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

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Date of Decision: 26th May, 2022

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BAIL APPLN. 1647/2022

NIZAMUDDIN KHAN Petitioner
Through: Mr. Mohit Mathur,
Sr.Advocate with Mr. Javed
Ahmad, Mr. Kunwar
Mohd. Asad, Mr.
Vinayak Chatale and Ms.
Aakriti Aditya, Advocates

versus

THE STATE & ANR. Respondents
Through: Ms. Neelam Sharma, APP
for State with SI Indoo
Verma, P.S. Jamia Nagar
Mr. Samama Suhail and
Mr. Dilshad Ali, Advocates
for complainant with
complainant in person

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

SWARANA KANTA SHARMA, J. (ORAL)

CRL.M.A. 10632/2022 (exemption)

1. Allowed, subject to all just exceptions.
2. The application stands disposed of.

BAIL APPLN. 1647/2022

3. The instant application under Section 438 of the Code of Criminal Procedure, 1973 has been filed on behalf of the petitioner seeking anticipatory bail in FIR bearing No. 201/2022, registered

at Police Station Jamia Nagar, for offences punishable under Sections 376D/506/34 of the Indian Penal Code, 1860.

4. It is stated by the complainant, who is the real sister of the petitioner, that she has lodged a complaint with Police Station, Jamia Nagar and thereupon an FIR No. 201/2022 under Section 376D/506/34 IPC was registered on 25.4.2022. The incident in question has allegedly taken place on 10.3.2019. When a query was put to the learned counsel for the complainant, who is present in Court and who is assisting the learned APP for the State as well as the Investigating Officer (IO), regarding reason for the delay in lodging of the FIR, it was stated that since it was a sensitive relationship; at the instance of their father who has unfortunately passed away in October, 2021, the complainant did not lodge any complaint. The prestige of the family was paramount for her. It is now stated that after passing away of her father and after consultation with her husband the present FIR was lodged in April, 2022 i.e. after about three years of the alleged incident. Except this reason, no other reason has been put forth by the State or the learned counsel for the complainant. In any case, this is a matter of trial and may be explained by her when her testimony will be recorded and will be tested on the touchstone of cross-examination.

5. My attention has also been drawn to a statement recorded under Section 164 Cr.P.C. which was recorded after three years of the alleged incident. It is mentioned therein by the complainant

that the video of the incident in question had been made and she had been threatened that in case she will disclose it, the video will be made public. It is now stated that anticipatory bail should be rejected since the video is to be recovered. There is no other reason brought to the knowledge of the court for custodial interrogation except for the purpose of recovery of the alleged video, which does not find mention in the FIR.

6. Having heard learned counsel for the petitioner, learned APP for the State and the learned counsel assisting the Id. APP on behalf of the complainant, I am of the considered view that while deciding this application I have to remain conscious and keep in mind that the present case involves sexual assault of the real sister by two brothers and also involvement of the wife of the present applicant/petitioner who had allegedly stood guard outside the room where the alleged incident had taken place. It is stated that earlier there were some disputes in the family regarding their late father bequeathing his property. However, learned counsel for the complainant insists that since she had received her share of the property that cannot be a reason for lodging of the present FIR. I am of the view that prima facie there is delay of three years in lodging of the present FIR and in the statement under Section 164 it is mentioned that since her father had requested her not to disclose the same, she had refrained from lodging the FIR.

7. Further, I am of the view that in the FIR the complainant has not made any mention of video recording of the sexual assault.

Learned counsel for the complainant states that since she was under shock, she had forgotten and therefore she had not disclosed it to the Police. I am of prima facie view that it is the case of the complainant herself that after giving careful thought for three years, she had lodged the FIR. Therefore while the FIR was neither lodged in a hurry nor under threat, the video recording still did not find mention in the FIR.

8. It has been vehemently argued that the nature of the allegations is serious therefore bail be declined. This is the only ground on which the bail has been opposed as discussed above. However, in view of the rulings of the Hon'ble Supreme Court in various cases, it is not merely the seriousness of the allegations levelled but also the facts and circumstances of the case that need to be examined, as to whether in case the accused is released on bail, he would flee from justice or not and if he would cooperate in the investigation or would attempt to influence the witnesses or tamper with evidence, and if he would participate as and when the trial commences.

9. Matters regarding liberty of a person have to be dealt with cautiously, a balance has to be struck between respect for his fundamental rights and free and fair investigation as well.

10. In this regard, it is useful to discuss the scope and ambit of anticipatory bail which has been enumerated in detail by the Hon'ble Supreme Court in the case of *Siddharam Satlingappa*

Mhetre vs. State of Maharashtra and Ors (2011) 1 SCC (Cri)

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109. *A good deal of misunderstanding with regard to the ambit and scope of Section 438 CrPC could have been avoided in case the Constitution Bench decision of this Court in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] was correctly understood, appreciated and applied. This Court in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] laid down the following principles with regard to anticipatory bail:*

(a) Section 438(1) is to be interpreted in the light of Article 21 of the Constitution of India.

(b) Filing of FIR is not a condition precedent to exercise of power under Section 438.

(c) Order under Section 438 would not affect the right of police to conduct investigation.

(d) Conditions mentioned in Section 437 cannot be read into Section 438.

(e) Although the power to release on anticipatory bail can be described as of an “extraordinary” character this would “not justify the conclusion that the power must be exercised in exceptional cases only”. Powers are discretionary to be exercised in the light of the circumstances of each case.

(f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such ad interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant.

110. *The Law Commission in July 2002 has severely criticised the police of our country for the arbitrary use of power of arrest which, the Commission said, is the result of the vast discretionary powers conferred upon them by this Code. The Commission expressed concern that there is no internal mechanism within the Police*

Department to prevent misuse of law in this manner and the stark reality that complaint lodged in this regard does not bring any result. The Commission intends to suggest amendments in the Criminal Procedure Code and has invited suggestions from various quarters. Reference is made in this article to the 41st Report of the Law Commission wherein the Commission saw “no justification” to require a person to submit to custody, remain in prison for some days and then apply for bail even when there are reasonable grounds for holding that the person accused of an offence is not likely to abscond or otherwise misuse his liberty. Discretionary power to order anticipatory bail is required to be exercised keeping in mind these sentiments and spirit of the judgments of this Court in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] and Joginder Kumar v. State of U.P. [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172]

Relevant consideration for exercise of the power

111. *No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] that the High Court or the Court of Session has to exercise their jurisdiction under Section 438 CrPC by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.*

112. *The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:*

- (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.

113. Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

114. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualise all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the Judge concerned, after consideration of the entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the Judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the Court of Session or the High Court is always available.

स्वयमेव जयते (emphasis supplied)

11. At the cost of the repetition, the alleged incident has taken place three years back. It is not the case of the prosecution that there is probability of petitioner not joining the investigation and therefore, as per the mandate of the Hon'ble Supreme Court in various cases, it is clear that the provisions of Section 438 CrPC have their genesis in Article 21 of the Constitution of India, which deals with liberty of an individual. In any case, 'A man is

presumed to be innocent till proven guilty' is a cardinal principle of criminal jurisprudence.

12. Learned Senior counsel appearing for the petitioner states that the petitioner is a practicing Advocate and there is no question of his leaving the country or not abiding with any condition imposed by this Court in case he is granted bail. Mr. Mathur further states that he is willing to join investigation and cooperate with the Investigating Officer.

13. Hence, it is directed that in the event of arrest, the petitioner be released on his furnishing personal bond in the sum of Rs. 50,000/- with a surety of like amount to the satisfaction of IO/SHO concerned with the following conditions:

- (i) The petitioner shall join investigation on 27.5.2022 at 4.00 p.m. and shall continue to join as and when required by the IO.
- (ii) The applicant shall remain available on mobile numbers; shared by him with the Police.
- (iii) The applicant shall not leave NCT of Delhi or country without prior permission of the concerned IO/SHO.
- (iv) The applicant shall not directly or indirectly make an attempt to influence the witnesses or tamper with the evidence in any manner.
- (v) In case of change of residential address/contact details, the applicant shall promptly inform the same to the concerned I.O/SHO.
- (vi) The applicant shall not approach or contact the complainant or her close relatives.

14. The bail application stands disposed of. It is needless to mention here that the observations made here-in-above will not tantamount to expression of any opinion on the merits of the case.

SWARANA KANTA SHARMA, J

MAY 26, 2022

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