

**(2014) 04 MP CK 0018**

**Madhya Pradesh High Court**

**Case No:** Miscellaneous Criminal Case No. 2394 of 2014

Kirti Martin

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

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**Date of Decision:** April 22, 2014

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 154, 161, 164, 438, 82
- Penal Code, 1860 (IPC) - Section 376(2)(g), 376(D), 438, 506
- Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 18, 3(1)(xii), 3(2)(v), 3(2)(xii)

**Citation:** (2014) CriLJ 3681

**Hon'ble Judges:** U.C. Maheshwari, J

**Bench:** Single Bench

**Advocate:** Anil Khare, Senior Advocate and Jasmeet Singh Hora, Advocate for the Appellant; Amit Kumar Sharma, P.L, Advocate for the Respondent

**Final Decision:** Dismissed

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**Judgement**

@JUDGMENTTAG-ORDER

U.C. Maheshwari, J.

On behalf of the applicant this second repeat petition is preferred u/s 438 of Cr.P.C. for grant of anticipatory bail to the applicant as he is under apprehension of his arrest in connection of Crime No. 332/13, registered at P.S. AJJAK Sagar District Sagar for the offence u/s 376(D), 506 of IPC, 3(1)(xii) and 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, in short "the Act". Earlier occasion on behalf of the applicant in this regard M. Cr. No. 1601/13, was preferred. On taking up the same for hearing on 24.1.2014, the then arguing counsel instead to argue had pleaded no instruction, on which with the assistance of the case diary and the State counsel so also in presence of the counsel of objector/prosecutrix such M. Cr. C. was initially considered on merits in which it was found that the

applicant does not deserve for extending the benefit of anticipatory bail, but in view of aforesaid pleading of no instruction of the appearing counsel after making observation on merits as stated above the petition was dismissed for want of prosecution. Before proceeding further, I deem fit to reproduce the relevant part of aforesaid earlier order dated 24.1.2014:

"I deem fit to mention here that the State's counsel has made the submission with the assistance of the aforesaid counsel for the objector-prosecutrix.

Having heard the counsel, keeping in view the arguments advanced, I have carefully perused the F.I.R., interrogatory statements, so also other papers available in the case diary, according to which, the investigation of the case is in progress and it is undisputed fact that the applicant being Police Officer has committed the alleged act accompanied with some other person which comes under the purview of gang rape, defined under the IPC. It is also apparent from the case diary that the applicant belongs to upper community while the prosecutrix is from the community covered under the provision of S.C., S.T. (Prevention of Atrocities) Act. So firstly, in view of the provision of Section 18 aforesaid special Act barring to extend the benefit of anticipatory bail to the accused of the offence of the aforesaid special Act, the applicant is not entitled to extend such benefit. Even otherwise, in view of aforesaid factual matrix of the case, the applicant does not have case on merits for extending such benefit as such there is sufficient prima facie evidence in the case diary against the applicant for committing the alleged offence of the gang rape made punishable u/s 376(2)(g) of IPC and of the criminal threat given by the applicant to the prosecutrix made punishable u/s 506 -II of IPC and besides it, there is also prima facie ingredients of the offence of Section 3(2)(xii) and Section 3(2)(v) of the S.C., S.T. (Prevention of Atrocities) Act against the applicant. In such premises, the impugned petition for extending the benefit of anticipatory bail deserves to be dismissed.

However, as no one is present on behalf of the applicant and engaged counsel Shri Sharad Verma has already taken permission to withdraw from this case to prosecute this petition, thus, instead to dismiss the same on merits, with aforesaid observation, the petition is hereby dismissed for want of prosecution.

After dictating the aforesaid, Shri P.S. Tomar, learned counsel for the objector-prosecutrix submits that he has filed an affidavit of the prosecutrix sworn on 9.1.2014 stating that the present applicant has not committed any alleged offence on her but due to wrong information supplied by the co-accused, the name of the present applicant has been stated in the F.I.R. and prayed to consider such question on the basis of affidavit.

It is apparent from the case diary that the impugned F.I.R. was lodged by the prosecutrix on 22.8.2013 and since then till 9.1.2014 no such affidavit was sworn by the prosecutrix and the fact remains that the applicant a Police Sub-Inspector

remained outside and was not arrested in the present matter. So such circumstance also requires investigation, which may be carried out by the Investigating Agency. Section 154 of Cr.P.C. specifically and mandatorily provides that on receiving information of any cognizable offence by the SHO of a Police Station, then he has no option except to register the F.I.R. and subsequently such offence being cognizable could be investigated by the Police Officer under its discretion and unless the investigation is completed, on the basis of said affidavit, this petition could not be adjudicated contrary to the evidence collected by the Investigation Agency available in the case diary. Apart from this, in the matter of cognizable offence, specially the offence, which is not made compoundable under the law, at the stage of consideration of bail petition, either anticipatory or regular bail, such affidavit could not be taken into consideration. As the court is bound to consider the F.I.R. and the interrogatory statements of the witnesses and other available collected evidence by the Investigating Agency to decide the application of anticipatory bail. So in such premises, without expressing any opinion on merits on the aforesaid affidavit, a liberty is extended to the Investigating Agency to investigate the case on the said affidavit its discretion, if the same is permissible under the law.

The petition is dismissed, as indicated above."

2. Senior counsel Shri Anil Khare, after taking me through the averments of the petition along with the papers placed on record so also aforesaid earlier order of this Bench argued that on pleading no instruction by the applicant's counsel his earlier application was dismissed for want of prosecution but by making the observation on merits, therefore to demonstrate the case effectively for grant of anticipatory bail the petitioner has filed this repeat petition. He also argued that there is no bar under the law to hear and consider the repeat petition u/s 438 of Cr.P.C. In continuation, on merits he said that as per allegation of the prosecution the alleged offence of gang rape was committed on the prosecutrix by the applicant accompanied with co-accused Billu Dhaniya (Sindhi) and accordingly there is no distinguishable case against the applicant. He further said that before dismissing his earlier application vide aforesaid order dated 24.1.2014 the application of the aforesaid co-accused for grant of anticipatory bail was considered and allowed by the coordinate Bench of this Court vide order dated 8.1.2014 in M. Cr. C. No. 16382/13, and firstly prayed to extend the benefit of anticipatory bail to the applicant on the ground of parity. He further said that while considering this repeat petition the conduct of the prosecutrix requires consideration. In this regard he said that before the date of alleged incident at the instance of Garima an offence was registered against the prosecutrix, in which she was arrested, he also referred the copy of Rojnamcha Sanha (Ann. A. 4), in this regard. Besides this the husband of the prosecutrix also made a complaint (Ann. P. 9) to the police regarding character and conduct of the prosecutrix stating that she had illicit relation with some other person and also prayed to initiate the proceeding against her. He further said that F.I.R. of the impugned crime was lodged at very belated stage from the date of the

incident. In continuation, it was argued that after lodging the impugned F.I.R. and recording the interrogatory statement of the prosecutrix so also her statement u/s 164 of Cr.P.C., contrary to such F.I.R. and statements the prosecutrix had given her affidavit, mere perusal of such affidavit, it is apparent that applicant has been falsely implicated in the matter. In this regard he also prayed to call the prosecutrix before the Court to verify the averments of the affidavit before considering this petition on merits. He further said that although the applicant is working as Sub-inspector of Police in the Police Department but he is not posted at any police station. He is working in some office of the police department, and therefore, it could not be assumed that by misusing his power and position he has committed the alleged offence. So far, the affidavit of the investigation officer filed in compliance of the order of the Court is concerned, he said that averments of the affidavit stating that applicant is absconded since long could not be considered to be a ground for dismissal of his repeat application for grant of anticipatory bail. He also argued that unless the applicant is declared to be absconded person u/s 82 of Cr.P.C. he could not be treated to be absconded person. He also placed his reliance on the decided cases of the Apex Court in the matter of [Major General J.K. Bansal Vs. Union of India \(UOI\) and Others,](#) in the matter of [Avtar Singh Vs. State of Punjab](#) of [Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others,](#) of [Shobhan Singh Khanka Vs. The State of Jharkhand,](#) and of in the matter of [State of Madhya Pradesh Vs. Pradeep Sharma,](#) and prayed to extend the benefit of anticipatory bail to the applicant by allowing this repeat petition.

3. On the other hand responding the aforesaid arguments learned P.L. with the assistance of the case diary argued that it is undisputed that applicant is working as Sub-inspector of Police and as per averments of the F.I.R., he had taken the prosecutrix first inside of the alleged room and taking advantage of his position committed the rape on her knowingly that she is from the caste/community covered under the Act and thereafter co-accused committed rape on her. The same was stated in the F.I.R. and such version is further supported by her interrogatory statement recorded u/s 161 of Cr.P.C. so also in the statement recorded u/s 164 of Cr.P.C. Besides this from the place of incident the offending things and articles were also seized. He further said that it is apparent on record that since the date of registration of the offence in spite making efforts the applicant is not available for his arrest, interrogation and medical examination. On the contrary in the course of the investigation he had either prepared or obtained false affidavit of the prosecutrix and thereby tried to created unnecessary obstruction in the investigation. Accordingly, after absconding by taking advantage of his position of Sub-Inspector Police by hooks and crooks he had obtained the affidavits of the prosecutrix, but on holding the inquiry in this regard such affidavits were found to be based on false averments and were also found to be taken under undue influence from the prosecutrix. Even otherwise there is no provision in the law to consider the affidavit of the prosecutrix for grant of bail. He further said that in

further investigation the mobile call details of the applicants and prosecutrix have also been obtained by the investigation agency from the concerning mobile operator, such circumstance also goes against the applicant. So far ground of parity is concerned, he argued that there is lot of differences between the case of the applicant and co-accused Billu Dhaniya (Sindhi), as such co-accused is not a public servant, he being lay man is a simple citizen but the applicant being police officer was bound to protect the person like prosecutrix but contrary to his duty accompanied with the co-accused he has committed the alleged act with the prosecutrix belonging to the community covered under the Act, therefore the gravity of the offence of the applicant is very high and if the police officer like applicant is extended the benefit of anticipatory bail in the alleged case of gang rape then it will not give healthy message to the society at large, specially in the circumstance when sufficient prima facie evidence is available against the applicant for committing the alleged offence of gang rape. As such provision of Section 438 of IPC has not been enacted to extend the benefit of anticipatory bail to the person like applicant. Apart the aforesaid he also argued that there is prima facie case against the applicant for the offence of S.C.S.T. Act and as per mandatory provision of Section 18 of such Act, the benefit of anticipatory bail could not be extended to the applicant and such aspect was not considered by the coordinate Bench while granting anticipatory bail to the aforesaid co-accused Billu Dhaniya, so on such count also the order of the co-accused granting anticipatory bail is distinguishable and in such premises the applicant is not entitled to extend the benefit on the ground of parity.

4. He also said that at this stage mere in the lack of any proceeding u/s 82 of Cr.P.C. in the available circumstances of the case diary, it could not be said that the applicant is not absconded person. As such he is not coming on his duty since long and in spite making efforts he could not be traced out by the investigation agency for his arrest while the custody of the applicant for interrogation and his medical examination is necessary. So far the case laws cited by the applicant's counsel are concerned, he said that the bail matters are always decided on the basis of available facts of the case and the order of bail of another case could not be deemed to be identical case as case at hand, and therefore, the cited cases being distinguishable on facts are not helping to the applicant and prayed for dismissal of this petition.

5. Having heard the counsel keeping in view the arguments, after perusing the case diary, I have found that on the date of the incident the applicant being police official with the assistance and co-operation of the co-accused by giving assurance to the prosecutrix to make her available the job had taken her first in side of the room and committed the alleged act of rape on her in spite knowing the fact that she is woman from the community covered under the Act and for that reason beside the offence of Section 376(D) of IPC the offence under the S.C.S.T. (Prevention of Atrocities) Act was also registered against the applicant and co-accused and as per mandatory provision of Section 18 of the Act, the benefit of anticipatory bail could

not be extended to the applicant in respect of any of the offence of the Act. So, firstly on this count the applicant is not entitled for extending the benefit of anticipatory bail.

6. Apart the aforesaid, the name of the applicant with description of his committed act was stated by the prosecutrix in the F.I.R. with the averments that such act was committed by him by giving her assurance to make available the job. So, in such premises the gravity of the offence of the applicant is more high in comparison of the co-accused. Such version of the prosecutrix stated in the F.I.R. is further supported by her in interrogatory statement and statement recorded u/s 164 of Cr.P.C. In any case in the alleged circumstances for interrogation and medical examination the custody of the applicant is necessary. So far the arguments of the applicant's counsel regarding conduct of the prosecutrix is concerned, in view of the settled proposition the conduct or the character of the prosecutrix could not be the criteria to grant the bail or anticipatory bail to the accused. Even otherwise for the shake of argument if it is deemed that the conduct and character of the prosecutrix was not good or suspicious or she is having the bad conduct even then any person like the applicant has no authority or right to commit the sexual act on her without her consent. The arrest of the prosecutrix in other case registered at the instance of said Garima, could not be a ground to extend the benefit of anticipatory bail to the applicant. The matrimonial dispute of the prosecutrix with her husband also could not be taken into consideration for extending the benefit of the anticipatory bail to the applicant.

7. So far the alleged affidavits of the prosecutrix obtained from her during pendency of the investigation is concerned, it is suffice to say that there is no provision in the Cr.P.C. in which such type of affidavit could be taken into consideration either in the investigation or to consider the anticipatory bail petition. If such affidavits are taken into consideration as argued by the applicant's counsel then it would adversely affect the investigation of the case. Even otherwise it is apparent from the case diary that on making inquiry regarding such affidavits by the investigation agency, the same were found to be taken under undue influence and with wrongful means from the prosecutrix. So, in such premises, at this stage I have not found fit to call the prosecutrix before the Court to verify the averments of the affidavits placed on behalf of the applicant on record.

8. The case was also argued on the basis of medical report of the prosecutrix but in view of averments of the F.I.R. and interrogatory statement of prosecutrix, there is apparent prima facie evidence against the applicant. So on the basis of medical report or MLC the interrogatory statement of prosecutrix could not be discarded at this stage.

9. So far the case laws cited on behalf of the applicant are concerned, although there is no dispute regarding principle laid down in such cases but same being distinguishable on facts are not applicable to the present case, as such bail matters

are always decided on the basis of the own facts of the concerning case, and therefore, bail order passed in some other case based on some other facts could not be considered as precedent in the other matter on account of distinguishable features and the facts.

10. In view of aforesaid discussion, I have found sufficient prima facie evidence against the applicant for committing the alleged offence of gang rape with a woman belonging to the community covered under the Act, therefore, I am not inclined to extend the benefit of anticipatory bail to the applicant either on merits or on the ground of parity. In such premises, I am of the firmed view that the applicant does not deserve to extend the benefit of anticipatory bail as was observed in the aforesaid earlier order dated 24.1.2014 passed in M. Cr. C. No. 1601/13. Resultantly, this repeat petition is dismissed on merits. The petition is dismissed, as indicated above.