

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.1810 of 2021

Abbas Asmat Ali .. Applicant
Versus
The State of Maharashtra & Anr .. Respondents
...

Mr. Nelson Rajan P.V for the applicant.
Ms.Ameeta Kuttikrishnan for the complainant.
Mrs.A.A. Takalkar, APP for the State.

CORAM: BHARATI DANGRE, J.
DATED : 26th JULY, 2022

P.C:-

1 The applicant came to be arrested on 11/9/2020 on being arraigned as an accused in C.R.No. 239/2020 registered with Nerul Police Station, which invoke Sections 376(3), 504, 506-II r/w Section 34 of IPC and Section 4 and 5(j)(ii) of the POCSO Act.

 The subject C.R came to be registered on a complaint filed by the mother of the victim girl, aged 14 years, wherein she stated that she along with her daughters reside in a slum area and is engaged in labour work. She was acquainted to the applicant, who was residing in a building adjoining the slum and she was aware that he was married, having one year old child. Somewhere

in the month of February 2020, the applicant along with his wife approached her and requested her to send her daughter, aged 14 years to look after their children aged 6 and 1 year old. The complainant stated that after discussing the issue with his wife, they agreed to the proposal and from the next day, the victim girl used to visit their house and return back by 8.00 p.m in the night.

The complainant narrated that on 9/7/2020, the victim girl had suffered pain in the stomach, and when she was administered medicine, she disclosed that while she was taking care of the two minor children of the applicant, taking advantage of the situation that his wife was out of station, he committed forcible sexual intercourse with her and he continued to do so for 10 days. She was threatened that if she disclose the incident, he would cause harm to her parents. When the complaint was filed, the wife of the applicant visited the family and admitted the guilt and offered to take the victim girl for treatment. She was taken to the hospital by the wife of the applicant and she retained the medical papers and brought the victim at their house.

2 Upon the FIR being registered, the statement of the victim girl, aged 14 years was also recorded on 12/9/2020, where she stated that the applicant had assured her that he would perform marriage with her and he offered her Rs.200/- and established physical relationship with her. She stated that he used to maintain physical relationship with her twice in a day, which resulted into her pregnancy. After declaration of lock-down,

when she did not report to the house of her master, it is stated by her that he gave an amount of Rs.5,000/- to her mother. Since she missed her periods, on carrying pregnancy test, it was revealed that she was carrying a pregnancy. The statement of the victim girl recorded u/s 164 of Cr.P.C and she maintained her stand that the applicant forcibly committed sexual intercourse with her. She has narrated her ordeal in her statement and she has reiterated that when the wife of the applicant became aware of the incident, she had taken her to the hospital in absence of her parents, and she was administered two injections and four tablets but the foetus could not be terminated.

3 The medical examination of the complainant do not reveal any positive evidence of sexual intercourse, since she was examined after seven months.

4 During the course of investigation, the DNA analysis of the foetus was conducted and report exclude the applicant to be the biological father of the baby of the victim.

5 The learned counsel Mrs.Nelson appearing for the applicant would seek release of the applicant in the backdrop of the said report. He would rely upon a decision of this Court in case of Shyam Maruti Shingade Vs. State of Maharashtra (Criminal Bail Application No. 2372/2019 delivered on 9/1/2020).

Per Contra, Ms.Kutty appearing for the complainant would place reliance upon the decision of the Single Judge of this Court in case of *Dashrath s/o Hiranman Johare vs. State of Maharashtra (Criminal Application No. 392/2020 dated 14/7/2022)*.

6 It is not in dispute that the evidence of DNA analysis can be used for the purpose of corroboration. The statement of the victim girl as well as her mother is recorded u/s.164 of Cr.P.C. The victim has specifically narrated about the incident of repeated sexual assault committed on her by the applicant. She has specifically stated that he lured her by paying some amount and even threatened her not to disclose the incident to any person, which compelled her to keep mum. When her pregnancy was disclosed, she revealed to her parents that the applicant is responsible for the pregnancy and he had forced himself upon her. The DNA test exclude the applicant as the father of the child, but that do not discredit the victim who has reiterated in her 164 statement that the applicant forcibly committed sexual intercourse with her. As per the charge-sheet, the applicant has taken undue advantage of the situation of the victim girl, who was working in his house. There is no reason to disbelieve the testimony of the victim who has narrated the act of sexual assault upon her at the instance of the applicant. The DNA test cannot be said to be the conclusive evidence regarding a rape, but it can only be used as a corroborative evidence.

7 Distinguishing the decision in case of Shyam Shingade (supra), it can be seen that the victim girl, on attaining majority, stated that she had no complaint against the applicant and it was only because the ‘*Mahila Atyachar Virodhi Samiti*’ pressurized her to give the complaint, she had lodged the same. Since in the present case, the victim girl is firm in her version that the applicant had forcibly committed sexual intercourse with her, he shall be subjected to trial and merely because the DNA exclude him to be the biological father of the child, do not deserve the applicant’s release on bail.

The Hon’ble Apex Court in case of *Sunil Vs. State of Madhya Pradesh, 2017 (4) SCC 393*, in paragraph no.4 has made the following observations :-

“From the provisions of Section 53-A of the Code and the decision of this Court in Krishan Kumar it does not follow that failure to conduct the DNA test of the samples taken from the accused or prove the report of DNA profiling as in the present case would necessarily result in the failure of the prosecution case. As held in Krishan Kumar (para 44), Section 53-A really “facilitates the prosecution to prove its case”. 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 have to be considered. It is to the other materials brought on record by the prosecution that we may now turn to.”

In the wake of the observations of the Hon'ble Apex court, though a positive result of DNA would constitute clinching evidence against the accused, if however, the result is in negative, the other material available on record will still have to be considered independently.

8 In the wake of the above, since the statement of the victim as well as her mother recorded u/s.164 Cr.P.C, and at this stage, there is no reason to doubt the said statement where the victim girl has clearly stated about the sexual exploitation at the hands of the applicant and further, considering the precarious situation of the family of the victim, there is every likelihood of the victim and his family being pressurized by the applicant.

Application is rejected.

(SMT. BHARATI DANGRE, J.)