

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION No. 1504 OF 2016

Anand P. Chanar	... Applicant
Vs.	
The State of Maharashtra	... Respondent

WITH
BAIL APPLICATION No. 1510 OF 2016

Devrath Prashant Dubey	... Applicant
Vs.	
The State of Maharashtra	... Respondent

WITH
BAIL APPLICATION No. 1636 OF 2016

Abhinaya Santosh Sahi	... Applicant
Vs.	
The State of Maharashtra	... Respondent

Mr. Aabad Ponda a/w. Mr. Samsher Garud, Mr. Bharat Mukkar i/b. Jayakar & Partners, Advocate for the applicants in all the Applications.
Mr. Arfan Sait, APP for the respondent/State in BA/1504/2016 and BA/1510/2016.
Mr. Prashant Jadhav, APP for respondent/State in BA/1636/2016.
Ms. Surekha Gcharge, P.I., ACB Mumbai Unit present.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **10th February, 2017.**

P.C.:

These Applications are filed for bail under section 439 of Cr. P.C., as the applicants/accused are arrested for the offences punishable under section 366, 342, 376D and 114 of Indian Penal Code in C.R. No. 35 of 2016 registered with Mundhawa Police Station, Pune. The FIR was

registered at the instance of prosecutrix aged 24 years old on 28th February, 2016.

2. It is the case of the prosecution that prosecutrix, who was 24 years old, was working as Technic Support Associate in one Company at Hinjewadi, Pune. The applicant Abhinaya Sahi, who is original accused no.1, was working with her in the company and they were friendly. On 27th February, 2016 the company had organized Annual Gathering for the employees of Hinjewadi between 2 p.m. to 9 p.m. The prosecutrix picked up applicant Abhinaya Saha in her car from Yerwada. They decided to have refreshment before going for gathering. So, they went to Hotel Irish (chilly) at around 4.45 p.m. The applicant Abhinaya asked her whether she would like to drink alcohol, for which she refused. Then he ordered for himself a tuborg beer and dry chicken and for complainant paneer and ice-tea. The complainant went to wash her hands and came back to the table. Thereafter she had two glasses of ice-tea, however, she started feeling dizzy. Before feeling unconsciousness, the complainant noticed that applicant Abhinaya was laughing at her. The complainant didn't remember what happened to her thereafter. She regained her consciousness at about 2 a.m. on 28th February, 2016 and found herself to be in a flat. The complainant saw applicant Abhinaya accompanied by his 4 to 5 friends and one girl. The complainant found that her leggings were

not worn inside out. Her nicker and slip were lying somewhere else. Her orange colour kurta was torn on one side. She had severe pain in abdomen, lumber portion and in private part. She realized the she has been sexually assaulted, so she questioned accused no. 1 regarding her condition and as to why he had sexually assaulted her. In reply, accused no. 1 told her why only he but ask others also, what they had done to her. After hearing this, the complainant was shocked. Accused no. 1 told her that her father is continuously calling her and she should go home. He assisted complainant to the ground floor and asked her to follow his bike. At Alandi road, accused no. 1 gave the complainant her a cup of tea and told her to convince her office colleague Florentina to complainant's father that she was with Florentina. Thereafter accused no. 1 told complainant to go home. The complainant reached home at around 2.30 a.m. and informed about this incident to her parents and brother. The complainant's father and brother went to inspect the Hotel Irish(chilly) and came back. Then they took the complainant to Mundhawa police station and gave information about the offence committed by the accused persons and the pain suffered by her due to same. The police officer sent the complainant for medical treatment and registered the complaint.

3. The learned counsel for the applicants/accused has submitted that all the applicants/accused are falsely implicated in this case. He

submitted that there is no case against accused nos. 2 and 3, i.e., Anand Chanar and Devrath Dubey. He prays parity, as learned Judge of this Court by order dated 19th July, 2016 in Criminal Bail Application No. 1361 of 2016 has granted bail to co-accused Abhijit Devroy. He relied on the observations made in the said Bail Application by the Single Judge of this Court. He submitted that a packet of condom was found with co-accused Abhijit Devroy when he was arrested but the Judge has taken a view that finding of a packet of condom in the packet of young boys cannot be given over bearing importance. The learned counsel further submitted that the statement of prosecutrix is full of variance and contradictions. In fact there is falsity in her statement if it is compared with the statements of other witnesses, i.e., the waiter of Irish (chilly) Cafe and the statement of Florentina, colleague of the prosecutrix. The learned counsel relied on the whatsapp messages exchanges between the complainant and accused No. 1 Abhinaya. He submitted that from the whatsapp messages it is clear that the girl was not averse to drinks and therefore, they both planned to go to Irish cafe and then to go for the function at their company. He further submitted that from the statement of the waiter, it is found that the girl did not take simple ice tea but four long cocktail iceland ice tea. As she consumed alcohol, she walked down from the first floor of the hotel and walked up to the flat of accused No. 2 where he was staying as a licensee. He further submitted that during 9.30 p.m. to 2 a.m. 6 to 7 outgoing calls

on the cell phone of prosecutrix were seen. At around 1.50 a.m. a call was made to Florentina by the prosecutrix requesting her to inform her father that prosecutrix was with her. The learned counsel further argued that the complainant travelled with accused No. 1 who acted as an escort on bike and they both stopped at Alandi road and had tea in the early morning. No woman if gang raped would go with one of the rapists and would not have taken tea along with him after rape. The statement of tea vendor indicates that the prosecutrix was neither fighting nor quarelling with accused no.1. The learned counsel further relied on the medical report of the girl where vaginal swab was taken, no sperm or semen were found in vaginal swab. He further submitted that in the medical report of the victim, no alcohol was found in the blood. It shows that medical report does not indicate any stupefying substance in the blood of the victim. Therefore, the story of the complainant that she was raped by applicants/accused Nos. 1, 2 and 3 is false. The learned counsel further submitted that young people who are financially independent, they often have free interaction. They drink together and sometimes also take sexual liberty and intercourse is consensual. He submitted that the victim must have lied out of fear of her father and made a cooked up story of gang rape and because of which the three innocent boys are languishing in the prison since last one year. They are young boys with no criminal record. However, because of this one incident, their life is ruined. Therefore, they

are to be granted bail.

4. The learned APP Mr. Sait opposed all the three Bail Applications. He relied on the medical certificate of the prosecutrix. He submitted that the report shows that there was penetrative intercourse on that night. He explained that on that night the accused have used condoms, hence no semen was found in the vaginal swab. He also relied on the whatsapp messages shared by accused nos. 1 and 2 wherein accused No. 1 has disclosed in the morning of 27th February, 2016 that he was having a date on that night. Thus, the applicants/accused nos. 1 and 2 had knowledge about it. He submitted that applicant Anand when was called at the police station, on his search, a packet of viagra was found. He further submitted that both accused nos. 2 and 3 were present and with the furtherance of common intention, they all raped the prosecutrix. He further submitted that the said flat was in possession of accused No. 2 Devrath. He relied on spot panchnama which discloses that the under garment of the victim was found lying in the said room. He further submitted that applicant/accused No. 1 had intention to sexually abuse her and therefore, he brought her to the flat of his friend on that night and he raped her when she was unconscious. He further submitted that it is a case of gang rape under section 376D and the section is amended after Nirbhaya's case to control such incidents of gang rape.

5. Perused the FIR, statements of witnesses and all the documents which are produced before me. I have also perused the order of my brother Judge dated 19th July, 2016 granting bail to co-accused Abhijit Devroy. It is true that if the statement of prosecutrix and statement of waiter in Irish (Chilly) cafe are compared with on the point of taking ice tea, *prima facie* there is variance. The sequence of the incidents as stated by the complainant and waiter of Irish (chilly) cafe and as contended by the learned counsel of the applicants/accused even if accepted as it is, assuming that the girl had drunk four cocktails of long iceland ice tea, as per the statement of the waiter, the girl was not in a position to walk and therefore, the boy took her purse and kept it in the car and again came up and took her in the car, yet *prima facie* this evidence goes against the applicant/accused no. 1 Mr. Abhinaya Sahi, considering legal position. At this stage, a simple question poses in the mind why boy did not take her to her house when she could not walk and didn't have orientation instead of taking her to the flat of his friend. In the medical certificate the doctor who examined her has given a positive report that she had penetrative sexual intercourse with 4 to 5 vaginal tears. No alcohol can be found, as her blood was taken after 12 hours of alleged consumption. A spot panchnama also supports the case of the prosecution.

6. In the case of rape, intoxication cannot be an excuse. If a girl is intoxicated, it means mentally she is not capable to give a free and

conscious consent. In a case of rape, when a woman says “No” for sexual intercourse, it means she is not willing; similarly when she says “Yes”, it should be free and conscious “Yes”. Not every “Yes” is covered under the valid consent. Under section 375 of the Indian Penal Code, in the definition of “rape” the words used are “against her will” and “without her consent”. The term “without her consent” has a wider meaning and covers a broader area of her wish to have sexual intercourse. If a woman is under intoxication/influence of liquor or any drug, then even though she gives consent, it is not a consent. On the other hand, act of rape committed under influence of drug or liquor is not covered under the exceptions under the Indian Penal Code and that argument is not available to the accused. While reading Section 375 of the Indian Penal Code, one has to refer to definition of consent under section 390 of the Indian Penal Code wherein it is specifically mentioned that consent given when a woman is intoxicated is not a consent. Similarly, along with section 90, it is necessary to refer to section 85 of the Indian Penal Code to understand that under intoxication if rape is committed, it is not an excuse for a man.

7. Considering the rising number of rape cases, genuine or false, and after coming across the incidents wherein young lives are ruined due to ignorance of law, I am constrained to observe that the young generation needs legal education and it is to be impressed upon them that Criminal

Jurisprudence and the Indian Penal Code are largely based on human psychology, social norms and moral values in order to maintain peace and harmony in the society.

8. There is variance in the statement and so it was argued that the benefit is to be given at this stage to the accused as she has lied. However, in the case of rape, considering the social norms and culture of the family, the victim might not have disclosed that she had drinks on that evening and therefore she might have lied to that extent to her father to save herself but it does not mean at this stage that whatever she has stated is a complete lie. *Prima facie* considering her post rape-conduct and physical condition, it appears that she did not want to have sexual intercourse and if at all she had consented to it, the said consent was not valid. It is also considered that nearly for three hours from 9.40 p.m. to 12.30 there was no outgoing call from her phone. Thus, I am not inclined to grant bail to applicant Abhinaya Sahi.

9. However, against applicant Anand Chanar and applicant Devrath Dubey, the utterance of the applicant/accused No. 1 is the main evidence that he stated why only me but ask others what they have done to you. This statement is the only evidence against applicants/accused nos. 2 and 3. Section 376D is enacted by the legislation to protect woman against gang rape and rapist who have participated in such innocuous act of rape

should not set free and therefore section 376D is added. However, *prima facie* there should be some evidence. Therefore, I grant bail to applicant/accused Anand Chanar and applicant/accused Devrath Dubey, who have attributed the similar role of accused Abhijit Devroy, who was released on bail. Hence, Anticipatory bail is granted to applicant/accused Anand Chanar and applicant/accused Devrath Dubey, on the following terms and conditions:

ORDER

- i) The applicant/accused Anand Chanar and applicant/accused Devrath Dubey be enlarged on bail on furnishing P.R. Bond in a sum of Rs.50,000/- each with one or two sureties in the like amount;
- ii) The applicants shall not commit any criminal activity while on bail;
- iii) The applicants shall not contact the prosecutrix;
- iv) The applicants shall attend all Court dates;
- v) The applicants shall not abscond or leave India without prior permission of the Court and furnish their permanent address to the Investigating Officer alongwith documentary proof of their address;
- vi) In the event of breach of any of the above conditions, the prosecution will be at liberty to move the Court for cancellation of bail.

10. The Applications for bail stands disposed of on above terms

(MRIDULA BHATKAR, J.)