had ignored such sexual advances on that occasion. It is alleged that thereafter the applicant made an itinerary to visit Prayagraj, Varanasi, and Gaya for the performance of the post demise ceremonies.

4. It is alleged that the prosecutrix, on the advice of the applicant, went to Prayagraj on 31.01.2020, who allegedly was already present there. It is alleged that while in Prayagraj, the applicant helped the prosecutrix to get a tin hut to stay, and further helped the prosecutrix with bone immersion. It is alleged that thereafter, when the prosecutrix returned to her tent after the bone immersion ceremony, the applicant once again sexually assaulted the prosecutrix.

5. It is alleged that thereafter the prosecutrix and the applicant went to Varanasi, and on 06.02.2020, reached Gaya for '*Pind Daan*.'

6. It is alleged that on 07.02.2020 post the '*Pind Daan*' ceremony, the applicant had invited the prosecutrix to his room to eat '*Prasad*'. It is alleged that thereafter, the applicant forcefully established sexual relations with the applicant.

7. It is alleged that thereafter the prosecutrix and the applicant boarded the train for Delhi. It is alleged that the

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prosecutrix, out of fear, deboarded the train at Mughal Sarai, without informing the applicant. It is alleged that the prosecutrix, out of shock, and trauma could not lodge a complaint at that time.

8. It is alleged that the prosecutrix called the applicant at Nehru Place in mid-February, 2020 in order to get him apprehended, however could not get the opportunity to inform the police. It is further alleged that thereafter the applicant continuously made phone calls to the prosecutrix. It is alleged that between 16.02.2022 till 05.03.2022, multiple calls/video calls were made by the applicant.

9. The applicant was arrested on 06.03.2022. Chargesheet in the present case was filed under Sections 354/376 of the IPC.

10. The learned counsel for the applicant submits that the applicant has been falsely implicated in the present case. At the outset, he denies that the applicant engaged in any physical relation with the prosecutrix. He submits that even for the sake of argument, if it assumed that there was any physical relation at all between the applicant and the prosecutrix, the same was consensual. He submits that there was also a substantial delay in lodging the FIR which casts a doubt on the story of the prosecution.

11. He submits that as per prosecutrix's own stand, the incident allegedly took place on 04.02.2020, however, the FIR itself was lodged much later on 06.03.2022. He submits that there is no explanation why the prosecutrix kept mum for 2 years. He submits that the fact that the applicant is falsely implicated in the present case is further evident from the fact that

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the prosecutrix demanded ₹45,000/- from the applicant on 27.02.2022. He submits that contrary to what the prosecutrix deposed, she demanded money from the applicant with the clear intention to extort money from him.

12. He submits that the trial is not proceeding and the applicant is still languishing in custody. He submits that the examination of witness-‘RA’ is not crucial as she is only a hearsay witness, and not a material witness. He submits that even if the case of the prosecution is taken at the highest, even then any physical liaison between the prosecutrix and the applicant, if at all, was consensual, which is why the prosecutrix did not make any complaint, and travelled with the applicant to Prayagraj, Banaras and Gaya for the post-demise ceremonies.

13. The learned Additional Public Prosecutor for the State opposes the grant of bail to the applicant stating that serious allegations have been levelled against the applicant. He submits that the witness-RA is a crucial witness, and is yet to be examined. He submits that the applicant is an influential person, and should not be released till the examination of the prosecution witnesses is complete.

14. The learned *amicus curiae* for the prosecutrix vehemently opposes the request for grant of bail to the applicant. He submits that the prosecutrix had no reason to falsely implicate the applicant in the present case. He submits that the delay in lodging an FIR in cases of sexual assault cannot be considered to be fatal to the case of prosecution. He submits that the applicant is an influential person in Gaya, which is why the prosecutrix did not make any complaint at that place. He submits that the prosecutrix

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being in denial, lacked the courage to raise a complaint against an influential person, that too, in an alien country.

15. He submits that the applicant had forcefully established sexual relations with prosecutrix. He submits that the applicant had paid a sum of ₹20,000/- to the prosecutrix to deter her from approaching the police. He submits that considering the gravity and the nature of the alleged offence, the applicant should not be enlarged on bail.

16. On an earlier occasion, this Court *vide* order dated 14.03.2023 had dismissed the application filed by the applicant seeking grant of regular bail and noted that serious allegations had been made against the applicant. This Court after hearing the parties at length had observed that from the applicant's own stand, it appeared that he took the prosecutrix to Prayagraj, Banaras and Gaya for the post-demise ceremonies.

17. It was noted that merely because the prosecutrix had assented to accompany the applicant to various holy places for conducting the last rites and rituals, the same cannot *ipso facto* imply that she had consented to any physical relations with the applicant. It was observed that the crucial witness—RA, stated to be a Czech National, was yet to depose. It was further observed that regardless of whether the prosecutrix and the prime witness were in India or abroad, the applicant's attempt to influence them cannot be ruled out. In view of the said observations, this Court had denied the bail to the applicant. The applicant was however given liberty to apply for the same relief before the learned Trial Court after the completion of deposition of all the prosecution witnesses.

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18. The present application is filed on the ground that the trial has not proceeded since the dismissal of the previous bail application by this Court *vide* order dated 14.03.2023. It is contended that applicant on the earlier occasion was not admitted on bail since the witness 'RA' had not been examined. It is contended that said witness still remains to be examined even though more than one year has elapsed since the dismissal of the bail application of the applicant *vide* order dated 14.03.2023. The question, thus, is whether the delay in trial in the present case merits an admission on bail to the applicant.

19. I have heard the submissions of the parties and perused the material on record. Prosecutrix also appeared through video-conferencing and is heard at length.

20. It is seen that after the dismissal of the previous bail application by this Court, an application under Section 311 of the Code of Criminal Procedure, 1973 ('CrPC') was preferred by the applicant, seeking recall of the prosecutrix. The learned Trial Court, noting that there were some discrepancies in the date of the alleged commission of offence, and to arrive at a just decision of the case, allowed the application under Section 311 of the CrPC, and permitted further cross-examination of the prosecutrix *vide* order dated 28.08.2023.

21. It is seen that thereafter, an application was also preferred by the applicant seeking examination of the prosecutrix through video conferencing. Since no objection was given by the parties, the learned Trial Court *vide* order dated 14.10.2023, allowed the application seeking cross-examination of the victim through video-conferencing. On 22.11.2023, the testimony of the

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prosecutrix was recorded by video-conferencing under Section 311 of the CrPC.

22. On being pointedly asked, it is stated that only 2 witnesses remain to be examined.

23. It is stated that one of the two witnesses—RA resides outside India. From a perusal of the record, it appears that requests were made that she be allowed to join the proceedings through video-conference for the purpose of recording her testimony.

24. It is seen that summons were issued to witness-RA through Ministry of External Affairs, *vide* order dated 03.11.2022 by the learned Trial Court and on the process it was mentioned that the said witness can give her evidence through video conference by appearing in Indian Embassy on 24.02.2023.

25. On 01.02.2023, the witness had appeared through video conference and made such a request herself as well before the learned Trial Court. The learned Trial Court on the said date noted that as per the record, process had been sent to the witness through Ministry of External Affairs *vide* order dated 03.11.2022 for recording evidence on 24.02.2023, and consequently the matter was put up for prosecution evidence on 24.02.2023. As the learned Presiding Officer was on a half day leave on 24.02.2023, the matter was fixed for 10.03.2023.

26. On 10.03.2023, owing to the fact that the regular prosecutor was on leave, no PW was present, and there was bereavement in the family of the learned counsel for the applicant, the matter could not be taken up.

27. On 15.04.2023, considering the request made by witness-

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RA on 01.02.2023 to appear through video conferencing, the learned Trial Court, besides pursuing the process for recording the statement of the said witness-RA through video conferencing, had issued summons for the purpose of recording her statement before the Court in consonance with the prescribed format through the Ministry of External Affairs/Ministry of Home Affairs as well. The report for the same however was not received.

28. Subsequently, the victim had volunteered to make the said witness appear through video-conference for the purpose of getting her testimony recorded. The same had been opposed by the learned counsel for the applicant who submitted that the said witness be summoned through Court for her deposition. The learned counsel for the applicant had raised a concern that the said witness being close friend of the prosecutrix, might be influenced by the prosecutrix and her deposition might be tutored. In view of the objections raised, the learned Trial Court *vide* orders dated 07.12.2023 and 28.03.2024 again directed that the said witness be summoned through Ministry of Home Affairs in terms of the concerned guidelines. The report for the same however was not received.

29. Thereafter, the learned Trial Court noting that the applicant was languishing in custody due to non-appearance of the said witness and in order to expedite the trial, directed that the said witness be served through electronic mode *vide* order dated 23.07.2024.

30. It is apparent from the aforesaid discussion that multiple efforts were made by the learned Trial Court to summon the said

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witness, however, she still remains to be examined. While the delay in trial is unfortunate, the same has been caused by various procedural anomalies, and cannot be attributed to either the prosecution or the defense.

31. It is seen that the trial is not proceeding on the ground of examination of the said witness-RA. The question, thus, is whether given the circumstances, the examination of the said witness can be directed through video-conference as per the High Court of Delhi Rules for Video Conferencing for Courts, 2021 (hereafter ‘VC Rules’).

32. It is relevant to note that in terms of Rule 5.3.11, whenever the Court allows the examination of a witness through video-conferencing in a criminal case, of any person located outside the country, then in such cases, before exercising its discretion, the Court has to seek the consent of the accused person. The said rule is reproduced as under:

“5.3.11 Notwithstanding the provisions of Clause 5.3.1, where witness examination is to take place in a criminal case of a person located outside the country, the provisions of the “Comprehensive Guidelines for investigation abroad and issue of Letters Rogatory (LRs) / Mutual Legal Assistance (MLA) Request and Service of Summons / Notices/ Judicial documents in respect of Criminal Matters” (available at http://164.100.117.97/WriteReadData/userfiles/ISII_ComprehensiveGuidelinesMutualLegalAssistance_17122019.pdf) will be followed to the extent they comport with the provisions of the CrPC and the Evidence Act. Furthermore, before the Court employs its discretion to carry out witness examination via video conference, it will obtain the consent of the accused.”

33. Further, Rule 18 of the VC Rules provides discretion to this Court to relax the requirement of any rule if its applicability would cause hardship on the parties. Rule 18 of the VC Rules

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reads as under:

“18. Power to Relax

The High Court may if satisfied that the operation of any Rule is causing undue hardship, by order dispense with or relax the requirements of that Rule to such extent and subject to such conditions, as may be stipulated to deal with the case in a just and equitable manner.”

34. In the present case, the applicant had opposed the request for examination of the said witness-RA through video-conference on the ground that the said witness-RA, in the presence of the victim may give a tutored testimony. However, such concern would arise only if the testimony of the witness-RA is carried out in the presence of the prosecutrix. Such apprehensions can be dealt with by allowing the examination of the witness-RA in accordance with the procedure prescribed under the VC Rules.

35. The Hon’ble Apex Court in the case of *State of Maharashtra vs. Praful B Desai* : 2003 (4) SCC 601 while considering the question of recording of evidence through video conferencing in a criminal trial observed as under:

“20. Recording of evidence by video-conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the accused. The accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact the accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded courtroom. They can observe his or her demeanour. In fact the facility to playback would enable better observation of demeanour. They can hear and rehear the deposition of the witness. The accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The facility of playback would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in court. All these objects would be fully met when evidence

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is recorded by video-conferencing. Thus no prejudice, of whatsoever nature, is caused to the accused. Of course, as set out hereinafter, evidence by video-conferencing has to be on some conditions.”

(emphasis supplied)

36. It is seen in the instant case that the witness is a Czech National. It is further stated that the witness is a single mother having two children. It is alleged that the said witness was also sexually assaulted by the applicant.

37. In the light of such circumstances, compelling the witness-RA to come to India for her examination would cause undue hardship and would unnecessarily burden her. It is also probable that the witness-RA refuses to give her testimony altogether if compelled to give her deposition demanding her physical presence in Court.

38. It is seen that the trial has also not proceeded on the ground that the said witness has not been examined. Given the aforesaid, this Court deems it fit to relax the requirements of Rule 5.3.11 of the VC Rules.

39. As observed by the Hon'ble Apex Court in *State of Maharashtra vs. Praful B Desai (supra)*, the applicant would be in a better position to observe the demeanour of the witness, and may even be able to rehear the deposition of the witness.

40. The learned counsel for the applicant while opposing the request for examination of the said witness-RA through video-conference had stated that the witness may give a tutored testimony in the presence of the prosecutrix. It is pertinent to mention that the Hon'ble Apex Court in *State of Maharashtra vs. Praful B Desai (supra)* while dealing with a similar concern had observed as under:

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*“26. To be remembered that what is being considered is recording evidence on commission. Fixing of time for recording evidence on commission is always the duty of the officer who has been deputed to so record evidence. Thus the officer recording the evidence would have the discretion to fix up the time in consultation with VSNL, who are experts in the field and who will know which is the most convenient time for video-conferencing with a person in USA. The respondent and his counsel will have to make it convenient to attend at the time fixed by the officer concerned. If they do not remain present, the Magistrate will take action, as provided in law, to compel attendance. We do not have the slightest doubt that the officer who will be deputed would be one who has authority to administer oaths. That officer will administer the oath. By now science and technology has progressed enough to not worry about a video image/audio interruptions/distortions. Even if there are interruptions they would be of temporary duration. **Undoubtedly, an officer would have to be deputed, either from India or from the Consulate/Embassy in the country where the evidence is being recorded who would remain present when the evidence is being recorded and who will ensure that there is no other person in the room where the witness is sitting whilst the evidence is being recorded. That officer will ensure that the witness is not coached/tutored/prompted. It would be advisable, though not necessary, that the witness be asked to give evidence in a room in the Consulate/Embassy. As the evidence is being recorded on commission that evidence will subsequently be read in court. Thus no question arises of the witness insulting the court. If on reading the evidence the court finds that the witness has perjured himself, just like in any other evidence on commission, the court will ignore or disbelieve the evidence. It must be remembered that there have been cases where evidence is recorded on commission and by the time it is read in court the witness has left the country. There also have been cases where a foreign witness has given evidence in a court in India and then gone away abroad. In all such cases the court would not have been able to take any action in perjury as by the time the evidence was considered, and it was ascertained that there was perjury, the witness was out of the jurisdiction of the court. Even in those cases the court could only ignore or disbelieve the evidence. The officer deputed will ensure that the respondent, his counsel and one assistant are allowed in the studio when the evidence is being recorded. The officer will also ensure that the respondent is not prevented from bringing into the studio the papers/documents which may be required by him or his counsel. We see no substance in this submission that it would***

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be difficult to put documents or written material to the witness in cross-examination. It is now possible, to show to a party, with whom video-conferencing is taking place, any amount of written material. The officer concerned will ensure that once video-conferencing commences, as far as possible, it is proceeded with without any adjournments. Further, if it is found that Dr Greenberg is not attending at the time(s) fixed, without any sufficient cause, then it would be open for the Magistrate to disallow recording of evidence by video-conferencing. If the officer finds that Dr Greenberg is not answering questions, the officer will make a memo of the same. Finally, when the evidence is read in court, this is an aspect which will be taken into consideration for testing the veracity of the evidence. Undoubtedly, the costs of video-conferencing would have to be borne by the State.”

(emphasis supplied)

41. The learned Trial Court is therefore directed to proceed with the examination of the witness-RA through video-conferencing by allowing the presence of the witness-RA in the nearest Indian Embassy, and record the evidence in accordance with the VC Rules and the guidelines laid down by the Hon'ble Apex Court in ***State of Maharashtra vs. Praful B Desai (supra)***.

42. The learned Trial Court is directed to ensure that before and during the session in which the evidence of the witness-RA is recorded, the officer of the Embassy who is appointed to record the testimony ensures that no other person except the witness is present in the room where the testimony is to be recorded. Further, the officer so deputed to record the testimony, shall remain present with the said witness at all times during the sessions in which the evidence is to be recorded.

43. As regards the question of grant of bail, it is seen that serious allegations have been made against the applicant regarding the alleged commission of rape of a foreign national. Merely because there has been a delay in trial, which too cannot

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be attributed to either of the parties, this Court cannot appreciate the merits again. Further, considering the gravity and nature of the alleged offence, the same also cannot be made a ground for grant of bail only because there has been a delay in trial. While it is true that prolonged custody in itself may result in a fresh cause of action, yet this Court cannot lose sight of the fact that one of the prime witnesses-‘RA’ has still not been examined.

44. This Court on an earlier occasion had declined to admit the applicant on bail noting that the witness was a vulnerable witness. It was noted that regardless of whether the prosecutrix and the witness-RA were in India or abroad, the applicant’s attempt to influence or intimidate them cannot be negated. While the trial has not proceeded, and the said witness remains to be examined, there is no denying that the testimony of the said witness is crucial to the adjudication of the case.

45. In view of the aforesaid, this Court does not deem it fit to enlarge the applicant on bail at this stage.

46. The learned Trial Court is directed to proceed with the matter expeditiously. It is however made clear that if the trial does not conclude within the next 6 months, the applicant is at liberty to file a fresh application seeking necessary relief before this Court.

47. The present bail application is dismissed with the aforesaid observations.

AMIT MAHAJAN, J

AUGUST 29, 2024

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