

MHCC050068622022



**IN THE COURT OF SESSIONS AT DINDOSHI
(BORIVALI DIVISION), GOREGAON, MUMBAI**

ANTICIPATORY BAIL APPLICATION NO.2060 OF 2022

IN

C.R.NO.1282 OF 2022

Mr. Malek Shahrukh Shabbir Husen

Age 29 years, Occ.- Business,

R/at D-18, Sankalit Nagar,

Juhapura, Ahmadabad,

Ahmadabad

Gujarat

.....Applicant

V/s.

The State of Maharashtra

(At the instance of Malvani

Police Station, Mumbai)

.....Respondent

Adv. Karim Pathan for applicant.

APP. Ms. R. S. Kanojia for State/respondent.

CORAM : H.H. Additional Sessions Judge,

Shri S. N. Salve.

Court Room No.15.

Date : 12th January, 2023

ORAL ORDER

This is an application under section 438 of Code of Criminal Procedure 1973 moved by the applicant-accused for grant of bail in anticipation of his arrest in connection with C. R. No.1282 of 2022 registered with Malvani Police Station for an offence

punishable u/sec.376, 376(2)(n), 323, 504 of the Indian Penal Code.

2. In short, it is the contention of the applicant-accused that he is law abiding and bonafide citizen of India. He is apprehending his arrest in connection with the aforesaid crime registered with Malvani Police Station at the instance of the report lodged by the victim alleging therein that the applicant-accused from time to time under the pretext of marriage committed forceful sexual intercourse with her. It is further alleged that victim went to the native place of the accused but he was not found there. Subsequently, when she contacted to the wife of the accused on her cell phone, then she warned not to contact the applicant-accused. According to the applicant, he has not committed the offence as alleged by the prosecution and has been falsely implicated in the crime. It is submitted by the accused that the relationship between him and the victim was consensual. He never misrepresented the victim. On the contrary, he already informed her that he is already married and has minor daughter of 5 years old. It is further contended by him that in fact the victim has misrepresented him and cheated him. According to the applicant, no offence as alleged by prosecution is made out against him. According to the applicant, there is no need of custodial interrogation. Further, he is permanent resident of the address given in the application and if he enlarged on bail, he will not evade the trial. Lastly, the applicant-accused prayed that he be enlarged on bail in anticipation of arrest in connection with the aforesaid crime.

3. The prosecution has opposed the application by filing say Ex.3. It is submitted by the prosecution that the applicant-

accused from time to time under the pretext of the marriage had committed forceful sexual intercourse with the victim. It is submitted by the prosecution that the victim is claiming to be pregnant from the applicant-accused. Therefore, in order to establish the paternity of the child, DNA sample is to be taken. Therefore, custody of the applicant-accused is required. It is further submitted by the prosecution that the offences alleged against the applicant-accused are serious in nature and if he enlarged on bail, he would threaten the victim and will not be available for trial. The Prosecution, therefore, prayed that application be rejected.

4. I have heard the Ld. Advocate for the applicant-accused and Ld. APP for the State. The Ld. Advocate for the accused argued that the applicant disclosed that he was already married to the victim and thereafter they developed relationship. It is further submitted by him that the accused has not made any false promise to the victim and as such no offence as alleged is made out. It is further argued that there was consensual relationship between the victim and accused. Therefore, the offences as alleged are not made out. It is submitted that offences under sec.376, 376(2)(n) of the Indian Penal Code are not attracted. To support his submissions, he has relied upon the decision in the case of **Promod Pawar Vs. The State of Maharashtra, Cri. Appeal No.1165 of 2019** decided by the Hon'ble Supreme Court of India, **Sonu @ Subhashkumar Vs. State of Uttar Pradesh & Anr., Cri. Appeal No.233 of 2021** decided by the Hon'ble Supreme Court of India, **Ansaar Mohammad Vs. State of Rajasthan & Anr Cri. Appal No.962 of 2022 @ SLP (CRL) No.5326 of 2022**, **Bail Order in Cri. Bail Application No.21 of 2022** decided by the Hon'ble High Court of Judicature at Bombay Nagpur Bench, **Prakashbhai Hirabhai**

Patel Vs. State of Gujarat in R/Criminal Misc. Application No.18553 of 2021 decided by the Hon'ble Gujarat High Court.

He further submitted that considering the allegations made against the applicant-accused, there is no need of custodial interrogation. Lastly, he prayed that the applicant-accused be enlarged on bail in anticipation of his arrest in connection with the aforesaid crime.

5. Per contra the Ld. APP for State submitted that the applicant-accused under the pretext of the marriage had committed forceful intercourse with the victim and after that he started suspecting the character of the victim and refused to marry with her. Victim is claiming to be pregnant and for determining the parternity of child, DNA of the accused is to be done. For that purpose, the presence of the accused with the police is necessary. It is further submitted by the prosecution that custodial interrogation of the accused is necessary. Offences are of serious in nature. Victim is pregnant. Therefore, prosecution prayed that bail application be rejected.

6. Having heard the Ld. Advocate for applicant-accused and Ld. APP for State, I have gone through the bail application and say filed by the prosecution. The applicant is apprehending his arrest in connection with the aforesaid offences punishable under sections 376, 376(2)(n), 323, 504 of the Indian Penal Code. The allegations against the accused are that he under the pretext of the marriage with the victim had forceful sexual intercourse with her. The victim is also claiming to be pregnant. Despite the victim is pregnant, the accused did not perform marriage with the victim, which prima facie shows that the accused gave false promise to

marry with the victim and had forceful sexual intercourse with her. The victim is claiming to be pregnant. For determining the paternity of the child, medical examination of the accused and DNA sample is essential. For that purpose the presence of the accused with the police is necessary. After having considered the allegations made against the applicant-accused, gravity of the offence and the fact that custody of the applicant-accused is required for medical examination and DNA sample, I am of the opinion that this is not a fit case to exercise the power under Section 438 of the Code of Criminal Procedure. In so far as the decisions relied upon by the Ld. Advocate for the applicant-accused is concerned, the facts of the present case and the facts of the decisions relied upon are distinguishable. After having considered the serious allegations against the applicant-accused and the fact that victim is claiming to be pregnant from the applicant-accused and for determining paternity, DNA Sample is to be taken, I am of the opinion that applicant is not entitled for bail.

In the result, following order is passed.

ORDER

- 1) Anticipatory Bail Application No.2060 of 2022 is rejected.
- 2) Anticipatory Bail Application No.2060 of 2022 stands disposed of accordingly.

Dt.12/01/2023

(S. N. SALVE)
Addl. Sessions Judge,
City Civil & Sessions Court,
Borivali Division, Dindoshi, Mumbai

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER.”

UPLOAD DATE 13.01.2023
AND TIME : 12.00 p.m.

Mrs. T. S. Bhogte
NAME OF STENOGRAPHER

Name of the Judge (with Court Room No.)	HHJ Shri S. N. Salve (Court Room No.15)
Date of Pronouncement of Judgment/Order	12.01.2023
Judgment/Order signed by P.O. on	13.01.2023
Judgment/Order uploaded on	13.01.2023