

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.2394 OF 2016

SHYAM SUDHAR @ DEEPAK PRAKASH)
CHANDRA MISHRA)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Ghanshyam Upadhyay and Ms.Khushi Mishra i/b. Law Juris,
Advocate for the Applicant.

Mr.R.M.Pethe, APP for the Respondent – State.

Mr.Yatam, P.S.I., Kherwadi Police Station, present in court.

CORAM : A. M. BADAR, J.

DATE : 5th OCTOBER 2017

P.C. :

1 The applicant / accused in Crime No.257 of 2016
registered with Nirmal Nagar Police Station, Mumbai, at the
instance of father of the victim female child, by this application, is
seeking his release on bail, after filing of the charge-sheet. The
applicant / accused along with a co-accused are alleged to have
committed offences punishable under Sections 363, 376, 377,

366A, 323, 506 read with 34 of the Indian Penal Code (IPC) and under Section 4, 8 and 12 of Protection of Children from Sexual Offences Act (POCSO Act).

2 Heard the learned advocate appearing for the applicant / accused. He argued that versions of the prosecutrix coming on record are contradictory. She has tendency to rope in as many persons in the crime as seen from the history given by her to the Medical Officer wherein she has made allegations of commission of rape even against police personnel named Palekar. Therefore, in submission of the learned advocate for the applicant / accused, the applicant / accused is entitled for bail during pendency of the trial.

3 The learned APP opposed the application by pointing out supplementary statement of victim female child and stated that as per this supplementary statement, the victim was in company of the present applicant / accused who had taken her to a lodge in the night hours of 9th July 2016 and then committed

rape on her. The learned APP further argued that the statement of the victim came to be recorded under Section 164 of the Code of Criminal Procedure (Cr.P.C.) by the learned Metropolitan Magistrate which also implicates the present applicant / accused in the crime in question. The offence alleged is serious and therefore, the applicant / accused is not entitled for bail as the victim in the crime in question is a minor female.

4 I have carefully considered the rival submissions and also perused the entire charge-sheet. Though First Informant father is claiming that his daughter, who was subjected to the alleged offence, was 16 years of age at the time of the incident, date of birth of the victim female child is not coming on record. Prima facie, it is seen that investigation on this aspect is not conducted. The alleged victim of the crime in question was subjected to ossification test and the result thereof shows that she is 16½ years of age. At this juncture, judgment of the Hon'ble Apex Court in the matter of Jaya Mala vs. Home Secretary, Government of Jammu and Kashmir and Others¹ pointing out

1 AIR 1982 Supreme Court 1297

that there can be error on either side of two years, becomes relevant. Ultimately, that will be the subject matter of the trial. Now let us see nature of evidence against the present applicant / accused, as nature of evidence and seriousness of accusation are factors which needs consideration while releasing the accused on bail.

5 According to informant / father, his daughter left the house at about 12 noon of 9th July 2016. Statement of sister of the victim female child shows that she along with the victim female child had gone out for meeting her boyfriend. Though elder sister of the victim female child returned to her house, the victim female child did not return on 9th July 2016.

6 What happened after 9th July 2016 with the alleged minor female victim is stated by her immediately on her return to police. As per prosecution case, the alleged minor female victim returned on 15th July 2016. On the very same day, her statement under Section 161 of the Cr.P.C. is recorded by police. She stated

that after her elder sister left her at Nalasopara railway station on 9th July 2016, she stayed at Nalasopara itself. Then on 13th July 2016, she met her friend Sandesh at the very same railway station. She went to house of Sandesh at Virar. She stayed at the house of Sandesh up to 15th July 2016. She, then, left house of Sandesh and came towards Bandra local railway station. She alighted the local train at Andheri station and then called her friend Rohit Pande. Rohit Pande then took her to Nirmal Nagar Police Station.

7 Thus, it is crystal clear that in her return journey, alleged minor female victim firstly met Rohit Pande at Andheri Police station, who reached her to Nirmal Nagar Police station. Rohit Pande in his statement under Section 161 of Cr.P.C. has stated that he met alleged minor female victim at Andheri station as she had called him to that place. As per version of Rohit Pande, at that time, alleged minor female victim told him that she was in company of boyfriend of her elder sister. She named the said boyfriend as Anis and further disclosed to Rohit Pande that Anis

had taken her to various places during these days. This is the first version of the alleged minor female victim heard by Rohit Pande, which is not implicating the present applicant / accused in any offence. Her subsequent version before the Police Officer is also not implicating the present applicant / accused in any offence.

8 In her second version, the alleged minor female victim had disclosed to police that from 13th July 2016 she was residing at the house of her friend Sandesh. Statement of Sandesh is also recorded by police and is a part of charge-sheet. Sandesh has stated that he met the alleged minor female victim at about 1.00 p.m. of 10th July 2016. He insisted her to return to her house. However, she started crying and therefore, Sandesh took her to his own house. Statement of Sandesh shows that he told his mother that the alleged minor female victim is his girlfriend. Statement of Sandesh further shows that he disclosed inmates of his house that he loves the alleged minor female victim and therefore, she was allowed to stay at his house. It is seen that mother of Sandesh had purchased even undergarments for alleged minor female

victim. She roamed at various places in company of Sandesh, as disclosed by him, during this period. Then, as seen from statement of Sandesh, there was some quarrel between him and the alleged minor female victim, and therefore, the alleged minor female victim left his company.

9 On this backdrop, after about seven days from her return, the alleged minor female victim gave her supplementary statement to police wherein she alleged that in the night hours of 9th July 2016, the present applicant / accused threatened her, took her to a lodge, committed rape on her, and thereafter, the co-accused came and raped her. In her supplementary statement, the alleged minor female victim of the crime in question, claimed to be in company of the present applicant / accused as well as the co-accused up to 15th July 2016. She pointed out finger accusing guilt to the applicant / accused as well as the co-accused. Then comes one more version about the incident from the mouth of the alleged minor female victim. That is in the form of history narrated by her to the Medical Officer. In the said history she stated that at Nirmal Nagar Police station also, the Police

Constable named Palekar asked her to spent one night with him.

10 Ordinarily, in such type of heinous crime, the accused does not deserve liberty during pendency of the trial. However, in this case, it is seen that the alleged minor female victim of the crime in question, is modulating her version time and again by pointing finger of guilt to several persons and the applicant / accused is one amongst them. The witness named Sandesh is corroborating her second version, wherein, she has stated that she was not subjected to any offence by anybody. It is worthwhile to note that witness Sandesh had accepted the liability of being in company of the minor female victim during the period of her elopement from the house. In her very first version to her friend called at the railway station, she has named Anis as a person in whose company she was. It is in the wake of this evidence against the applicant/accused, the basic principle, that there is presumption of innocence of accused unless and until guilt is proved against him, applies in full force and warranting his pre-trial detention totally unjustified. As such the order :

ORDER

- i) The application is allowed.
- ii) The applicant / accused in Crime No.257 of 2016 registered with Nirmal Nagar Police Station, Mumbai, for the offences punishable under Sections 363, 376, 377, 366A, 323, 506 read with 34 of the Indian Penal Code (IPC) and under Section 4, 8 and 12 of POCSO Act, be released on bail on his executing P.R.Bond in the sum of Rs.25,000/-, and on furnishing 1 or 2 solvent surety in like amount.
- iii) As a condition of this order the applicant / accused should not contact the prosecutrix or her relatives in any manner.
- iv) The applicant / accused shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case, so as to dissuade him from disclosing such facts to the court or to the Police Officer.
- v) The applicant / accused should stay away from locality where the minor female victim resides i.e. Darga Galli, Santacruz (East), Mumbai.

11 At this stage, the learned advocate appearing for the applicant / accused submitted that in order to enable the applicant / accused to arrange for sureties, initially he may be released on cash security. Hence, the applicant / accused be released on depositing cash security in the amount of Rs.25,000/-, initially, for a period of four weeks.

12 Parties to act on authenticated copy of this order.

(A. M. BADAR, J.)