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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 10.10.2022

Judgment delivered on: 12.10.2022

+ CRL.M.(BAIL) 1044/2022 in CRL.A. 416/2022

ASHISH WINDWANI

..... Appellant

Through: Mr. N. Hariharan, Senior Advocate
with Mr. Bharat Chugh, Mr. Siddharth
Shiva Kumar, Mr. Siddarth S. Yadav,
Mr. Varun Deswal, Ms. Punya Rekha
Angara, Mr. Prateek Bhalla, Mr.
Sharian Mukherji, Mr. Rahul, Mr.
Kaushal Kaushik and Mr. Adab
Ahmad, Advocates.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Aman Usman, APP for State.
Counsel for complainant (appearance
not given).

CORAM:

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

ORDER

ANOOP KUMAR MENDIRATTA, J.

CRL.M.(BAIL) 1044/2022

1. An application under Section 389 read with Section 482 Cr.PC has been preferred on behalf of the appellant for suspension of sentence and release of the appellant on bail during the pendency of appeal.
2. The appellant has preferred the appeal against the judgment dated 02.07.2022 and order on sentence dated 13.07.2022 passed by the learned

ASJ, Patiala House Courts, New Delhi in FIR No. 684/2015 under Sections 376(2)(n)/313 IPC registered at Police Station R.K. Puram whereby he has been sentenced to undergo rigorous imprisonment of 10 years for the offence punishable under Section 376 (2)(n) IPC and directed to pay fine of Rs.6 lakhs (in default of payment of fine to undergo SI for one year). However, the appellant stands acquitted of the offence under Section 313 IPC.

3. Learned counsel for appellant submits that there is patent infirmity in convicting the accused as crucial evidence in favour of appellant has been overlooked and challenges the impugned judgment on following grounds:-

(i) That the learned Trial Court erred in concluding that appellant obtained prosecutrix's consent for sexual intercourse on a false promise of marriage.

(ii) That there is patent illegality in the impugned judgment as the glaring lacunas in prosecution evidence have been overlooked. It is also pointed out that there is overwhelming un rebutted evidence on record that the prosecutrix herself had written blogs which were posted on social media that she did not believe in the institution of marriage.

(iii) That the appellant/applicant had met the complainant/prosecutrix on a social media application 'Tinder', which is known for casual dating. As such, the prosecutrix herself did not believe in the idea of marriage. Further, it is improbable by her conduct and circumstances on record that she was misled on alleged promise of marriage.

(iv) That there is overwhelming evidence on record that the prosecutrix knew that the appellant was already married having two children which falsifies the theory of alleged promise to marry. Reliance in this regard is

also placed upon the testimony of DW-3 (wife of the appellant). The name of the children is also stated to have been engraved on the forearm of the appellant in the form of permanent tattoos and, as such, it was unlikely that the prosecutrix did not notice the same. The prosecutrix/complainant is stated to have simply feigned ignorance with regard to aforesaid piece of evidence during cross-examination. The incident of alleged sexual encounter on both 26.05.2015 and 10.06.2015 has been denied and it is submitted that there is no corroborative evidence to infer the allegations of rape.

(v) That no-corroborative evidence was collected from Hyatt Hotel qua the alleged sexual encounter, though the prosecutrix is alleged to have bled during sexual assault as she was having menstrual cycle. It is further submitted that stay at Hyatt Hotel on 26.05.2015 was only at the behest of the complainant/prosecutrix. Further, the evidence qua the alleged abortion undertaken by the prosecutrix at behest of appellant is stated to be far from sterling and the presence of the appellant at the time of abortion does not stand confirmed. The testimony of the prosecutrix is further stated to be unworthy of belief in the absence of specific details of the various alleged meetings and on account of improvements in her testimony.

(vi) That the present FIR was lodged after a delay of about 88 days and no explanation is forthcoming in this regard.

(vii) That the learned Trial Court acquitted the appellant under Section 313 IPC disbelieving the testimony of the prosecutrix and concluded that the prosecutrix herself consented for termination of alleged pregnancy. The learned Trial Court is stated to have erred in invoking the presumption under Section 114 of the Indian Evidence Act.

(viii) That the report of defence expert DW-2 examined on behalf of the appellant is stated to have been wrongly ignored by the learned Trial Court.

Reliance is further placed upon the judgments passed in *Uday Vs. State of Karnataka*, (2003) 4 SCC 46, *X (Assumed Name) Vs. State & Anr.*, CrI. Rev. P. 110/2017, *Gravit Indora Vs. NCT of Delhi*, 2015 SCC OnLine Del 9673, *Babu Vs State of Kerela*, 2013 SCC OnLine Ker 24124, *Rai Sandeep @ Deepu Vs. State of NCT of Delhi*, (2012) 8 SCC 21, *Gravit Indora Vs. State of NCT of Delhi*, 2015 SCC OnLine Del 9673, *Narender Kumar Vs. State (NCT of Delhi)*, (2012) 7 SCC 171, *Rajesh Namdeo Mhatre v State of Maharashtra*, (2002) 4 Mh LJ 266, *Chinniah Server v State of Madras [And Vadivelu Thevar v State of Madras - same case]*, AIR 1957 SC 614, *Rachna Singh Vs. State*, 2019 SCC OnLine Del 8519, *Ganesan Vs. State*, (2020) 10 SCC 573, *Narender Kumar Vs. State, (NCT of Delhi)*, (2012) 7 SCC 17, *Sadashiv Ramrao Hadbe v State of Maharashtra*, (2006) 10 SCC 92, *Rai Sandeep @Deepu Vs. State of NCT of Delhi*, (2012) 8 SCC 21, *Kanan and Ors. Vs. State of Kerela*, (1979) 3 SCC 319, *Dana Yadav Vs. State of Bihar*, (2002) 7 SCC 295, *Padum Kumar Vs. State of Uttar Pradesh*, (2020) 3 SCC 35, *Dudh Nath Pandey v State of Uttar Pradesh*, 1981 2 SCC 166, *Pradeep Saini Vs. State*, 2009 SCC OnLine Del 2803, *Aiyali Vs. State Bank of India*, 1993 SCC OnLine MP 252, *Rajesh Patel Vs. State of Jharkhand*, (2013) 3 SCC 791, *Babu Singh v State of UP*, (1978) 1 SCC 579, *Angana v State of Rajasthan*, (2009) 3 SCC 767, *Atul Tripathi v State of UP*, (2014) 9 SCC 177 and *Bhagwan Rama Shinde Gosai v State of Gujarat*, (1999) SCC (Cri) 553.

Learned counsel for appellant also submits that father of the appellant requires dialysis on daily basis. It is also claimed that the appellant is the father of two daughters, who are dependent upon the appellant for their education and life.

4. On the other hand, the application has been vehemently opposed by the learned APP for the State along with the learned counsel for the complainant. It is pointed out by the learned APP for the State that the complainant/prosecutrix was duly examined at Safdarjung Hospital and her statement under Section 164 Cr.PC was also recorded wherein she supported her version as given in the complaint. The appellant is stated to have misled for sexual intercourse on a false promise of marriage. It is also submitted that reliance could not be placed upon the social posts/blogs by the prosecutrix as the thought process could be changing and the same does not preclude from believing that the prosecutrix was duped by false promise. It is further urged that the prosecutrix was not aware of the marital status of the appellant and the testimony of the wife of the appellant DW-3 was rightly rejected. The delay in registration of FIR is stated to have been duly explained by the prosecution.

5. I have given considered thought to the contentions raised.

It may be reiterated that the Appellate Court, at the stage of suspension of sentence and release on bail till disposal of appeal, has to examine if there is any patent infirmity in the order of conviction that renders the conviction prima facie erroneous. The evidence is not to be re-assessed or re-analyzed to suspend the execution of the sentence. The detailed observations on merits of the case are not called for, at this stage lest it

prejudices the case of the petitioner but the matter has to be seen in the light of settled principles of law.

6. Reverting back to the facts of the present case, it may be observed that the detailed submissions have been made on behalf of the appellant pointing out that the factum of marriage of the appellant was already known to the prosecutrix/complainant. Further, the blogs/posts on the social media put by the complainant/prosecutrix appear to reflect that she had reservations about institution of marriage and supported the idea of live-in relationship. The aforesaid observations need to be kept in perspective since the blogs had been made prior to the alleged reporting of the incident. It appears that sexual encounter initially at Hyatt Hotel on 26.05.2015 was completely voluntary. The evidence relating to incident dated 10.06.2015 also requires a deeper scrutiny in the light of defence evidence led on behalf of the appellant. It may be preposterous to make observations in detail at this stage but the evidence led by the appellant does require consideration. At this stage, even if the evidence is not to be re-assessed or re-analyzed for the purpose of execution of sentence but the infirmities which have been pointed out on record need consideration. It may also be noticed that the disposal of the appeal is likely to take some time.

7. Having regard to the evidence on record and the infirmities pointed out by the learned counsel for the appellant, I am of the considered opinion that the sentence of the appellant be suspended till the disposal of appeal and he be admitted to bail on furnishing a personal bond in the sum of Rs.25,000/- (Rupees Twenty Five Thousand only) with two sureties in the

like amount to the satisfaction of the learned Trial Court and subject to the following conditions:

- (i) The appellant shall provide his mobile number to the Investigating Officer (IO) concerned/SHO concerned/concerned trial court at the time of release, which shall be kept in working conditions at all times. The appellant shall not switch-off, or change the same without prior intimation during the period of his bail;
- (ii) The appellant shall not indulge in any criminal activity or any illegal activities during the bail period; and
- (iv) The appellant shall be released on bail, subject to deposit of fine amount.

Application for suspension of sentence is accordingly allowed. The observations herein have been made only for purpose of consideration of application for suspension of sentence and shall have no bearing on the final disposal of appeal.

A copy of this order be forwarded to the Superintendent Jail and learned Trial Court for information and compliance.

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List in due course.

**(ANOOP KUMAR MENDIRATTA)
JUDGE**

October 12, 2022/A