

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO.1081 OF 2017

Mehtab Alam Abidali Ansari .Applicant

Vs.

The State of Maharashtra .Respondent

Ms Anjali Patil, Advocate, for the Applicant
Mr.A.S.Patil, APP, for the Respondent – State

CORAM : REVATI MOHITE DERE, J.

DATE : 22.08.2017

P.C.

. Heard learned counsel for the parties.

2. By this Application, the Applicant seeks his enlargement on bail in connection with C.R.No.790 of 2015 registered with the Malvani Police Station, Mumbai, for the alleged offences punishable under Sections 376, 354, 323 & 506 of the Indian Penal Code.

3. Learned counsel for the Applicant vehemently submitted that the Applicant has been falsely implicated in the said case because of a dispute between the Complainant and the Applicant on 17.12.2015. She submitted that there are discrepancies in the narrative given by the Complainant and the statement of the prosecutrix aged five years and

her sister, seven years. She further submitted that although, the incident is alleged to have taken place on 17.12.2015, the FIR was lodged on 23.12.2015 i. e. after five days. She further submitted that although the prosecutrix was taken for medical examination to a Government Hospital on 17.12.2015, it is recorded in the medical report as under :-

“Possibility of sexual assault looks unlikely”.

It is also mentioned in the said report that hymen appears intact. She further submitted that it is highly improbable that in broad daylight, the prosecutrix was taken by the Applicant to his residence and thereafter, sexually assaulted. She further submitted that there are no independent witnesses whose statements have been recorded. She further submitted that the Chemical Analyst's report is not placed on record to show, whether any semen stains were found on the clothes of the prosecutrix, in view of the statement made by the Complainant.

4. Learned APP opposes the Application. He submitted that although it is mentioned in the report dated 17.12.2015 that possibility of sexual assault is unlikely, it appears that no detailed examination of the prosecutrix was carried out. He submitted that although the incident had taken place on 17.12.2015, only after cajoling the prosecutrix, the prosecutrix disclosed to the Complainant and her husband, on 22.12.2015, about the sexual assault on her, by the Applicant. He

submitted that after the said disclosure was made by the prosecutrix on 22.12.2015, the aforesaid complaint was lodged on 23.12.2015 and the prosecutrix was sent for medical examination. He submitted that it is mentioned in the said report that sexual assault has been attempted on the prosecutrix and her hymen was found torn. He submits that till date, the C.A.Report is awaited.

5. Perused the papers. According to the Complainant, on 17.12.2015 at about 6.00 p.m. when the Complainant's daughter i. e. the prosecutrix, aged five years and her sister, seven were playing badminton, the Applicant came and assaulted the prosecutrix. Pursuant thereto, an NC was lodged as against the Applicant on 17.12.2015 alleging an offence punishable under Section 323 of the Indian Penal Code. She has stated that as she suspected, that the Applicant may have sexually assaulted her daughter, she expressed the same to the police, pursuant to which, the prosecutrix was taken to the Government hospital for examination. The Complainant has further stated that on 22.12.2015, she and her husband cajoled their daughter (the prosecutrix aged five years) and questioned her, pursuant to which, she disclosed that the Applicant had taken her home and had outraged her modesty and had sexually assaulted her. The Applicant is also alleged to have threatened her not to disclose the incident to any person. Pursuant to the said

information, the aforesaid FIR was lodged on 23.12.2015 alleging the aforesaid offences. The statement of the prosecutrix has been recorded both, under Sections 161 & 164 of the Code of Criminal Procedure. A perusal of the statement recorded under Section 164 Cr.P.C. of the prosecutrix shows, that the Applicant had taken her home, outraged her modesty and had sexually assaulted her. The said statement is by and large consistent to the statement of her sister aged seven years. No doubt, the report dated 17.12.2015 mentions possibility of sexual assault looks unlikely, however, there is nothing to show, that detailed physical examination of the prosecutrix, aged five years was done. The history given by the prosecutrix and her mother is as under :-

“At around 6 pm today evening when the prosecutrix (Miss Sabrin) was playing with her sister in front of her house, a known person took her to his house in neighbourhood. Mother noticed this after some time as the child came out crying. Child could not tell properly what exactly happened to her in the house.”

It appears considering the history, no detailed physical examination of the prosecutrix was done and hence the observation that possibility of the sexual assault is unlikely and hymen **appears** intact. It is pertinent to note, that after the prosecutrix disclosed to her mother of sexual assault by the Applicant on 22.12.2015, the aforesaid FIR was lodged on 23.12.2015 and the prosecutrix was taken to the Government

hospital for a detailed checkup. In the history given by the prosecutrix, it is mentioned as under :-

“5 yr old girl c A/H/O sexual assault around 10 days back. History retrieved from victim – Similar episodes of sexual abuse, verbal threats, violence and attempts of oral sex, fingering genitals masturbating over victim genitals has been attempted several times from last 8 months. Similar history has been done with victims 2 sisters.”

It is also mentioned that on genital examination, hymen was found torn and the opinion given was that sexual intercourse has been attempted.

6. Considering the aforesaid material on record, this is not a fit case to enlarge the Applicant on bail. Accordingly, the Application stands rejected.

7. It is made clear that the observations made herein are *prima facie*, and the trial Court shall decide the case on its own merits, in accordance with law, uninfluenced by the observations made in this order.

(REVATI MOHITE DERE, J.)