

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on: 01.09.2017*
Judgment pronounced on: 21.09.2017

+ **BAIL APPLN. 1380/2017**

SULAIMAN AHMADI THROUGH
PAIROKAR POORVI SINGH

.... Petitioner

Through: Mr.M.N. Dudeja, Advocate with
Mr.Anuj Chauhan, Advocate.

versus

STATE

..... Respondent

Through: Mr.Tarang Srivastava, APP for
State with W/SI Usha Yadav, PS Safdarjung
Enclave, Delhi.

Mr.Shrey Mehta, Advocate for Complainant
along with complainant in person.

CORAM:

HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J.

1. The petitioner seeks his release on bail under Section 439 of the Code of Criminal Procedure, 1973 (in short 'Cr.PC') in a case registered against him and Tawab Ahmad @ Saleem vide FIR No.0012/2017 dated 12.01.2017, Police Station Safdarjung Enclave, South District, Delhi, under Sections 376/34 of Indian Penal Code, 1860 (in short 'IPC') on the complaint of prosecutrix "M".

2. Learned counsel for the petitioner submitted that as per the report of the FSL, semen found on the undergarment of the prosecutrix does not match with the blood of the petitioner and co-accused. He submitted that the statement of the prosecutrix has not been consistent and does not inspire confidence. He submitted that the prosecutrix had willfully joined the bonfire party where admittedly the petitioner was present.
3. He submitted that the petitioner even did not touch the prosecutrix and the entire story against the petitioner is false and baseless. He submitted that the petitioner was in close company of his fiancée Ms. Poorvi Singh from previous night till 8:30 AM on 12th January, 2017 and therefore, there was no occasion for the petitioner of raping or even attempting to rape the prosecutrix. He submitted that the allegation of the prosecutrix that on 12th January, 2017 when she woke up early in the morning she found that the petitioner and co-accused Tawab Ahmad @ Saleem had raped her cannot be believed.
4. He submitted that prosecutrix had refused her internal medical examination and as per MLC no injuries were found on her person. He submitted that the IO has not recorded the statement of eye-witness Ms. Poorvi Singh, who is fiancée of the petitioner, and was present at the spot throughout. He submitted that simply because the petitioner is a foreigner, being a citizen of Afghanistan, and staying in India under proper refugee visa for

last 10 years, he cannot be denied bail. He submitted that the petitioner has been in judicial custody since 12th January, 2017. He submitted that the allegations had been levelled against the petitioner to settle some ulterior motive/object or extortion. He submitted that the petitioner, having accepted the invitation of his friend Sahil, joined his company along with his fiancée Ms.Poorvi Singh at 11:00 PM on 11th January, 2017 at K-36, Second Floor, Green Park, New Delhi. When the petitioner, Ms.Poorvi Singh and Sahil were enjoying the bonfire, the co-accused Tawab Ahmad @ Saleem with two girls including prosecutrix “M” and one Ms.Saraswati Ingle came there in the midnight (i.e. at 12:00 AM). After some time accused Tawab Ahmad @ Saleem along with prosecutrix “M” and Ms.Saraswati Ingle left the place on the request of the prosecutrix but after some time prosecutrix and accused Tawab Ahmad @ Saleem again arrived at about 2:30 AM on 12th January, 2017. He submitted that at about 2:40 AM on 12th January, 2017, the petitioner and his fiancée Ms.Poorvi Singh requested the prosecutrix to leave the place as it was too late but the prosecutrix, while flashing her uncontrolled behavior under the influence of liquor, did not allow them to leave.

5. He submitted that the petitioner has been falsely implicated in the case just to harass him. He cited a judgment of this court in **Sameer v. State of NCT, 2005 (1) JCC 336**, wherein a single

Bench of this Court granted bail to the accused under Section 439 Cr.PC as the blood group of the accused did not match with that of the prosecutrix.

6. He had relied upon a judgment of the Apex Court deciding an Appeal in the case of **Santosh Kumar v. State, 2010 (9) SCC 747** in which the Apex Court had partly accepted the appeal against the judgment of the High Court and commuted the death sentence into life imprisonment under Section 302 IPC. While adjudicating the appeal, the Apex Court observed that the trial court was not justified in rejecting the DNA report as nothing adverse could be pointed out.
7. He had relied upon a judgment of the Single Bench of this Court in **Manoj Kumar v. State, 2016 (2) JCC 1251**, wherein this Court while deciding an appeal had set aside the conviction of the appellant No.1 and observed that the version of the prosecutrix that she was made pregnant by appellant No.1 because of rape committed upon her stood belied by DNA report.
8. He had also relied upon another judgment of the Single Bench of this Court in **Amit v. State, 2015 (6) AD (Delhi) 608**, wherein the conviction of the appellant was set aside in appeal finding that the testimony of the prosecutrix was wholly unreliable due to inherent infirmities.

9. To buttress his argument, he had also relied upon a judgment of the Single Bench of **Gujarat High Court** in **Kamlesh Mansing Ganag v. State of Gujrat**, in **Crl.Misc. Application (for Regular Bail) No.581/2017**, decided on 6th February, 2017, granting bail to the accused when the DNA report did not support the case of the prosecution. He had also relied upon a judgment of the Single Bench of this Court in **Narender @ Nikhil v. State**, **Crl.Appeal 694/2014**, decided on 4th May, 2016. He had also referred two judgments of this Court in **Lambert v. Enforcement Directorate, 2000 Crl.LJ 2125**, and **Jagdish Nautiyal v. State, Bail Application No.1317/2012**, decided on 29th November, 2012.
10. Per contra, the learned APP for the State had vehemently opposed the bail application of the petitioner. He submitted that the prosecutrix, a student, along with her friend had gone to Hauz Khas Village at about 10:30 PM on 11th January, 2017 where she met a person, who had introduced himself as Saleem (@ Tawab Ahmad) to her. Mr.Saleem offered and suggested them to join him at a bonfire party at his friend's flat at Green Park where many boys and girls were present and she would feel comfortable. The complainant and her friend enjoyed the bonfire party and after sometime, the co-accused Saleem (@ Tawab Ahmad) went to drop the complainant and her friend at JNU Campus. After dropping her friend, on several requests of the co-

accused Saleem @ Tawab Ahmad, the complainant came back with him at the same place to continue to join the bonfire party where three boys namely the petitioner, Mr.Sahil and Mr.Sidhhant and fiancée of petitioner namely Ms.Poorvi Singh were found present. They remained in the party till 3:00 AM. The prosecutrix had also taken liquor in the party with all of them and then she went to sleep in a separate bed-room at the premises. When she woke up at about 6:00 AM and was in a semi-conscious condition, she found Saleem @ Tawab Ahmad had raped her forcibly and without her consent. After he left, the petitioner came inside the room and raped her again forcibly and she pushed him away. The prosecutrix was crying and shouting at the top of her voice. Mr.Sidhhant, who was present there, dropped her in the hostel of JNU and she narrated the entire episode to her friends Ms.Disha and Ms.Geeta who brought her to the Police Station.

11. He submitted that the prosecutrix was taken to Safdarjung Hospital where she was medically examined. Learned APP for the State pointed out that semen was found on her undergarment. He pointed out the copy of the MLC where there is a mention of slight vaginal bleeding. He submitted that the entire factual position of her attending the party and commission of rape by the petitioner and co-accused Tawab Ahmad @ Saleem was narrated by the prosecutrix to the Medical Officer which is found recorded

in the MLC and medical examination report. He submitted that after investigation, charge sheet under Section 376D/506/34 IPC was filed against the petitioner and his co-accused Tawab Ahmad @ Saleem. He submitted that after framing of the charge by the learned Additional Sessions Judge, the testimony of the prosecutrix has been examined out of 12 prosecution witnesses. He submitted that prosecutrix has fully supported the case of the prosecution and nothing material could come out in her cross-examination which could help the petitioner.

12. He further submitted that the petitioner is an Afghan national and in case he is released on bail, there is every chance of his fleeing from the justice. He further submitted that vital witnesses including Sidhhant and Sahil, who were at the spot, are yet to be examined and Sidhhant had seen the petitioner and his co-accused entering into the bedroom of the prosecutrix where she was sleeping alone.
13. He had also relied upon a judgment of the Hon'ble Supreme Court in **Madan Lal v. State of J&K, AIR 1998 SC 386**, wherein on chemical analysis semen was found on the *salwar* of the prosecutrix and the **Hon'ble Supreme Court** while deciding the appeal has held that even if it has not been established to be the semen of the accused, the statement of the mother of the prosecutrix to the effect that prosecutrix narrated the entire episode immediately when she arrived at home can also be held

to be a corroborative piece of evidence which the learned Sessions Judge excluded from consideration erroneously and the appeal of the convict was dismissed.

14. He submitted that the statement of the expert from Forensic Science Laboratory is yet to be recorded by the prosecution in the Court and he submitted that it is a gang rape and the prosecutrix was raped by the petitioner and his co-accused Tawab Ahmad @ Saleem. He argued that in case the semen of one accused gets in touch with the semen of the co-accused, it gets contaminated and it is only the expert who shall be able to give his opinion of its effect when he will come into the witness box. He also argued that as per medical text books on the subject the sample of semen gets contaminated even by sneezing, coughing or at the time of taking over the samples without using the gloves.
15. He cited a judgment of the Apex Court in an appeal being **Solanki Chimanbhai Ukabhai v. State of Gujarat, AIR 1983 SC 484**, wherein the **Hon'ble Supreme court** has held that testimony of the eye-witness cannot be discarded if it was otherwise satisfactory on the simple ground that the medical evidence was in conflict with the testimony of the witnesses.
16. He has relied upon a judgment of the Apex Court in an appeal being **State of Maharashtra v. Chandraprakash Kewakhand Jain, AIR 1990 SC 658**, wherein the semen of the prosecutrix

was found dissimilar with that of the accused and the Apex Court held that it cannot cast doubts on the creditworthiness of the prosecutrix.

17. I have heard the learned counsel for the petitioner and learned APP for the State.
18. The principles for considering the bail under Section 439 of Cr.PC have been laid down by the Hon'ble Supreme Court in **Prasanta Kumar Sarkar Vs. Ashish Chatterjee and Another, (2010) 14 SCC 496** and Para 9 and 10 of the judgment reads as under: -

“9. We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

- (i) **whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;**
- (ii) **nature of gravity of the accusation;**
- (iii) **severity of the punishment in the event of conviction;**
- (iv) **danger of the accused absconding or fleeing, if released on bail;**
- (v) **character, behavior, means, position and standing of the accused;**

- (vi) **likelihood of the offence being repeated;**
- (vii) **reasonable apprehension of the witnesses being influenced; and**
- (viii) **danger, of course, of justice being thwarted by grant of bail.**

10. It is manifest that if the High Court does not advert to these relevant considerations and mechanically grants bail, the said order would suffer from the vice of non-application of mind, rendering it to be illegal. In *Masroor*, a Division Bench of this Court, of which one of us (D.K. Jain, J.) was a member, observed as follows:-

“13. Though at the stage of granting bail **an elaborate examination of evidence and detailed reasons touching the merit of the case, which may prejudice the accused, should be avoided, but there is a need to indicate in such order reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence.**”

19. The Apex Court had elaborated the principles for considering the bail application in its another judgment **Dipak Shubhashchandra Mehta Vs. Central Bureau of Investigation and Another, (2012) 4 SCC 134** and Para 32 of the judgment reads as under: -

32. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail, **a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken**, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted, particularly, where the accused is charged of

having committed a serious offence. The court granting bail has to consider, among other circumstances, the factors such as **(a) the nature of accusation and severity of punishment in case of conviction and the nature of supporting evidence; (b) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; and (c) prima facie satisfaction of the court in support of the charge.** In addition to the same, the court while considering a petition for grant of bail in a non-bailable offence, apart from the **seriousness of the offence, likelihood of the accused fleeing from justice and tampering with the prosecution witnesses, have to be noted.**

20. Learned counsel for the petitioner had vehemently argued that the testimony of the prosecutrix has not been consistent and she had improved her version when examined by the Trial Court. Surprisingly, learned counsel for the petitioner, though having placed on record the copy of the testimony of the prosecutrix, did not refer to any part of it during the course of arguments. Learned APP strongly disputed the statement of the learned counsel for the petitioner and argued that the testimony of the prosecutrix has throughout been consistent and despite brutal examination of the prosecutrix, the petitioner and his co-accused could not cause any dent in her deposition. Be that as it may, while considering bail under Section 439 of the Cr.PC, this Court is not supposed to evaluate the evidence of the prosecutrix when the petitioner and his co-accused are charged of having committed a serious offence of rape on a girl of young age as

held by the **Hon'ble Supreme Court** in **Prasanta Kumar Sarkar (*supra*)** and **Dipak Shubhashchandra Mehta (*supra*)**.

21. The argument of the learned counsel for the petitioner that the prosecution has not recorded the statement of Ms.Poorvi Singh, who remained present in the party attended by the prosecutrix, the petitioner and his co-accused, is not a ground worth considering bail. However, it is not out of place to mention that Ms.Poorvi Singh is admittedly the fiancée of the petitioner; the present petition is filed by the petitioner through Pairokar Ms.Poorvi Singh and even during the course of arguments, she remained present throughout with the learned counsel for the petitioner.
22. There is no force in the arguments of the learned counsel for the petitioner that since the DNA test of the semen which was found available on her undergarment is found to be dissimilar by the FSL with the blood of the petitioner and his co-accused and solely on this ground, the petitioner should be given the benefit of bail. It is trite that the medical evidence is a corroborative piece of evidence but where medical evidence does not support the otherwise clinching and trustworthy ocular evidence of any material witness, then the testimony of such ocular evidence shall prevail on the medical opinion and not vice versa. This is so held by a Division Bench of this Court in **Lokesh Mishra vs. State of NCT of Delhi, Manu/DE/0658/2014**. The **Hon'ble Supreme**

Court in the case of **Ranjit Hazarika v. State of Assam, (1998) 8 SCC 635**, where the opinion of the Doctor was that no rape appeared to have been committed because of the absence of rupture of hymen and injuries on the private part of the prosecutrix, held that the medical opinion cannot throw overboard an otherwise cogent and trustworthy evidence of the prosecutrix.

23. Very recently also a larger Bench of three **Hon'ble Judges of the Supreme Court** in the case of **Sunil v. State of Madhya Pradesh, (2017) 4 SCC 393**, has held that a positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative, i.e. favouring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still has to be considered. Similar view was taken by the Apex Court in the case **Madan Lal v. State of J&K (supra)** relied upon by the learned APP for the State.
24. So far as the DNA report is concerned, in **(i) Ranjit Hazarika (supra) (ii) Sunil (supra) (iii) Madan Lal (supra) (iv) Solanki Chimanbhai Ukabhai (supra) (v) Chandraprakash Kewakhand Jain (supra)**, the **Hon'ble Supreme Court of India** has held that the ocular testimony of the prosecutrix or the evidence of the person to whom the prosecutrix immediately

narrated the incident or testimony of any other material witness shall be considered and prevail over the medical/FSL report.

25. Hence, in view of the facts and circumstances of the case, looking into (i) the serious nature of the accusation, (ii) severity of punishment in case of conviction which can be awarded up to life, (iii) every likelihood of the petitioner, an Afgan national, absconding or fleeing from justice, (iv) the fact that the material witnesses including persons, who were at the spot and to whom episode was narrated by the prosecutrix soon after the incident, are yet to be examined, (v) reasonable apprehension of petitioner tampering with or winning over the vital witnesses, the petitioner has no ground in his favour for grant of bail. As such, the application for bail under Section 439 of the Cr.PC is dismissed. Nothing stated in this order shall tantamount to any expression of opinion on the merits of the case.

(VINOD GOEL)
JUDGE

SEPTEMBER 21, 2017