

15.01.2024  
cm/ct 28

**C.R.M (DB) 4166 of 2023**

Sl. 35

In Re : An application for bail under section 439 of the Code of Criminal Procedure filed on 17.10.2023 in connection with Rajarhat Police Station Case No. 341 of 2022 dated 11.11.2022 under Sections 328/376D of the Indian Penal code (G.R. Case No. 4383 of 2022).

And

In Re : **Shubham Periwai**

... .. petitioner

Mr. Samrat Goswami  
Ms. Supriti Sarkhel

.... for the Petitioner

Mr. Rudradipta Nandy  
Mr. Subrata Roy

.... for the State

Ms. Jhuma Sen  
Mr. Dinesh Vishwakarma  
Ms. Arpita De

... for the de facto complainant

1. Petitioner is a co-accused in a case of gang rape. He is in custody for more than a year. He contends allegation of gang rape suffer from inherent improbabilities which go to the root of the prosecution case. Firstly, the victim had treated herself in a private hospital where she did not disclose the names of her assailants. Although she alleged that petitioner had subjected her to forcible unprotected sex, it is left to one's imagination how FSL report shows petitioner is a contributory to the DNA found in the semen sample in the contraceptive. That apart, it is contended most of the vulnerable witnesses have been examined. Hence, petitioner may be enlarged on bail.

2. The learned lawyer for the State contends the deposition of the victim (PW.1) unequivocally shows petitioner was present at the place of the occurrence. He had raped the victim in the bathroom. Thereafter she was made to consume alcohol and was subjected to rape by others. Subsequently, she returned home and divulged the incident to her friend. Out of shame she may have withheld the name of the miscreants from the medical officer. Her version has been corroborated by other evidence on record. The relations of the petitioner had intimidated the victim which resulted in a separate criminal case. Bail prayer of co-accused was turned down in October 2023 and direction was given to conclude the trial in six months. Prosecution case has progressed considerably and 23 witnesses have already been examined. Learned Counsel assures the Court the trial shall be concluded within the time frame as prescribed in CRM (DB) 2670 of 2023.

3. The learned lawyer for de facto complainant/victim opposes the bail application. She contends the evidence on record particularly that of the victim (PW 1) implicates the petitioner in the crime. Minor variations in evidence are not sufficient to discredit a victim of sexual offence. Relations of the petitioner had intimidated the victim earlier. Bail prayer of co accused had been turned down and trial is in progress. Petitioner and others are powerful individuals and in the event they are released on bail, the trial shall be delayed.

4. We have considered the evidence on record. Victim has been examined as P.W.1. From her deposition, it appears that she had gone to attend the birthday celebration of a co-accused. Petitioner is a friend of co-accused. In course of the party, victim was initially accosted by the petitioner in the bathroom and raped. Thereafter, she was raped by others. She was also made to consume alcohol and became unconscious. Subsequently she recovered and returned home. Thereafter, she disclosed the incident to her friend and went to a doctor. Most probably out of fear and apprehension she did not divulge the names of the miscreants. Be that as it may, the facts and circumstances in which the victim had been subjected to repeated sexual assaults in the course of a birthday party by petitioner and co-accused have been graphically described. Her deposition is also corroborated by other witnesses.

5. It is strongly contended victim claimed she had been subjected to forcible unprotected sexual intercourse by the petitioner but FSL report shows that the petitioner is a contributory to the DNA profile gathered from the semen in the condom.

6. Learned Counsel for the petitioner also strenuously argued FSL report is unreliable as the sample was not in a sealed condition which was belatedly produced in the Court. As a result, the chain of custody has not been established.

7. Whether the victim was subjected to protected or unprotected sexual intercourse is of little consequence. Her deposition shows the sexual assault was a forcible one and lacks consent.

8. In a case of gang rape there is a statutory presumption with regard to the truthfulness of the victim's version regarding lack of consent. This requires to be rebutted during trial. Apart from the FSL report, there are other corroborative evidence on record that the petitioner had access to the victim at the time of occurrence.

9. It is also relevant to note that a relation of the petitioner had intimidated the victim during pendency of the proceedings before the trial court. This prompted the Court to initiate contempt proceedings against police officers who had been lax in extending witness protection measures to her and/or had harassed her. The aforesaid facts have been noted in extenso while declining the bail prayer of co-accused in CRM (DB) 2670 of 2023. These circumstances demonstrate the nefarious influence that the petitioner and co-accused have upon the police administration.

10. Under such facts and circumstances, we do not consider it prudent to release the petitioner on bail at this stage.

11. Accordingly, the prayer for bail of the petitioner is rejected.

12. We reiterate the trial Court to conduct the trial with utmost expedition and conclude the same within the time frame as proposed in CRM (DB) 2670 of 2023.

13. Parties shall cooperate with the trial Court.

**(Partha Sarathi Sen, J.)**

**(Joymalya Bagchi, J.)**