

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.2395 OF 2018

Abdul Kher Abdul Hasan Shaikh, Age 27 years,
Occ.Daily Wage, R/o.Room No.3, Deonar Mistry
Chawl, Pathanwadi, Malad (West),
Mumbai-400 097.

Applicant

versus

The State of Maharashtra

Respondent

Mr.Prashant Goyal for applicant.

Mr.S.R.Agarkar, APP, for State.

Ms.Masulkar, API, Dindoshi Police Station, present.

CORAM : PRAKASH D. NAIK, J.

DATE : 6th December 2018

PC :

1. Leave to amend to correct the name of applicant. Amendment be carried out forthwith.

2. This is an application for bail. The applicant was arrested on 5-10-2017 in CR No.657 of 2017. The FIR was lodged with Dindoshi Police Station on 2-10-2017. Initially offence was registered under Section 363 of Indian Penal Code. Subsequently the offences under Sections 376, 342 r/w 34 of IPC and Sections 3 and 4 of Protection of Children from Sexual Offences were registered. The investigation is completed and charge sheet is filed.

3. The prosecution case is that the victim was aged about 17 years of age at the time of incident and was missing from her residence from 28-9-2017. The complaint of kidnapping was lodged on 2nd October 2017. She was brought home by police on 3rd

October 2018. The complainant is the mother of victim. On the earlier occasions she had disappeared from house. The earlier incident had occurred in October-2016 and in July-2017. In view of the above, the complainant had called her married daughter to keep watch on the victim. On 28-9-2017 the complainant, her elder daughter and son-in-law had gone out for work by closing the door of the house from outside. When they returned home, the victim was not found at the residence. Subsequently supplementary statement of the complainant was recorded on 5-10-2017. In the said statement she had referred to the statement made by the victim child. According to the complainant, the victim had informed her that she has left the house on 28-9-2017 and she met accused no.1 who is known to them as he was the person who used to drop her younger brother to school being rickshaw driver. It was further informed to her that the victim had gone to see Garba in the area and in the night accused no.1 met her, who took her in the auto rickshaw. They went to some premises and the said accused had committed sexual intercourse with her without her consent. On the next day i.e. on 29-9-2017, another unknown person came. Accused no.1 Kamlesh was also present in the premises. The said unknown person also had sexual relationship with her without her consent; she was assaulted. During the said period Kamlesh and unknown person had sexual intercourse only once. The victim managed to run away from the place of incident and returned home on 3-10-2017. The statement of the victim child was recorded on 5-10-2017. She has referred to the incident as stated hereinabove. From the said statement it also appears that on 5th October 2017 the victim went to rickshaw stand along with police and mother and pointed out Kamlesh and person who was with Kamlesh as the persons who had

sexually abused her. The name of that person was disclosed as Ramtahal Yadav. Subsequently on 7-10-2017 another statement of the victim was recorded in which she has also referred to the sexual assault by one more person. The victim pointed out one tea vendor as the person who had also allegedly committed sexual intercourse with her. However, the exact date of the incident has not been mentioned in the said statement. Thus, in her version, as narrated to the complainant and in her statement, the victim had referred to the incidents which had occurred on the aforesaid dates and had referred to involvement of two persons and subsequently had referred to another incident without mentioning the date of incident. The third person is allegedly applicant who was shown on 7th October 2017. In the statement u/s 164 of Cr.P.C, the victim has, however, referred to only two persons being involved in the crime and there is no reference to the third person.

4. The spot panchanama was recorded by police. It is alleged that during the search of the accused, the victim has pointed out accused no.1 Kamlesh and the co-accused who was with accused no.1. The applicant was unknown to victim. The victim was sent for medical examination. In the history submitted to the hospital during the examination, it was stated that there was history of sexual assault by multiple people, however, exact dates could not be elicited. It was also noted that the survivor was in local area by herself and she names the rickshaw driver who knows her and the survivor keeps changing her history regarding her whereabouts. It was also noted that there is history of sexual assault by multiple people in October-2016 and survivor was pregnant and had undergone abortion in Shatabdi Hospital and she was kidnapped two

months back by two rickshaw drivers. In the medical report it is indicated that there are no report of external injuries, however, sexual assault cannot be ruled out.

5. In the aforesaid factual scenario it was contended by the advocate for the applicant that the prosecution is merely relying on the alleged identification of applicant being the unknown person, who had allegedly committed sexual assault. There was no identification parade but the identification was during the search of accused and allegedly the applicant was the person found at the place on 7th October 2018 and allegedly tea vendor. It is submitted that medical history indicate that the victim was not in a position to collect actual facts and she kept on changing the history of assault. It is further submitted that in the initial statement, reference was made to accused no.1 who was known to the family of victim and other unknown person who had committed the sexual assault on 28th and 29th September 2017. Subsequently she has also referred to involvement of third person but the actual date of incident is not mentioned. It is, therefore, submitted that this is a case of mistaken identity and only on the basis of such mistaken identity, the applicant cannot be continued in custody for prolonged period. The investigation is completed and charge sheet is filed. It is also submitted that there is no corroborative evidence in the nature of clothes of the victim and the accused and presence of any other incriminating evidence against applicant.

6. Learned APP stated that the accused is involved in serious crime. He is identified by the victim child and there was no need of separate identification parade. The victim has attributed overt act to

the applicant as a person who had committed the alleged act. The discrepancies as pointed out by the advocate for applicant, can be agitated at the time of trial. The victim was suffering from mental retardation of moderate severity and her mental age is 7 years.

7. Having heard both sides and having perused the documents, it is apparent that there was a history of victim leaving the house in the past. The only person allegedly known to her was the rickshaw driver (accused No.1). The applicant was allegedly unknown person who was involved in the sexual assault. The first statement refers to involvement of only two persons who were found together and arrested. In the subsequent statement the victim has referred to involvement of third person and shown applicant during search who was tea vendor. The history also indicate that she was not clear in disclosing the history of assault. There is no other evidence showing involvement of the applicant in the crime. The applicant was impleaded on the basis of statement made by the victim child during the search of accused. In the circumstances and more particularly considering that the applicant is in custody from the date of arrest, bail can be granted to him.

8. Hence, I pass following order :

ORDER

- (i) Criminal Bail Application No.2395 of 2018 is allowed and disposed off;
- (ii) The applicant is directed to be released on bail in connection with CR No.657 of 2017 registered with Dindoshi Police Station, Mumbai, on furnishing PR bond in the sum of Rs.25,000/- with one or more sureties in the like amount;

- (iii) The applicant is permitted to furnish cash security in the sum of Rs.25,000/- for four weeks;
- (iv) The applicant shall report Dindoshi Police Station once in a month on every first Friday between 10 am and 12 noon till further orders;
- (v) The applicant shall not tamper with evidence.

(PRAKASH D. NAIK, J.)

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