

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

+ BAIL APPLN. No. 1745/2009

% Reserved on: 29th January, 2010

Date of Decision: 1st February, 2010

NIKHIL PARASAR Petitioners

Through: Mr. R.S. Juneja, Adv.

!

versus

\$ THE STATE GOVT. NCT OF DELHI Respondent

Through: Mr. Pawan Bahl, APP

Ms. Ruchi Mishra for complainant.

* **CORAM:**

HON'BLE MR. JUSTICE V.K. JAIN

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

: V.K. JAIN, J.

1. This is a petition under Section 438 of the Code of Criminal Procedure for grant of bail. The case of the prosecution, in a nutshell, is that the parents of the complainant/prosecutrix selected the petitioner through Internet in February, 2009 for marriage with the complainant/prosecutrix. The petitioner and

the prosecutrix met face to face on 16th February, 2009, liked each other and agree for marriage. The family of the petitioner also accepted the prosecutrix for marriage with the petitioner. The prosecutrix and her family members then met the family members of the petitioner in Parikrama Hotel, Connaught Place, New Delhi. The prosecutrix was liked by the parents of the petitioner. In the end of March, 2009, when the petitioner was in Mumbai on an official tour, he persuaded the prosecutrix to come to Mumbai. The prosecutrix, accordingly, joined him and stayed with him in a hotel for 3-4 days. During night, the petitioner had sexual intercourse with the prosecutrix and he also assured her that he was going to marry her. *Roka* was, thereafter, held in Delhi on 3rd April, 2009. The petitioner then took the prosecutrix with him on 4th April, 1999 to Sailor Home, Vasant Kunj, on the pretext of celebrating *Roka* ceremony. They stayed there in the night intervening 4th April, 2009 and 5th April, 2009 and the petitioner again had sexual intercourse with the prosecutrix without her consent. She, however, did not report the matter to the police, since the petitioner told her that they were going to marry soon. The prosecutrix further claims that the petitioner again took her to the same place 3-4 times and again had sexual

intercourse with her on the same pretext. Ultimately, the petitioner refused to marry the prosecutrix, leading to matter being reported to the police.

2. The first question, which comes up for consideration in this case, is as to whether having sexual intercourse with the prosecutrix, in the facts and circumstances of this case, amounts to committing rape or not. This issue came up for consideration before the Hon'ble Supreme Court in **Deelip Singh Vs. State of Bihar** 2004 (iv) Ad. Cri. (SC) 433. After examining case law on the subject, including its earlier decision in **Uday vs. State of Karnataka** 2003 (2) Scales 329, the Hon'ble Supreme Court, *inter alia*, observed as under:

“it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 Clause secondly.”

3. In **Yedla Srinivasa Rao vs. State of A.P.** 2006 VIII AD (SC)

309, the Hon'ble Supreme Court, in the facts and circumstances
BAIL APPLN. No1745/2009

of the case before it, found that the intention of the accused, right from the beginning was not honest and he kept on promising that he would marry her till she became pregnant. The Hon'ble Supreme Court then, inter alia, held as under:

“This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him..... It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuaded the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent.... It is always matter of evidence whether the consent was obtained willingly or consent has been obtained by holding a false promise which the accused never intended to fulfil. If the court of facts come to the conclusion that the consent has been obtained under misconception and the accused persuaded a girl of tender age that the he would marry her then in that case it can always be said that such consent was not obtained voluntarily but under a misconception of fact and the accused right from the beginning never intended to fulfil the promise. Such consent cannot condone the offence.”

4. Though the facts of the cases before the Hon'ble Supreme Court were different from the facts in this case, the proposition of law which emerges from the above-referred decisions is that though every case of having sexual intercourse with a girl, on the promise of marrying her, would not amount to commission of rape, it cannot be said that in no case, having sexual intercourse with a girl on the strength of such a promise would amount to commission of rape. Every such case has to be examined on its individual facts, to be considered in the light of attending circumstances of the case. The Hon'ble Supreme Court has specifically recognized and held that if it is shown that since the very inception of making the promise, the accused did not intend to marry her and the prosecutrix extends her consent to have sexual intercourse with him, only because she believes the misrepresentation made to her, and thereby forms a misconception of fact that the accused was definitely going to marry her, it would amount to commission of rape.

5. The learned counsel for the petitioner has relied upon the decision of the Hon'ble Supreme Court in the case of **Uday** (supra) in support of his contention that having sexual intercourse

on the false promise of marriage does not constitute rape. In the case before the Hon'ble Supreme Court, a friendship had developed between the prosecutrix and the appellant. When the appellant proposed to marry her, the prosecutrix told him that since they belonged to different castes, such a marriage would not be possible. In these circumstances, the Hon'ble Supreme Court was of the view that the consent, given by the prosecutrix to sexual intercourse with a person with whom she was deeply had love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact.

However, the Hon'ble Court observed as under:

“but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact.”

6. In the case before it, the Hon'ble Court, noticing that the

prosecutrix was deeply in love with the appellant and having found that the proposal for their marriage was bound to be seriously opposed by their family members and finding no evidence to prove conclusively that the appellant never intended to marry her, felt that perhaps the appellant wanted to marry her, but was not able to get enough courage to disclose his intention to his family members for fear of strong opposition from them and that the matter had got complicated on account of the prosecutrix becoming pregnant, leading the appellant to distancing himself from her. The Hon'ble Court also noticed that the prosecutrix was clearly conscious of a distinct possibility that the marriage might not take place at all despite the promise of appellant and concluded that there was hardly any evidence to prove that the prosecutrix had consented to have sexually intercourse with the appellant only as a consequence of her belief based on his promise, that they will get married in due course.

7. The facts of the present case are, however, altogether different. The petitioner was not even known to the prosecutrix not to talk of she being in love with him at any time, before they met each other for the purpose of deciding whether they would be a suitable life partners for each other or not. Not only did the

appellant like and approve the prosecutrix as her life partner, his family also had a meeting with family of the prosecutrix in Parikrama Hotel, Connaught Place, New Delhi. The meeting firstly between the petitioner and the prosecutrix and thereafter between the families was followed by a *Roka* ceremony in New Delhi on 3rd April, 2009. In these circumstances, it is difficult to dispute that the prosecutrix had intercourse with the petitioner in Mumbai only because both of them having liked each other and both the families having consented to their marriage, the petitioner was definitely going to marry her within a few days. While going to Mumbai and staying with him in hotel, the prosecutrix could never have suspected that the petitioner was not going to marry her. She, therefore, acted solely upon the representation made to her by the petitioner and succumbed to her pressure or persuasions to have sexual intercourse with him. Her belief in the promise made by the petitioner had become stronger by the time she went to Sailors Home with him, as her *Roka* with the petitioner had been performed before that date. The facts of the case of **Uday** (supra) being altogether different, the decision of the Hon'ble Court would not help the petitioner, particularly when the Hon'ble Supreme Court even in the case of

Uday (supra), did not say that in no case, consent given by the prosecutrix to sexual intercourse on the assurance of marriage would be involuntary or will not amount to a misconception of fact.

8. The expression 'under a misconception of fact' is enough to include a case where the misrepresentation, made by the accused, leads to a misconception of fact in the mind of prosecutrix, who, believing the misrepresentation made to her and presuming, it to be true and correct, forms a misconception of fact that the accused was definitely going to marry her and acting thereupon, she consents to have sexual intercourse with him. As held by the Hon'ble Supreme Court in the case of **Deelip** (supra), a representation deliberately made by the accused, with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent if it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry was only a make belief held out only to obtain her consent for sexual intercourse.

9. If I take the view that sexual intercourse with a girl, in the facts and circumstances such as in the present case, does not

amount to rape, it will result in unscrupulous and mischievous persons, taking undue advantage of innocent girls by promising marriage with them, without having any intention to do so, re-assuring the girl and her family by making the two families meet each other and formalize the matter by ceremonies, such as an engagement, persuading the girl to have sexual intercourse with him by making her believe that he was definitely going to marry her and then abandoning her, after robbing her of what is most dear to her. A case where the girl agrees to have sexual intercourse on account of her love and passion for the boy and not solely on account of the misrepresentation made to her by the boy or a case where a boy, on account of circumstances, which he could not have foreseen or which are beyond his control, does not marry her, despite having all good intentions to do so, has to be treated differently from a case, such as the present one, where the petitioner since the very inception had no intention of marrying the prosecutrix to whom he was a complete stranger before he met her to consider the proposal for marriage with her. A view, which is likely to result in victimization or exploitation of innocent girls, needs to be avoided and the Courts need to take a view, which would discourage unscrupulous persons from taking

advantage of innocent girls by alluring them and having sexual intercourse with them, on a false promise of marriage.

10. If a girl surrenders herself to a boy, who comes into contact with her for the first time only in connection with a proposal for her marriage with him and who not only proposes to marry her but also formalizes his promise and strengthens her belief in his promise by entering into a formal ceremony such as engagement with her and thereby convinces her and that he is actually going to marry her, she does it not because she loves him or wants to have pleasure with him, but, because she does not want to disappoint her future husband. She does not, at that stage, harbour any doubt about their forthcoming marriage and therefore allows herself to be persuaded by him to have physical relations with him, in the belief that there was nothing wrong in establishing physical relations with someone who was going to be her husband after a few days. In case, she doubts his intentions as regards the promise made by him, to marry her, she would never succumb to his lusty demands.

11. Taking a view that persuading a girl to have physical relations on the false promise of marriage, despite having no intention to marry, will in no case constitute rape, will amount to

putting premium on a conduct which is not only highly reprehensible and abhorable but also criminal in nature. If this is allowed to happen, it will enable immoral and dishonest persons, including those who come to this country for such very purposes, to exploit girls belonging to weaker sections and lower strata of society by alluring them with false promise of marriage pressuring them to have physical relations with them by making them believe that they are going to marry them and that there was nothing wrong in having such relations with a person who is very soon going to be her husband and later on turn; their back at her, in a comfortable belief that the law being on their side, they can easily get away with their misdeeds. The courts cannot and should not give such a licence to those who keep on looking for opportunities to exploit the sentiments and vulnerability of Indian girls who perceive marriage as a pious bonding; and not as a union of two bodies. Allowing such persons to go scot free after exploiting poor and helpless girls in this manner could never have been the intention of the legislature which considered rape to be such a heinous as to attract imprisonment up to life.

12. When the Hon'ble Supreme Court recognised that there could be cases where obtaining consent for sexual intercourse by

false promise of marriage may amount to rape, it obviously had cases such as the present one in mind, where the girl succumbs to the pressure of the boy only because she believes, on account of promises made and ceremony performed, that he was going to be her husband very soon. If she knows that the boy who is making such a promise and is also formalising it by roka/engagement does not intend to marry her she is not going to allow herself to be persuaded by him.

13. According to the petitioner, he came to know from the mother of the prosecutrix that she was a Kanojia. If the family of the prosecutrix had misrepresented about their caste and that was the decisive factor for the petitioner agreeing to marry the prosecutrix, her mother would never have disclosed this to the petitioner, at least till their marriage even if she was her step mother. The whole effort of her family would then have been to keep their caste under wraps, instead of proclaiming it to the petitioner. This by itself shows that the plea taken by the petitioner that he is not marrying the prosecutrix only because of her caste is just an afterthought in an attempt to save himself from criminal liability.

14. In the present case, the only reason, being given by the

petitioner for not marrying the prosecutrix, is that though she was a *Kanojia*, she and her parents had misrepresented to him that she was a *Kaushik (Brahmin)* and that is why he later on declined to marry her. The case of the prosecution, on the other hand, is that the petitioner had met the prosecutrix where he had liked her and, therefore, he agreed to marry her not on account of her castes, but because he liked her after meeting her and interacting with her. As noted earlier, the personal meeting between the petitioner and the prosecutrix was followed by a meeting of the families and led to engagement of the petitioner with the prosecutrix on 3rd April, 2009. Both, the petitioner as well as the prosecutrix, are well-educated persons. It is difficult to accept that the petitioner genuinely wanted to marry the prosecutrix, but is not marrying her only because of her caste. Can it be said that the petitioner would have agreed to marry any girl merely because she belonged to a particular caste or sub-caste, even if he did not approve of her personality, temperament, education, culture, upbringing and family background. The answer can, obviously, be in negative. From the facts and circumstances of the case, it appear to me that from the very beginning, the petitioner did not really intend to marry

the prosecutrix and that is why he did not wait even till his formal engagement with her and persuaded her to come to Mumbai and to live with him in a hotel. Had the petitioner been such an orthodox and conservative person so as to refuse marry the prosecutrix only on account of her caste, he would not have even thought of having sexual intercourse with her before marriage and would have waited till his marriage with her. It is difficult to accept that a young and well-educated boy such as the petitioner, who is modern, bold and outgoing enough to call the prosecutrix to Mumbai, spends a few nights with her in a hotel under an assumed name and follows it up by taking her to Sailors Home in New Delhi a number of times and has sexual intercourse with her, would not marry her only on account of her caste/sub-caste. It, therefore, appears to me that the plea taken by the petitioner that he declined to marry the prosecutrix only because she was a *Kanojia* and not a *Kaushik* is only a false defence set up in order to wriggle out of criminal case, registered against him.

15. It was pointed out by the learned counsel for the petitioner that in the first complaint made to the police, there was no allegation of rape. We need to recognise that in a tradition bound society like ours, it is not easy for an unmarried girl to

admit a mistake of this nature made by her. It must have taken quite some time for the prosecutrix to muster enough courage to disclose to her parents that she had allowed herself to be used by a person, who never intended to marry her. She disclosed it only when she felt that there was really no reasonable possibility of this man still marrying her. In any case, this would have no bearing in the present case, as corroborative evidence has been collected by the IO to show that the petitioner had spent nights with the prosecutrix not only in a hotel in Mumbai but also in Sailors Home in New Delhi.

16. It was also submitted by the learned counsel for the petitioner that this is not the case of the complainant that she had consented to physical relations with the petitioner on the strength of the promise made by him to marry her and that her case in the FIR is that the petitioner had sex with her without her consent and she did not report the matter to the police on account of the promise of marriage made by him. As noted earlier, this is not easy for an Indian girl to admit that she consented to have sexual intercourse or did not resist the advances made by the boy in whose company she spent a number of nights either in hotel or in a Sailors Home. Therefore, her first attempt may be to avoid

disclosing such weakness on her part. But, the facts and circumstances of the case clearly indicate that this was a case of the prosecutrix succumbing to the demands of the petitioner for establishing physical relations with him, believing the misrepresentation made by him since not only he, but also his family had approved her and the proposal had also been formalized in the form of *Roka* ceremony and she, therefore, entertained a misconception of fact that the petitioner was soon going to be her husband.

17. The learned counsel for the petitioners has referred to decision of the Hon'ble Supreme Court in **State of Maharashtra vs. Uddav 2002** (3) Crimes (SC), where the prosecutrix and the accused had developed friendly intimacy and on account of that relationship, the respondent had sexual intercourse with the prosecutrix and promise to marry her was ultimately declined. In the present case, as noted earlier, there was no intimacy between the prosecutrix and the petitioner, who were not even known to each other before when the father of the prosecutrix selected the petitioner, as a person, who could be a suitable match for their daughter. The learned counsel also referred to the decision of Hon'ble Supreme Court in **Pradeep Kumar vs.**

State of Bihar & Anr. (2007) 3 SCC (Cri) 407. I have gone through this judgment, but I do not find any such proposition in it, as would show that having sexual intercourse with a girl in the circumstances, such as in the present case, would not amount to commission of rape. He has also referred to the decision of this Court in **Crl.M.A.No.12865/2009** in **Bail Application No.2145/2009** where bail was granted to a person who had developed intimacy with the prosecutrix and had later made promise to marry here. In that case, the prosecutrix had gone to the extent of giving intoxicating pills to her family members so as to have physical relation with him in her own house. In that case, there were letters written by the prosecutrix to the petitioner which indicated that she was deeply in love with him and wanted not only to come close to him, but also to have a child from him. In these circumstances, the anticipatory bail was granted to the petitioner. However, the facts of this case are altogether different.

The learned counsel has also referred to the order of this Court dated 7th October, 2009 in **Bail Application No.1467/2007**, where the complainant claimed to have married the petitioner by garlanding in a temple in Vrindavan. However,

the facts of the present case are altogether different and it is an admitted position that the petitioner has flatly refused to marry the prosecutrix. The learned counsel has referred to decision of this Court in **Manish Kumar vs. State & Anr.** 2005 (3) JCC 1611. In that case also, there was a love affair between the complainant and the accused. Subsequent to lodging of FIR, the accused had married the complainant and a petition was filed by both, the complainant as well as the accused, for quashing FIR. In that case, the prosecutrix and the petitioner were deeply in love with each other and had been touring out of Delhi. This judgment is, therefore, of no help to the petitioner. The learned counsel has lastly referred to the decision of Bombay High Court in **Sunil Vishnu Salve & Anr. vs. State of Maharashtra** 2006 (3) Crimes 49 and decision of Jharkhand in **Kubar Chandra vs. State of Bihar** 2005 (1) RCR (Cri) 905. Having considered both these judgments, I am of the view that they have no application to the facts of the present case.

18. Though in his petition under Section 482 of the Code of Criminal Procedure, the petitioner had denied having sexual intercourse with the prosecutrix in a hotel in Mumbai, I find that at the time of hearing of the anticipatory bail application of the

petitioner before the learned Additional Sessions Judge, his counsel did not dispute this part of the allegations against the petitioner. Even otherwise, evidence has been collected during investigation which shows that the petitioner had stayed with the prosecutrix not only in a hotel in Mumbai, but also in a Sailors Home in New Delhi. It would not be appropriate to scrutinize the evidence and comment on it at this stage lest the petitioner gets prejudiced on account of scrutiny and evaluation of the evidence at this stage.

19. As observed by the Hon'ble Supreme Court in **Pokar Ram vs. State of Rajasthan** AIR 1985 SC 969, relevant considerations, governing the Court's decision in granting anticipatory bail under Section 438 of the Code of Criminal Procedure, are materially different from those which apply while considering application for bail by a person, who is arrested in the course of investigation or by a person who is convicted and who seeks bail during pendency of the appeal. The power of the Court under Section 438 of the Code of Criminal Procedure being somewhat extraordinary in character should normally be used only where it appears that the petitioner before the Court may have been implicated in a false case and there are reasonable

grounds to believe that he has not likely to otherwise misuse the liberty of bail, if granted to him. The offence under Section 376 of IPC being a serious offence, the Court ought to be circumspect while considering request of an accused in a case of this nature for grant of anticipatory bail. The facts and circumstances of this case do not make out an appropriate case for exercise of discretion under Section 438 of the Code of Criminal Procedure. In fact, the Status Report filed by the State, shows that the petitioner has been absconding and has not surrendered, despite raids at the places of his relatives. The application of the petitioner for grant of anticipatory bail has already been rejected by the Court of Sessions. A person, who is absconding and evading process of law, is not entitled to grant of anticipatory bail save in exceptional case justifying departure from this principal. Unless there are peculiar and special facts and circumstances in a given case, the Court would not be justified in extending the benefit of anticipatory bail to such a person.

20. In **Jagtar Singh vs. Satendra Kaur** 2002(6) Scale, the Hon'ble Supreme Court observed that normally when the accused are absconding, there is no question of granting anticipatory bail or regular bail to them. As held by the Hon'ble Supreme Court in

State of Maharashtra vs. Mohd. Sajid Hussain 2008(1) SCC (CrL.) 176, one of the factors, while considering the application for grant of anticipatory bail, is the possibility of the applicant, if granted bail, fleeing from justice. If a person is absconding, despite raids conducted by the police and rejection of his petition for grant of anticipatory bail by the Court of Sessions, the prosecution may not be unjustified in saying that anticipatory bail ought not to be granted to such a person who may even flee from justice by not attending the trial. In the absence of exceptional and peculiar circumstances, the Court, therefore, should not grant anticipatory bail to a person, who is evading the process of law by continuing to remain absconding.

The bail application is hereby dismissed. The observations made in this order, which have been necessitated only on account of and in order to deal with the contentions raised by the petitioner, shall, however, not affect the decision of the case at any stage of the trial or other proceedings.

V.K. JAIN,J

FEBRUARY 1, 2010

bg