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

Date of decision: 14th March 2023

+ **BAIL APPLN. 3051/2022**

SANJAY MALIK @ SANT SEVAK DAS Petitioner

Through: Mr. Krishan Kumar, Mr. Shivam Bedi, Mr. S.P. Nangia and Ms. Gargi Singh, Advocates.

versus

THE STATE & ANR. Respondents

Through: Mr. Tarang Srivastava, APP for the State with SI Ajay, P.S.: Neb Sarai.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition filed under section 439 read with section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') the petitioner seeks grant of regular bail in case FIR No. 216/2022 dated 06.03.2022 registered under sections 354/376 of the Indian Penal Code, 1860 ('IPC') at P.S.: Neb Sarai.

2. Notice on this petition was issued on 13.10.2022.
3. Status reports dated 28.10.2022 and 16.11.2022 have been filed. Nominal roll dated 16.02.2023 has been received from the Jail Superintendent.

4. Chargesheet in the matter has been filed on 04.05.2022; whereupon on 29.07.2022 charges were framed against the petitioner under sections 354/376 IPC.
5. As required, intimation was sent to the complainant/prosecutrix under section 439 (1-A) Cr.P.C. read with Delhi High Court Practice Directions dated 24.09.2019 in form *Annexure-A*; whereupon the prosecutrix appeared *via* video-conferencing and also sought assistance of a legal-aid counsel. *Vide* order dated 16.11.2022 the prosecutrix was provided counsel at State expense. The prosecutrix, who claims to be a Czech national, sought permission to join the hearings *via* video-conferencing, which permission was duly accorded.
6. Considering the nature of the matter, some of the hearings in the matter were conducted *in-camera*.
7. The court has heard Mr. Krishan Kumar, learned counsel appearing for the petitioner; as well as Mr. Tarang Srivastava, learned APP appearing for the State; as also Mr. Ashutosh Kaushik, learned counsel appointed for the prosecutrix by the Delhi High Court Legal Services Committee. The court has also heard the prosecutrix herself at considerable length.
8. Mr. Kumar submits that though the petitioner denies having had any physical relations with the prosecutrix, in any case, the prosecutrix is 'major' and any physical relations with her were entirely consensual. Counsel submits that though the prosecutrix alleges that the petitioner molested her on 12.10.2019 at a certain hostel in Delhi; and subsequently engaged in physical liaison with her on 31.01.2020 at

Prayagraj (Allahabad) and subsequently on 07.02.2020 at a hotel in Gaya (Bihar), the FIR came to be registered only much later on 06.03.2022 at Delhi; and the prosecutrix made no complaint nor any efforts to register any FIR at the various other places where she claims she was sexually assaulted.

9. Mr. Kumar submits, that though in the FIR the prosecutrix alleges that the petitioner took advantage of her, pretending to be a 'spiritual guru' who would help her perform the post-demise rituals of her deceased husband who had passed away on 08.08.2019, those allegations are false; and the petitioner did in fact guide her through those post-demise rituals. Attention in this behalf is drawn to the statement of the prosecutrix recorded under section 164 Cr.P.C. on 08.03.2022, to argue that that statement clearly shows how the prosecutrix has embellished the allegations.
10. Mr. Kumar also draws attention to the prosecutrix's cross-examination conducted on 20.08.2022, to point-out that admittedly, the print-out of WhatsApp messages exchanged between the petitioner and the prosecutrix show that the prosecutrix had saved the petitioner's mobile number on her phone with the appellation "*Tharki Guru*", which belies the pretended innocence of the prosecutrix. Counsel further argues, that the prosecutrix also admits as correct that on 27.02.2022 she demanded from the petitioner Rs.45,000/-; which she later tries to explain by saying that she asked for the money on the suggestion of her fiancé, so as to induce the petitioner to come to Delhi.

11. Mr. Kumar points-out, that in fact in her examination-in-chief recorded on 01.08.2022, the prosecutrix states that after the alleged sexual liaison in Gaya, she messaged one Mr. Ansari, who is stated to be the owner of Ansari Guest House in Bodh Gaya which she had visited in October 2019, seeking Mr. Ansari's help; arguing thereby, that the prosecutrix was acquainted with people in Gaya and could have made a police complaint there itself, had there been any truth in her allegations; but she chose not to do so since her allegations are false.
12. It is argued on behalf of the petitioner, that all the foregoing aspects show, at the worst, that the physical liaisons between the petitioner and the prosecutrix were consensual, which is why the prosecutrix never made any complaint nor did she thwart any physical advances when she travelled freely with the petitioner to Prayagraj, to Banaras and to Gaya.
13. In the circumstances, it is submitted, that especially now that the prosecutrix's cross-examination is also concluded, and she is not residing in Delhi and may return to the Czech Republic, there is no justification in continuing to keep the petitioner in judicial custody.
14. On the other hand, opposing the grant of bail, Mr. Tarang Srivastava, learned APP submits that only 08 of the 16 prosecution witnesses have so far been examined; that one of the crucial witnesses on behalf of the prosecution, a lady named Radka, who is the prosecutrix's friend, is yet to be examined; and therefore it would not be appropriate to grant regular bail to the petitioner at this stage.

15. It is further argued on behalf of the State, that mere delay in registration of the FIR is never fatal; and that the petitioner is a manipulative person, who represented himself to be a spiritual guru, and played on the prosecutrix's vulnerabilities after the untimely demise of her husband; and this gave to the petitioner an element of dominance over the prosecutrix, which he exploited unashamedly.
16. Upon being queried, learned APP states that there is no medical evidence in support of any of the incidents of physical assault since no MLC was ever conducted. He also states that the prosecution witness Radka is believed to have returned to the Czech Republic, and therefore her deposition would likely be recorded *via* video-conferencing.
17. Mr. Kaushik, learned counsel appearing for the prosecutrix argues, that the petitioner is an influential person in Gaya, which is the reason why no police complaint was made by the prosecutrix at that place; and that in fact, as narrated in the FIR, the prosecutrix was so fearful of the petitioner that she de-boarded the train at Mughal Sarai without informing him, to escape from his clutches. It is submitted that only when she was in a fit mental state, did the prosecutrix muster-up the courage to register the FIR on 06.03.2022 and took steps to have the petitioner apprehended.
18. On the point that the petitioner may interfere in recording the depositions of prosecution witnesses, in particular Radka's deposition, Mr. Kaushik submits that though Radka is in the Czech Republic, even there she is being intimidated by a local person at the petitioner's behest and instance.

19. As requested by her, the court has also heard the prosecutrix at length. She states that Radka, who introduced her to the petitioner, was not a close friend; that the petitioner misled her into believing that he was from the Himalayas whereas he was actually from Haryana; that the petitioner paid to her Rs. 20,000/- (and not Rs. 45,000/-) by way of inducement so that she would not approach the police; and that all episodes of physical liaison were forced upon her and were not consensual.
20. Upon a careful conspectus of the contents of the FIR, the chargesheet, the depositions recorded so far, and the submissions made as summarized above, on a *prima-facie* basis, what prevails with this court is the following:
 - 20.1 Admittedly, the prosecutrix had lost her husband in a tragic and untimely manner on 08.08.2019, and was therefore in an emotionally vulnerable state;
 - 20.2 Admittedly, the prosecutrix travelled with the petitioner from Prayagraj to Banaras to Gaya, all of which are places of Hindu worship and congregation, to perform the last rites and rituals of her deceased husband, and being a foreign national, unfamiliar with Hindu rites and ceremonies, she developed dependence upon the petitioner to bring a closure to the tragedy she had suffered;
 - 20.3 Though it is true that the travel to the aforementioned places happened over a period of almost 04 months, and it is nowhere specifically alleged that the petitioner held the prosecutrix 'hostage' or that she was made to travel with him by use of

physical force or restraint, in the opinion of this court, that alone would not be determinative of the state of the prosecutrix's mind, for the court to be able to say at this stage that the alleged sexual liaisons were consensual;

20.4 Though the first incident of physical relations is alleged to have happened in a hostel in Delhi itself, the nature of the act alleged in that instance was not rape, and in any case the prosecutrix's silence in relation to that act cannot be taken to be a licence for more aggravated sexual liaison, as has been alleged subsequently;

20.5 In the aforesaid circumstances, in the opinion of this court, the critical aspect of the offence of rape *viz.* 'consent' as opposed to 'compulsion' requires a more nuanced consideration. Though it is universally accepted that consent given under force, coercion or duress is no consent in law since it is not free or volitional, in many cases it is necessary to examine consent in a more granular manner, with the awareness that *substantivity of consent* may also be *vitiated by several other circumstances that erode the freedom of choice*. Several circumstances, including emotional exploitation, may vitiate the substantivity of consent;

20.6 A distinction also needs to be articulated between a prosecutrix '*consenting to a situation*' vs. '*consenting to sexual liaison*'. Merely because a prosecutrix consents to being in the company of a man, regardless of for how long, can never be the basis to infer that she had also consented to sexual liaison with the man.

In the present case, merely because the prosecutrix agreed to accompany the petitioner to various holy places - for purposes of conducting last rites and rituals - does not *ipso-facto* imply that she consented to sexual relations with him;

- 20.7 The delay in registration of the FIR has been sought to be explained on the same basis, *viz.* the prosecutrix's emotionally vulnerable state, as also the fact that she was in alien places and environments where she was fearful of consequences if she had made a police complaint;
- 20.8 Considering that the sexual liaisons happened over a period of time, the absence of medical evidence is also not dispositive of the matter, one way or the other;
- 20.9 Whether or not the prosecutrix has returned to the Czech Republic is not clear since on the last date of hearing, she joined *via* video conferencing from a place in Southern India. In any case, whether she wishes to return to her home country or not, is for her to decide;
- 20.10 Even the other crucial witness Radka, who is stated to be a Czech National, is yet to depose in court.
21. The court finds that in the present case, an aspect of particular concern is that the allegations disclose deception and guile on the part of the petitioner, in pretending to be a 'holy man' guiding a foreign national with pious post-demise ceremonies of her husband. In fact it appears to be the petitioner's own stand, that he took the prosecutrix to Prayagraj, Banaras and Gaya for the post-demise ceremonies. At this stage however, this court is not re-assured that the petitioner

would not interfere in the course of justice by practicing the same guile and deception. Whether the prosecutrix and her prime-witness are in India or abroad, the petitioner's attempt to intimidate or influence them, cannot be ruled-out.

22. In view of the above circumstances, this court is not persuaded to admit the petitioner to regular bail, *at this stage*. Accordingly, the bail petition is dismissed; however granting to the petitioner liberty to apply afresh for the same relief before the learned trial court, once the deposition of all prosecution witnesses is complete.
23. Nothing in this order shall be construed as an expression of opinion on the merits of the pending matter.
24. The petition stands disposed-of.
25. Other pending applications, if any, are also disposed-of.

ANUP JAIRAM BHAMBHANI, J

MARCH 14, 2023

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