

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

BAIL APPLICATION NO. 460 OF 2018

Harishankar Awadh Shukla @ J. Raj Shukla

... Applicant/
Accused

Vs.

State of Maharashtra

Through Nerual Police Station, Navi Mumbai

... Respondent

Mr. Vinod D. Gangwal for the Applicant.

Ms. Rohini Salian alongwith Mr. S.B. Bhatgunki for the intervenor

Ms. V.S. Mhaispurkar, APP for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 3rd APRIL, 2018

P.C.

1. The applicant has preferred this application renewing the prayer for bail. The earlier application viz. Criminal Bail Application No. 342 of 2017 preferred by the applicant was rejected by this Court on 26th July, 2017.

2. Since the earlier application was rejected by me, this bail application is listed before me.

3. Applicant is arrested in connection with Crime No. I-

390 of 2016 registered with Nerul Police Station for the offences punishable under Sections 376(f), 376(2)(i), 376(2)(n), 506(B) of Indian Penal Code read with Sections 4, 5F, 5L, 5J(2), 6, 8, 9F and 10 of Protection of Children from Sexual Offences Act, 2012. The applicant was arrested on 15th December, 2016. The investigation is complete and charge sheet is filed.

4. The brief facts of the prosecution case are as under :

(a) The victim is a student of Standard-VII, in Mahatma Gandhi Mission School situated at Nerul, Navi Mumbai;

(b) The incident had allegedly occurred in the month of April, 2016 when all the students of Class-7B were on the ground of the school for the physical education classes and the applicant was then a teacher in the said school had committed sexual intercourse in the class room and threatened the victim not to disclose the same to any other person;

(c) The victim had not gone for the classes of physical education as she had developed a stomach-ache and therefore, she preferred to be in the class room with one of her class mate named Komal. After some time, when Komal went to washroom, the applicant entered the class room and forced himself on the victim. He forced her towards the black board, put

his hand on her mouth and then committed sexual intercourse with her. He threatened her of dire consequences. Under the fear, the victim did not disclose the incident to her friend Komal when she came back from the washroom;

(d) As per the prosecution case, the second incident took place somewhere in the first week of August, 2016 when the accused had committed sexual intercourse with the victim in the ladies wash room situated on the second floor of the building which houses a law college some where between 10.15 to 10.45 p.m. and he again threatened the victim not to disclose the incident to anyone;

(e) Few days, complainant was having some health issues and she was not having food properly. She was taken to a doctor and after conducting sonography on her, it was found that she was pregnant. On that day, the mother of the complainant inquired about the same and the complainant disclosed that the accused had committed sexual intercourse with her and had also threatened her. The first information report (FIR) was lodged on 29th October, 2016.

5. The learned Advocate for the applicant submitted that the applicant is in custody since long. It is submitted that after rejection of earlier application for bail, the second DNA report dated 20.12.2017 has been submitted to the Trial Court which is negative. It is submitted that in view of DNA report the theory of rape allegedly committed by the applicant is ruled out. DNA report ruled out that applicant is a biological father of fetus. It is also contended that the first DNA report was also negative, however, while deciding first application for bail, the prosecution had contended that the Investigating Officer who had conducted the investigation at that point of time was biased. Thereafter, the Investigation Officer has been changed and the second report was sought which also did not support the prosecution case. It is submitted that in view of incarceration of the applicant in custody for a long period of time the grounds for bail which were argued earlier also may be reconsidered. It is further submitted that the wife of the applicant has also filed a complaint to the police alleging that the purported crime is committed by somebody else, however, the police had not conducted any investigation in that regard. It is submitted that the chargesheet which is on record is incomplete as the investigation is still going on and the applicant is

entitled for bail in accordance with the Section 167 (2) of Code of Criminal Procedure, 1973. It is also submitted that the information was provided to the police by another witness whose statement is appearing at page 83 of the compilation. The said witness is a Doctor to whom the victim and her mother had approached at her diagnostic centre. The said witness gave information to Nerul Police Station. It is therefore submitted that the said witness is the first informant and therefore, evidence of the complainant in the present case should not be treated as the First Information Report.

6. Learned counsel for the applicant relied upon several decisions stated below, in support of his submissions that the scientific examinations deciding parentage of child could be allowed as it is helpful in evidence.

(1) Dr. (Smt.) Bharti Raj -Vs- Sumesh Sachdeo and Ors;¹ ;

(2) Hanamant -Vs- State of Karnataka;²

(3) Pantangi Balarama Venkata Ganesh and Anr. -Vs- The State of Andhra Pradesh;³

(4) State of Gujarat -Vs- Jayantibhai Somabhai Khant;⁴

1 AIR 1986 All 259

2 2017 ALL MR (Cri)242

3 2003 CriLJ4508

4 2015 Cri.LJ 3209

*(5) Nandlal Wasudeo Badwaik -Vs- Lata Nandlal Badwaik and Anr.;*⁵

*(6) Vikas Suresh Mali -Vs- The State of Maharashtra;*⁶;

*(7) Kalyan Chandra Sarkar -Vs- Rajesh Ranjan @ Pappu Yadav and Anr.;*⁷

*(8) Hari Singh -Vs- State of Haryana;*⁸

*(9) Sarwan Singh -Vs- The State of Punjab;*⁹

*(10) Krishnegowda and Ors -Vs- State of Karnataka;*¹⁰

*(11) Sharadchandra Vinayak Dongre and others -Vs- State of Maharashtra;*¹¹.

*(12) Gurbaksh Singh Sibbia and Ors -Vs- State of Punjab;*¹²

*(13) Shashikant Goma Patil -Vs- State of Maharashtra;*¹³

*(14) Sanjay Chandra -Vs- C.B.I.;*¹⁴

7. It is submitted that in the light of the observations made in the decisions cited herein above, the evidence of DNA test

5 AIR 2014 SC 932

6 Criminal Bail Application No. 2567 of 2017 decided by Bombay High Court on 12th March, 2018;

7 (2005) 2 SCC 42

8 (1993) 3 SCC 114

9 AIR 1957 SC 637

10 AIR 2017 SC 1657

11 1991 Cri.LJ 3329

12 AIR 1980 SC 1632

13 2013 ALL MR (CRI) 2112

14 2012 (1) SCC (Cri) 26

is vital document which would establish the innocence of the applicant. It is also submitted that the applicant is in custody since the date of arrest and in accordance with the law laid down in the various decisions in relation to the prolonged custody and grant of bail, the applicant may be released on bail as no purpose would be served by keeping him in custody.

8. Learned APP submitted that the earlier application has been rejected by this Court by taking into consideration all the factual aspects and the documents on record. The submissions were advanced by the applicant on all aspects were considered in the earlier application and no new ground is made out for re-considering the ground of bail. Learned APP pointed out observations made in paragraph 11 of the order dated 26th July, 2017 passed by this Court while rejecting the earlier application for bail. It is submitted that there is no change in circumstances to entertain the second application for bail. Merely on the ground of the negative DNA report which was received subsequent to the rejection of the earlier bail application cannot be considered as a change in circumstances for entertaining this application. This Court while rejecting the first application for bail has referred to the earlier DNA report which was negative and inspite of that

considering the material on record the bail was refused to the applicant. It is further submitted that the applicant was absconding at the initial point of time. It is submitted that the applicant is involved in serious crime and on the ground that he is in custody from the date of arrest, he cannot be granted bail. The reliance was placed on the decision of Hon'ble Supreme Court in the case of ***Sunil Vs. State of Madhya Pradesh***¹⁵.

9. The earlier application preferred by the applicant was rejected by order dated 26th July, 2017. On receipt of second DNA report dated 21.11.2017, the applicant preferred an application before the Sessions Court contending that the second DNA report is negative and that the applicant is absolved of the charge of rape. It was also contended that the applicant is in custody for a long period of time. One more submission which was advanced before the Sessions Court is that the applicant is entitled for bail in accordance with Section 167(2) of Code of Criminal Procedure, 1973, as the prosecution has submitted incomplete chargesheet and investigation is still going on. The second DNA report which has been annexed to the application indicates that the accused is not biological father of the source of Exhibit A (product of

15 (2017) 4 Supreme Court Cases 393

conception) and that the victim girl is a biological mother the source of Exhibit A (product of conception). It is pertinent to note that when the earlier application was rejected, the Court has considered the submissions advanced by the applicant that the DNA report is negative which absolves him from the crime. While dealing with the said submission it was observed in the earlier order that, no doubt the DNA report states that the applicant is not the biological father of product from the DNA sample. However, at this stage the version of the victim who is a minor girl aged about 13 years as well as behaviour of the applicant-accused which is referred by in the statement of various students and teachers cannot be brushed aside. It was also observed that the conduct of the applicant-accused narrated by the other students, supports the case of the victim that there is possibility that the accused has indulged in such activity. The version of the victim therefore cannot be overlooked at this stage. Although, it was observed that the investigation was conducted by Mr. Vasudeo Morey was deprecated by this Court and that thereafter the investigation was transferred to another officer, the benefit of negative DNA report was not given to the applicant, as the victim had described the acts committed by applicant and had given specific role to the

applicant-accused. It was also observed that this is not the stage to scan and appreciate the evidence. It was observed that the applicant was arrested about two and half months and the victim is minor girl aged about 13 years and that the gravity and magnitude of the offence has to be taken into consideration while granting bail to the accused.

10. It is thus clear that while rejecting the earlier application, this Court has taken into consideration the material on record and rejected the application for bail. It would be appropriate to incorporate the observations made in paragraph 11 of the order dated 26th July, 2017.

“I have perused the documents on record which is in the form of charge sheet. I have considered the submissions advanced by the learned counsel for application, learned APP as well as the learned counsel for the intervenor-victim. It is noted that the victim is 13 year old girl and was studying in 7th standard at the relevant time. The applicant is charged with serious offences u/s.376 read with Section 4, 5, 6, 8, 9 and 10 of POSCO Act. The applicant-accused was the teacher in the school of the victim at the relevant time. The victim has narrated the incidents of sexual assault by attributing a clear overt act to the applicant. There is no reason for the minor girl to falsely implicate the applicant in the said crime. There

may be some contradictions or omissions in the statements of victim or other witnesses, however, it is pertinent to note that the victim has undergone a trauma as she was subjected to sexual assault which has resulted in her pregnancy. The entire family of the victim was under trauma on account of the incident. At this stage, there is no reason to disbelieve the statement of the victim girl. The statement of the friend of the victim namely Koral Jadhav corroborates the version of the victim in the statement recorded by police, wherein she has stated that on one day on account of stomach-ache, they were sitting in the class and that she went to bath room and when she returned back from bath room, she saw the victim standing near the window. It may be that in the subsequent statement, the said witness has not deposed about the said version. However, the contradictions or the omission in the statements can be looked into at the time of trial. There are consistent statements of the other students which depicts the objectionable behaviour of the applicant-accused who used to indulge in cracking adult jokes and also talking about nudity. The statements also speaks about the conduct of the applicant-accused that he used to hold hands of the girl students and also used to touch them on their shoulder. The statement also indicate about showing semi nude photographs to the students and narrating stories involving the nudity which outraged the modesty of girl students. The stand of the applicant that

he has been falsely implicated in the crime or that DNA report is negative and absolves him from the crime or that there is a video clipping which refers to the version of the mother of the victim where she has referred to name of another boy from the class, can be considered as defences of the applicant which can be agitated at the time of trial. No doubt the DNA report states that the applicant is not the biological father of the product from the DNA sample. However, at this stage the version of the victim who is a minor girl aged about 13 years as well as behaviour of the applicant-accused which is referred to by in the statements of various students and teachers, cannot be brushed aside. The conduct of the accused narrated by the other students, supports the case of the victim that there is possibility that the accused has indulged in such activity. The version of the victim, therefore, cannot be overlooked at this stage. It appears that at the initial stage, the investigation was conducted by Mr. Vasudeo Morey which has been deprecated by this Court and thereafter the investigation was transferred to another officer. The statements of the witnesses need not be gone into in minute details. Only on account of negative DNA report, the applicant cannot be absolved of the crime. The victim has described the acts giving specific role to the applicant-accused. This is not the stage to scan and/or appreciate the evidence. The applicant was arrested after about two and half months. The victim is minor girl aged about 13 years. The gravity

and magnitude of the offence has to be taken into consideration while granting bail to the accused. The applicant is charged with serious crime. Prima facie there is evidence on record to show his involvement in the crime. Considering all these aspects, I am not inclined to grant bail to the applicant.”

11. Thus, after all the documents and evidence in chargesheet, the earlier application preferred by the applicant was rejected and the same aspects cannot be re-appreciated again. On perusal of para 11 of the said order rejecting the application for bail it is apparent that this Court has been considered statements of witnesses in chargesheet and it is not possible to reconsider the material again and come to a different conclusion.

12. The decisions placed for consideration by the learned advocate for the applicant are in respect to the evidential value of DNA test or scientific examination and with regard to principles in respect to grant of bail. I have perused the observations made by the Court in the decisions relied upon by the applicant. As far as the decisions relating to the DNA test, the same can be appreciated during trial. In some decisions the Court has also considered grant of bail on the basis of FSL report or DNA report. However, in the facts of this case bail cannot be granted to the applicant. This

Court has rejected earlier application on merits after considering the statement of victim and other witnesses. This Court had rejected the application for bail after due consideration of the first negative DNA report and evidence on record hence there is no change in circumstance. Learned APP has relied upon the decision in the case of *Sunil -Vs. State of Madhya Pradesh* (Supra) wherein it was observed that the positive result of 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 have to be considered. The other submissions advanced by the advocate of the applicant is that the police has filed incomplete chargesheet. The submission is devoid of merits. On completing the investigation, the chargesheet has been filed. Thereafter, the applications for bail preferred by the applicant were rejected. Thus, there is no substance in the submissions that the applicant is entitled for bail under Section 167(2) of Code of Criminal Procedure, 1973. In the circumstances, I do not find any change in circumstances to reconsider the prayer for bail and the application is required to be rejected. However, the trial can be expedited

considering the fact that applicant is in custody from 15.12.2016.

Hence, I pass the following order:

ORDER

1. Criminal Bail Application No. 460 of 2018 is rejected.
2. The hearing of trial is expedited. The Trial Court is directed to complete the trial expeditiously and endeavour to conclude the same within 10 months from the date of receipt of this order.
3. It is clarified that the observations made in this order are only for considering the application for bail and the Trial Court shall not be influenced by the same at the time of trial.
4. The application is disposed of accordingly.

(PRAKASH D. NAIK, J.)