

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.543 OF 2016

1) MRS.DIPALI JAGDISH AHIRRAO)
2) KAUSTUBH VIKAS CHAVAN)
3) MANDAR MADAN THAKUR)...APPLICANTS

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Rajeev Patil i/b. Mr.Tanmay Vispute, Advocate for the Applicants.

Mr.H.J.Dedhia, APP for the Respondent - State.

CORAM : P N. DESHMUKH, J.

DATE : 3rd AUGUST 2016.

P.C. :

1 Accused involved in Crime No.I-153 of 2015 registered on 5.10.2015 with Kopari Police Station, Thane, for the offences punishable under Sections 376(D), 323, 366A read with 34 IPC and Sections 3, 4, 5(g), 6, 7 and 8 of Protection of Children from Sexual Offences Act (POCSO Act) has sought bail.

2 Learned counsel for applicants submitted that from the contents of report, as well as statement of prosecutrix who is aged 15

years, recorded under Section 164 of Code of Criminal Procedure, and Medical papers, no offence as leveled against applicants can said to have been established as there is no involvement of applicants Kaustubh and Mandar made out from the contents of report. It is further contended that the role attributed to applicant Deepali when considered together with contents of report, her involvement at the most can attract provisions of Section 7 of POCSO Act, where maximum punishment prescribed is up to five years. Learned counsel for applicants has further submitted that since prosecutrix prior to incident was addicted to consumption of liquor and has on the date of incident, with knowledge to her parents, had left her house to attend a birthday party and as parents of prosecutrix also were aware of the victim girl having been addicted to consumption of alcohol, it is submitted that it cannot be said that either of the applicant nos.2 and 3 intentionally took her out of her house for a birthday party and on offering her alcoholic drink, sexually assaulted her, with the assistance of applicant no.1 Deepali as alleged by the prosecution.

3 Learned counsel for applicants has also submitted that infact after prosecutrix was reached back to her house by one of her friends namely Aman, applicants had visited her house to verify if she had reached safely, and on meeting her parents had introduced themselves by disclosing their real names. It is, therefore, submitted that, had any of the applicants been involved in the present crime, they would certainly have not disclosed their names and submitted that since the applicants are behind bars for about 10 months, they be considered for bail by imposing suitable conditions.

4 Learned APP opposed the application and has submitted that from the report involvement of applicants has been established and by referring to the medical report of prosecutrix issued by government hospital, submitted vide this document, prosecutrix is certified to have sustained injuries on her person and thus corroborates with the report, and has submitted that application be rejected as there is direct evidence.

5 I have perused the copy of charge-sheet annexed to the application.

6 On perusal of FIR it reveals that same came to be lodged by prosecutrix herself on 5th October 2015 with reference to incident dated 30th September 2015 contending that on that date at about 12.30 p.m., applicant Kaustubh, as decided by them earlier, picked her and by his two wheeler they went to Thane Railway Station, where he parked his bike and both of them walked down to other side of the station, where both of them met applicants Deepali and Mandar, who were introduced by Kaustubh to her. From there, Mandar and Kaustubh proceeded on another two wheeler, while prosecutrix along with applicant Deepali went together and all of them went in a house situated in a chawl near Bharat College, where all arrangements were already made having various types of alcoholic drinks kept there. After sometime, applicants Mandar and Kaustubh left out for sometime and while prosecutrix alone was with applicant Deepali and was under the influence of liquor, she found that Deepali was attempting to remove

her clothes and therefore she came out of the house and made a phone call to her friend Aman, informing him that she was at Thane east and he should come and take her back. However, since he was in college, he informed that he would collect her after his college. It is further stated that as prosecutrix was under intoxication, as had consumed some drink, she was not fully in her senses and has stated that she could realize that applicant Deepali was again attempting to remove her clothes. However, she could not resist to that. She also realized that Deepali at the same time was touching to her private part to which she for the same reason could not resist and thereafter lost her senses and regained her senses at around 6 pm. From further contents of report, it reveals that applicant Deepali thereafter telephoned mother of prosecutrix and informed her about such condition of prosecutrix having consumed drinks and informed her that she should be taken back, or to send the residential address so that applicants can reach her back. In the meantime, Aman, friend of prosecutrix reached, and on his motorcycle took prosecutrix to her house.

7 Further contents reveal that on the following day, at around 11.30 a.m., when prosecutrix visited the washroom, she found that while she was under the influence of liquor, some one had trimmed her pubic hair and as she was also sustaining pain at her private part, and thus was taken to Dr.Kavita Mehta by her parents, who had opined that she was subjected to sexual assault and had also sustained injury to her private part.

8 On perusal of medical certificate dated 1st October 2015 of a private hospital where prosecutrix was taken by her parents, she had stated history of alcohol consumption, and as per statement of Dr.Kavita Mehta, from whom she was got examined on 2nd October 2015, she, on examining her has stated that she was subjected to sexual assault and for further treatment advised her to go to clinical psychologist. Apart from above two certificates, learned APP has also referred and relied upon statement issued by government hospital which is dated 7th October 2015 i.e. after six days after the incident. Here, prosecutrix has given history to the effect that she had sustained forceful sexual assault, between 3 to 6 pm, after removal of her clothes and on trimming her pubic hair, and had further stated that she was subjected to fingering in her vagina against her wish and has specifically stated that the victim as well as suspects were under the influence of alcohol. From this report it is certified that victim had sustained one injury on her back between two medial borders of scapula which was five to six days old and that on examination hymen was found ruptured. Except for this, there is nothing to establish or even opined if prosecutrix was subjected to sexual intercourse.

9 Having considered contents of report, medical certificates as aforesaid, together with statement of parents of prosecutrix and her friend Aman, there is absolutely no involvement of applicants Kaustubh and Mandar found in the present crime, much less of their committing sexual assault on prosecutrix on the material date.

10 So far as involvement of applicant Deepali is concerned, from the contents of report, her act can at the most attract provisions of Section 7 of POCSO Act wherein the minimum punishment is three years and maximum is of five years. In that view of the matter, and as it is also the case of prosecution that prosecutrix at the material time had on her own accompanied applicant Kaustubh as they were knowing each other and said Kaustubh had introduced prosecutrix to Mandar and Deepali with whom she spent time between 3 pm to 6 pm and has also consumed drinks willingly, it cannot be said that applicants participated in the offence of commission of rape upon victim girl.

11 Considering the fact as aforesaid, and as investigation is complete and applicants are behind bar for about 10 months, application is liable to be allowed as per order below :

- i) Application is allowed.
- ii) Applicants shall be released on bail on their executing PR.Bond in the sum of Rs.25,000/- each, with one surety each, in like amount.
- iii) Applicants shall mark their presence with Kopri Police Station, Thane, on first day of each month, pending trial, and shall not attempt to meet prosecutrix.

12 Needless to say, learned trial Judge shall not get influenced with the observations of the order as aforesaid, and shall consider the evidence recorded during trial independently.

(P. N. DESHMUKH, J.)