

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MCRC No. 1804 of 2016**

Shivam Dewangan, S/o Santosh Dewangan, Aged about 19 years, R/o Motipur, Ward No.-08, Tehsil/Distt. Rajnandgaon (C.G.)

---- Applicant

Versus

State Of Chhattisgarh: Through P.S.- Out Post Chikli, Distt. Rajnandgaon (C.G.)

---- Non-applicant

For Applicant: Shri H.S. Ahluwalia, Advocate.

For Non-applicant/State: Shri Dilman Rati Minj, Deputy Govt. Advocate.

For Amicus Curiae : Shri Manoj Paranjpe, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order**27/04/2016**

(1) The accused/applicant has moved this bail application under Section 439 of the Code of Criminal Procedure for releasing him on regular bail during trial in connection with Crime No.952/2015 registered at Police Station –Outpost Chikli, Distt. Rajnandgaon for the offences punishable under Sections 376,384,323 & 506 & 34 of Indian Penal Code.

(2) As per prosecution case, the applicant is said to have committed sexual intercourse with the prosecutrix from 1.1.2014

to 5.11.2015 & 28.11.2015, who is said to be the transgender on the false pretext of marriage; and extorted Rs.1,50,000/- threatening her to defame and also caused hurt and thereby committed the aforesaid offences.

(3) Mr. H.S. Ahluwalia, learned counsel appearing for the applicant would submit that the applicant has not committed any offence and he has been falsely roped in such offences. He would further submit that there is inordinate delay of more than one year in lodging the FIR without any proper explanation. According to him, applicant is languishing in jail since 10.12.2015; and the charge sheet has already been filed. He while referring to the medical report of the Medical Officer, Department of Causality, Government District Hospital, Raipur, who examined the victim on 30.11.2015, would submit that medical opinion is not supporting the case of the prosecution as victim is transgender and has undergone sex change surgery in the year 2013; her secondary sexual characters are on developing stage; her vagina was not developed completely; no sign of injury was seen over the anal region or vaginal area and, as such, there is no *prima facie* evidence of committing sexual intercourse with the prosecutrix, who is aged about 23 years and therefore, application for grant of bail may be allowed keeping in view the medical opinion; pre trial detention, and further taking into account the fact that no custodial interrogation of the applicant is required.

(4) Per contra, Shri Dilman Rati Minj, Dy. Government Advocate for the State while supporting the case of the prosecution would submit that there is overwhelming evidence of sexual intercourse with the victim by the present applicant, who is transgender in view of the definition contained in Section 375 of the Indian Penal Code. He would further submit that since the applicant had promised the victim to marry her, therefore FIR could not be lodged right in time. He would further submit that on the pretext of marriage, the applicant committed sexual intercourse with the prosecutrix for fairly long time and, as such, the application for grant of bail deserves to be rejected.

(5) I have heard learned counsel for the parties and also gone through the case diary of Crime No.952/2015 registered in Police Station Out post Chikhli, Rajnandgaon and also given thoughtful consideration to the submissions raised by learned counsel appearing for the parties.

(6) Definition of Section 375 IPC has suffered amendment with effect from 3.2.2013 by Act 13 of 2013 and the offence in question is said to have been committed from 1.1.2014 to 5.11.2015 and 28.11.2015. Amended definition of Section 375 IPC as on the date of offence stands as under:

“375 Rape.- A man is said to commit “rape” if he
(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions-

First. –Against her will.

Secondly. – Without her consent.

Thirdly. – With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death, or of hurt.

Fourthly. – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes, that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. – With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. – With or without her consent, when she is under eighteen years of age.

Seventhly.- When she is unable to communicate consent.”

Explanation 1.- For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- A medical procedure or intervention shall not constitute rape.

Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

(7) In order to constitute offence of rape within the mischief of Section 375 (a) to (d) of IPC, any one of seven circumstances enumerated under Section 375 IPC are required to be fulfilled.

(8) It is the case of prosecution that the prosecutrix is a transgender. She was examined medically on 30.11.2015. Medical opinion of Medical Officer, who examined the prosecutrix states as under:-

“Examine patient is a transgender has undergone sex change surgery 3 years back around 2013 at Dr. Kalda Clinic. Second Sexual Character on developing stage, has not started menses. Axillary hair+, Vagina is incompletely formed. No sign of injury seen over the anal region or vaginal area. 2 slides prepared form

the anal reigned area. From the above clinical finding about sexual intercourse cannot be told.”

(9) From bare perusal of the aforesaid report, it appears that though the victim had undergone Sex Reassignment Surgery (SRS) for change of sex but change of sex has not fully taken place as the secondary sexual characters are on developing stage and her vagina is not fully developed; and no sign of injury has been noticed over the anal region or vaginal area by the Doctor, who medically examined her.

(10) Recently, in the matter of ***National Legal Services Authority Vs. Union of India and others***¹, their Lordships of the Supreme Court while holding the transgender as third gender declared as under:-

“135.1. Hijras, eunuchs, apart from binary genders, be treated as “third gender” for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by Parliament and the State Legislature.

135.2 Transgender persons' right to decide their self- identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.”

(11) In the matter of ***National Legal Services Authority (supra)***, their Lordships of the Supreme Court have further held that ever after SRS surgery, transition from man to woman is

¹ (2014) 5 SCC 438

long procedure and it is not an overnight process but it is a “painfully” long procedure that requires a lot of patience and held in paragraph 109, which states as under:-

“**109.** Such a person, carrying dual entities simultaneously, would encounter mental and psychological difficulties which would hinder his/her normal mental and even physical growth. It is not even easy for such a person to take a decision to undergo SRS procedure which requires strong mental state of affairs. However, once that is decided and the sex is changed in tune with psychological behaviour, it facilitates spending the life smoothly. Even the process of transition is not smooth. The transition from a man to a woman is not an overnight process. It is a “painfully” long procedure that requires a lot of patience. A person must first undergo hormone therapy and, if possible, live as a member of the desired sex for a while. To be eligible for hormone therapy, the person needs at least two psychiatrists to certify that he or she is mentally sound, and schizophrenia, depression and transvestism have to be ruled out first. The psychiatric evaluation involved serious questions on how Sunaina felt, when she got to know of her confusion and need for sex change, whether she is a recluse, her socio-economic condition, among other things.”

(12) Thus, from the medical opinion filed along with the charge sheet, it is quite vivid that the victim is transgender and undergone SRS surgery three years back i.e. in the year 2013

and has changed her sex from male to female, but her secondary sexual character is on developing stage; her vagina is incompletely formed and no injury over the anal region or vaginal area has been found and, as such, clinical finding is negative.

(13) Taking into consideration the nature & gravity of the offence; facts & circumstances of the case; and further taking into account the medical report of the prosecutrix, in which her sex has not changed in tune with gender characteristics from male to female even after SRS surgery; and following the binding finding of their Lordships of the Supreme Court that transition from man to woman is long procedure after SRS surgery; further considering the fact that her vagina is not fully developed and the secondary sexual characters are on developing stage, as case of the prosecution is falling under Section 375 (a) of the Indian Penal Code; further considering the extent of delay of more than one year in lodging the FIR as the offence is said to have been committed with effect from 1.1.2014 till 5.11.2015 whereas FIR has been lodged on 30.11.2015 and there is no plausible explanation on record for such delay in lodging the FIR, no semen was found on the clothes recovered from the prosecutrix in the Forensic Science Laboratory report dated 18.02.2016; victim is major aged about 23 years; further considering the facts that applicant is languishing in jail since 10.12.2015; charge sheet has already been filed and no custodial interrogation of the

applicant is required; this Court is of the view that it is a fit case to release the applicant on bail. Accordingly, the bail application is allowed.

(14) Accused/applicant – **Shivam Dewangan** is directed to be released on bail on his executing a personal bond in the sum of Rs.25,000/- with one surety in the like sum to the satisfaction of the trial Court. He is directed to appear before the trial Court on each and every date given to him by the said Court till disposal of the trial.

(15) This Court appreciates the assistance rendered by Mr. Manoj Paranjpe, learned *Amicus Curiae* in this matter on short notice.

Certified copy, as per rules.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-