

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

**CRIMINAL APPELLATE SIDE**

**BAIL APPLICATION NO.614 OF 2016**

Hemant Dinesh Surti ... **Applicant** $V/s.$ 

The State of Maharashtra ... Respondent

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Mr.Vaibhav Karnik, Advocate for the Applicant.

Mrs.Rutuja Ambekar, APP for the Respondent/State.

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**CORAM : P. N. DESHMUKH J.**

**DATED : 13<sup>th</sup> JULY 2016.**

P.C.

1 This is an application for bail by accused involved in  
Crime No.271 of 2015 registered by Bhoiwada Police Station for  
the offences punishable under Sections 366A, 376(1)(2)(i) of the  
Indian Penal Code and Sections 4,8 and 12 of the Protection of  
Child from Sexual Offences (and Assault) Act, 2012.

2           Heard learned counsel for both the sides. Learned  
counsel for the applicant has submitted that there are statements  
on record of prosecutrix, as well as, that of police officials, which  
contradicted to each other on material aspect of the case, which  
doubts the case of the prosecution of applicant having indulging

into any act with the prosecutrix on the day of incident on 3<sup>rd</sup> of August 2015. Learned counsel for applicant by referring the contents of spot panchnama has further doubted case of prosecution of applicant sexually molesting the prosecutrix at the spot, which is stated to be open space, where no such incident can said to have taken place. Learned counsel has further pointed out that though according to the medical certificate and on considering ossification test probable age of prosecutrix is said to be between 17 to 18 years, that itself is not sufficient to deny bail to the applicant, when there is no other reliable evidence. It is, therefore, prayed that the application be allowed.

3           The learned Additional Public Prosecutor had opposed the application on the ground that prosecutrix is minor as per the provisions of the Protection of Child from Sexual Offences (and Assault) Act of 2012. It is also pointed out that there is direct evidence against the applicant establishing his involvement and by referring to the documents on record had submitted that application is liable to be rejected.

4           In the light of submissions, as aforesaid, I have perused the documents made available by the learned Additional Public Prosecutor. It appears that initial statement of prosecutrix was recorded on 03/08/2015 by Dadar Railway Police, wherein prosecutrix has stated that, as she had not completed 18 years of her age and as her father had settled her marriage with some boy from Zanshi, on 17/01/2015

she left her house at Nagpur and on 24/01/2015 arrived in Mumbai. She stayed in the house of one Sharif Ahmed for a period of two months, who then informed father of prosecutrix and accordingly she was taken by Bhandara Police and was kept at Pawani in Rehabilitation Center.

Thereafter, in the month of May, she again arrived in Mumbai and stayed in the house of one Sachin at Belapur alleged to be her friend and thereafter while she was proceeding to Aurangabad, she alighted from train at Kalyan station, as there was crowd in the train, and while she was at Kalyan Station, was apprehended by police and sent to remand home at Bhiwandi.

5           On 30/06/2015 prosecutrix was taken back by police to her house, and since her parents were not present in the house, she was left with her relatives, whose house she left and again arrived at Dadar Railway Station in the night on 02/10/2015 at around 10.00 p.m., where applicant met her, to whom she demanded some money for purchasing railway ticket, upon which applicant insisted her to do some work as demanded by him, and after holding her hand took her to Mumbai Central, and in spite of searching for lodge, since they were not allowed to occupy room, brought her back in taxi to Dadar.

6           It is further alleged that near Dasturwadi Santoshi Mata Temple adjoining to gate of Idea shop at about 2.45 a.m., applicant sexually assaulted her. On the basis of report, as aforesaid, FIR was registered by Dadar Railway Police Station vide Crime No.00 of 2015 and was further forwarded to Bhoiwada Police Station for further

investigation, where offence came to be registered vide Crime No.271 of 2015.

7 With reference to the contentions raised on behalf of the applicant about contradictory statement of prosecutrix with that of statements of police officials on record, I have perused statement of police constable Smt.Megha, who has stated that in the night of 03/08/2015, when she was on duty along with PI Wakhare, one boy and girl were present with PI-Tambade, who on inquiry disclosed his name as that of applicant i.e. Hemant Surti, and girl as of prosecutrix, and on further inquiry informed that she was knowing applicant about four months prior to 03/08/2015, and had met her at Dadar Railway Station at Platform No.5, to whom she demanded money for buying ticket, who provided her Rs.30/-, and while they were going out of platform to proceed to Dasturwadi came to be apprehended by police. Statement of police constable Megha totally absolved applicant for having sexually assaulted prosecutrix, as stated by her in her statement recorded by Dadar Railway Police on the previous day.

Similarly, from statement of Kumar Mane PSI attached to Dadar Railway Police Station, which corroborates the version of police constable Megha, the fact that prosecutrix is not sexually assaulted, thus can be said to be established.

8 Even on perusal of spot panchnama, case of prosecution appears to be even otherwise doubtful, as according to the contents of this document spot of incident appears to be an open space, where prosecutrix claims to have been sexually assaulted. Similarly, from the

medical certificate of prosecutrix on record, it cannot be established if she was subjected to sexual intercourse as alleged, as according to medical certificate dated 03/08/2015 though prosecutrix has given history of sexual assault, on her examination her hymen is stated to be intact. Having considering the medical report and statements, as aforesaid, which creates reasonable doubt in the case of prosecution merely from the birth certificate of prosecutrix, if she is found to be aged 17 years and 7 months, this by itself is not sufficient to deny bail to applicant.

9            Even otherwise, it is material to note that the learned Sessions Court had rejected the claim of applicant for his release on bail noting that no one can take undue advantage of mental condition of prosecutrix, there is nothing on record to show that prosecutrix was mentally challenged. On the contrary, from the statement of prosecutrix recorded under Section 164 of the Code of Criminal Procedure, it reveals that the learned Magistrate having inquired with the prosecutrix, found her to be in a matured condition to give rational answers to the questions put to her, and is found to be in fit state of mind to give statement. In that view of the matter, finding of the learned Sessions Court, of prosecutrix having suffering from some mental condition, and further noting that, applicant has taken undue advantage of said mental condition of victim, and had involved in sexual intercourse with her, does not stand for any reason.

10           In view of facts, as aforesaid, application is liable to be allowed. Hence, following order.

- (i) Applicant shall be released on bail on his executing personal bond in the sum of Rs.25,000/- with one surety or two sureties totalling in like amount.
- (ii) Applicant while on bail shall mark his presence with Bhoiwada Police Station on 15<sup>th</sup> day of each month pending trial, and shall not tamper with the witnesses.
- (iii) Applicant shall attend the trial on the fixed dates.

**(P. N. DESHMUKH J.)**