

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
LD VC DIST BAIL APPLICATION NO.48 OF 2020
WITH
INTERIM APPLICATION NO.1 OF 2020**

Jitin Mothukiri .. Applicant

Vs.

The State of Maharashtra through
Paud Police Station, Pune Gramin. .. Respondent

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Dr. Abhinav Chandrachud with Ms. Khushboo Pathak and Mr.
Wasi Sayyed i/b Mr. Prem Pandey for the Applicant.

Mr. Ajay Patil, A.P.P. for the State.

Mr. Satyam Nimbalkar for the intervener.

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CORAM: BHARATI DANGRE, J.

DATED : 21st JULY 2020

P.C:-

1. By this Application, the Applicant is seeking his release on bail in a crime where he is charged with offences punishable under Sections 376, 354-A and 354-B of the Indian Penal Code. On his Anticipatory Bail Application being rejected by the Sessions Court and the High Court, he came to be apprehended on 16/12/2019 and remanded to judicial custody on 21/12/2019 and since then he is incarcerated.

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2. C.R. No.472 of 2019 came to be registered with the Paud Police Station, Pune on 08/11/2019 and on a charge sheet being filed, it was numbered as Sessions Case No.282 of 2020, the take off point being a complaint filed by the victim girl, aged 25 years reporting about the incident which took place on 28/10/2019 at Aamby Valley (Lonawala), Pune.

3. According to the Complainant, she was acquainted with the present Applicant aged 24 years since last eight years as she was studying in Symbiosis College, Pune. As per her version, on 27/10/2019, the Complainant along with her eight friends, proceeded to a bungalow owned by one of her friends, Mr. Yashwardhan Agarwal for celebration of Diwali. The Complainant with her friends reached Bungalow No.94-B, Ambivali about 12.00 to 12.30 a.m. and amongst the friends present on the said occasion, the Applicant was one of them. The youngsters had an overnight party and it is the version of the Complainant that after having dinner around 2.00 a.m., she decided to have rest and occupied Bed Room No.3 on the second floor of the said bungalow whereas her other friends continued with the party. While she dozed off to sleep, at about 4.30 to 5.00 a.m., she was awakened to certain feeling and found that someone was forcing himself upon her. On becoming aware of the situation, she realised, it was the Applicant who was lying on her body kissing her and trying to have sexual intercourse with

her by penetrating his penis into her vagina after removing her jeans-pant and undergarments. At this juncture, the Complainant used all possible force to push him away and she was successful in thwarting the sexual overtures by the Applicant. Thereafter she wore her clothes and ran out of the room. In the complaint, she stated that once she went out of the room, she searched for her friends on the first floor but they were not found, which compelled her to return to Bed Room No.3 and when she found that the Applicant was not there, she went to sleep in the same bedroom. After passage of some time, again the Applicant came there in semi-nude state and tried to get intimate by forcing himself upon the Complainant to which the Complainant responded by scolding him and asked him to immediately leave the room. As a result, being scared, the Applicant left the room.

4. As per the version of the victim girl, this incident caused tremendous mental trauma to the Complainant and she was frightened. On spending one more day in the bungalow amidst her friends, she narrated the incident on a day after to her friends present in the bungalw. She returned to her home in Pune on 29/10/2019 in a distressed mental condition and did not report the matter until 30/10/2019, when she narrated the entire episode to her mother. She was in a tremendous depression and her mother accompaneid her to a psychiatrist in the city. Thereafter, on discussing the matter with the family, she approached Kondwa Police Station where her statement was recorded on

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04/11/2019 and a 'Zero' FIR was registered. Her supplementary statement came to be recorded on 07/11/2019. Thereafter, she approached the Paud Police Station on 08/11/2019 based on her complaint, the FIR came to be registered naming the Applicant as an accused alleging that he had committed offences punishable under Sections 376, 354, 354-A and 511 of the IPC. Section 511, however, came to be deleted while filing charge-sheet.

5. On completion of investigation, the charge-sheet came to be filed. On filing charge-sheet, a Bail Application was moved before the Sessions Court but it was rejected by Order dated 17/03/2020. The Applicant even attempted to prefer an Interim Application for temporary bail on account of Covid-19 situation but the same was rejected by the Sessions Court. In the aforesaid background of chronology of events and on failure to seek any relief from the Sessions Court, the Applicant has moved this Court by filing the present Application.

6. Dr. Abhinav Chandrachud, learned counsel for the Applicant has taken me through the entire charge-sheet, which has been uploaded and he has laid stress on certain relevant aspects from the charge-sheet. At the outset, he would submit that the FIR has been lodged on 08/11/2019 and, in fact, there is a delay in lodging the FIR, which is unexplained. Since on 04/11/2019 she had approached Kondwa Police Station where a

Zero FIR came to be registered, the explanation offered by the Complainant that she was extremely scared and not in a proper state of mind to take a decision is not a sufficient explanation, according to the learned counsel. Dr. Chandrachud has also emphasised on the improvements in her supplementary statement which was recorded on 07/11/2019 where she had made an attempt to improve her version on the material aspect like she had stated for the first time that she went to sleep in the bedroom on the second floor by locking the room but the door was having electric lock and it is possible to open it from outside. According to the learned counsel, the spot panchnama and the memorandum of panchnama do not record any such thing as electric lock on the door of the room where the alleged incident took place. Further, according to him, even the owner of the Bungalow Mr. Yashwardhan Agarwal has not mentioned anything about such electric lock being installed on the bed room doors. He would also invite my attention to the two statements; one by Mr. Yashwardhan Agarwal, the owner of the Bungalow and the other by Mr. Yash Wadhvani. The statements being to the effect that when these two persons wanted to go for sleep after finishing the party and when they approached Bed Room No.3 on the second floor, the Applicant and the victim girl were sleeping in the said bedroom and occupying the same bed. According to the learned counsel, this statement speaks for itself and presumably Dr. Chandrachud wants to hint at the act complained of being done with her consent. He is also acerbic

of the fact which emanates from the complaint of the victim that if on the first occasion, the victim was forced upon, why she kept quiet despite having an option of raising an alarm and seeking help from her friends by knocking the doors of other rooms in the bungalow and according to him, she remained tight lipped and spent on the entire next day with her friends and enjoyed her venture in the Sahara City which, according to him, is clearly reflected from the photographs that form part of the charge-sheet. It was only on 29/10/2019 when all the friends were leaving for their respective houses, she had revealed the said incident to them. This conduct, according to the learned counsel, speaks volumes. Apart from this, Dr. Chandrachud has also relied upon the discrepancies in the statement recorded under Section 164 of the Cr.P.C. as against her first statement as to the point of time when she had disclosed the incident to her friends. The learned counsel also urge that the medical history she had given at the time of her physical examination states that she had consumed alcohol, necessarily leading to an inference that she was not in her full consciousness to comprehend the situation.

7. Learned A.P.P. as well as the learned counsel for the Intervenor would emphatically argue that the offence complained of is serious one and modesty of a young girl has been outraged. The submission is to the effect that even the Applicant himself has admitted to his guilt in several WhatsApp chat with his friends and this amounts to extra

judicial confession.

8. I have perused the material placed on record in the form of charge-sheet. The Applicant seeks his release on bail and it will have to be decided on the well known judicial parameters of consideration of such an application. The exercise of discretion conferred on the Courts is expected to be exercised in a judicious manner. The question whether an accused is to be admitted to bail or not is dependant on variety of circumstances and the most acceptable being (a) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (b) nature and gravity of charge; (c) severity of punishment in the event of conviction; (d) danger of the accused absconding or fleeing the cause of justice; (e) character, behavior, position and standing of the accused in the society; (f) likelihood of offence being repeated and (g) reasonable apprehension of the Applicant tampering with the prosecution witnesses. All the circumstances have to be cumulatively assessed as competing factors while exercising the discretion. Each of the circumstance is to be given due weightage bearing in mind that any one of it do not superimpose on the other. It is the cumulative effect of all the aforesaid circumstances which must enter into the judicial verdict, is the settled position of law.

9. Every accused before he assumes the character of the convict is presumed to be innocent. Under the Indian

Constitution, liberty of an individual is zealously safeguarded and it is founded on the bedrock of the rights guaranteed under the Constitution itself. It is acknowledged as the most cherished value in Indian democracy. Deprivation of liberty is considered to be punitive and incarceration before conviction has a substantial punitive content. In the backdrop of the conundrum between the individual liberty of the accused and securing justice for the victim, a neat balance has to be struck. The overweighing factors to do justice to the victim is expected to pitted against avoidance of indefinite incarceration of the accused awaiting his transformation from accused to the convict. The availability of the accused for trial and the likelihood of abuse of his liberty to manipulate the prosecution case on the release are to be juxtaposed against justice to the victim by ensuring a fair trial.

10. In the background of the aforesaid settled position of law, I have examined the material compiled in the form of charge-sheet against the present Applicant. Though mere delay in lodging the FIR may not be fatal to the case of the prosecution and justiciable explanation offered by the victim girl can be re-asserted by evaluating her state of mind and it may be accepted during the course of the trial, certain circumstances warrant attention. The victim is aged 25 years on the date on which the alleged incident took place. She had categorically admitted that she was introduced to the Accused while she was pursuing her education in Symboisis College,

Pune and she was acquainted with him and he was a part of her friend circle. She accompanied her friends for celebration of Diwali to Ambivali and when she reached there on 27/10/2019, the Accused was already present there. The alleged incident took place on the intervening night of 27/10/2019 and 28/10/2019. The statement of the victim is to the effect that she entered the bedroom on the second floor of the bungalow and went to sleep there and it was only in the wee hours when she was awakened to the Applicant forcing himself upon her and she repelled him by using force. It is her statement that she stepped out and went one floor down in search of her friends and since the lights were switched off, she was not able to find any help. She again returned to her room where another attempt was made by the Applicant to establish physical contact with the victim by his explicit sexual overtures. When she raised an alarm to deter him, though being in the same bungalow, none of the friends came to her rescue is something astonishing. She did not report the incident to anyone on the same day though she was amidst of the friends and went for an outing. The photographs placed on record would lead to an impression of her being cheerful in the company of the Accused and one other friend. The reason for she not disclosing the offensive conduct of the Applicant which was so dreadful, horrific and appalling, according to her, is something incomprehensible. Further, in her statement under Section 164 of the Cr.P.C., she has stated that she did not disclose this fact to anyone and on the second day itself she left for her home in Pune. However, in her first statement to the

police recorded on 04/11/2019 she has stated that she stayed there on 28/10/2019 and while they were leaving on 29/10/2019, she divulged the incident which took place in the night of 28/10/2019 to her friends. This version is corroborated by the statements of her other friends, the inhabitants of the bungalow who had stayed there on the night of 28/10/2019 and 29/10/2019. The eight statements which form part of the charge-sheet in unison reflects that on 28/10/2019 all the friends had their breakfast and lunch and they had a ride in Sahar City and stayed in the bungalow on that night. On the next day i.e. on 29/10/2019 when they were about to leave, the victim narrated the alleged incident. This version is in contradiction to the statement of the victim recorded under Section 164 of the Cr.P.C. where she has stated that she went home the very next day and did not narrate the incident to anyone. One of the photographs placed on record with the charge-sheet reflects the time as 29/10/2019 at 3.09 p.m. and it captures the Applicant and the Accused together in a friendly pose.

The reliance of the prosecution and the intervenor is on some chat messages wherein the Applicant has accepted his guilt. The chat messages, however, are not reflective of the actual alleged incident but give an impression that the Applicant has apologized to some of his friends about his conduct with the victim girl. The extra judicial confessions in the form of chat messages are also compiled in the charge-sheet and its existence as piece of evidence would be tested at

the time of trial since there is no report of its veracity at this stage. It is a settled position of law that extra judicial confession is a weak piece of evidence unless and until corroborated with substantial evidence.

11. Taking an overall view of the material collected by the prosecution against the Accused and contained in the charge-sheet, prima facie I am of the considered view that it do not constitute a reasonable ground for believing that the Applicant is guilty of an offence with which he is charged. The statements of two witnesses to the effect that the Applicant and the victim were found sleeping in the same room on the same bed will have to be put to test in a trial and this evidence will have to be appreciated cumulatively. This is a prima facie opinion after having an overall feel of the prosecution case through the material contained in the charge-sheet and should not be taken as an opinion on merits of the prosecution case and the trial court shall not be influenced by the observations in this order.

12. There cannot be a straight jacket formula as to how a woman will react to an act of outrage by a male, since all women are borne into different circumstances in life, go through different things and faces, experience and react differently and necessarily each woman would turn out to be different from the other. The concept of consent of the victim or as to at what stage the consent was revoked and the act of

physical indulgence was attempted to be restrained is a matter of trial. The long lived notion as expressed in the words of Warren Buffet - *“If a lady says No, she means may be”* or in the expression of Rich Santos for Marie Claire - *“Most of us guys have been there; the night ends, we invite the girls come home with us. When a girl says no, we launch into our second and third attempts. Sadly, these attempts are filled with incentives such as promise of guitar playing, of 'fabulas chicken tenders at the dinner by my place' or even promises: 'I will definitely call on the next day' etc; I have taken girls home after long discussions, changing Nos to Yeses”* are the old hat tricks and the issue as to whether the girl really consented freely for a physical indulgence with her is to be searched by applying the new standards of modern life and the present social scenario. The freedom guaranteed to a woman to continue with her bodily integrity and autonomy, free from sexual violence are the emerging concepts which will have to be traversed during the course of a trial. This can all be established during the course of the trial by evaluating the version of the victim in the backdrop of the psychological framework, which would be expounded through a trial.

13. The Applicant came to be arrested on 16/12/2019, which is seven months ago, and till date he is confined there as a prisoner. He is a young boy of 24 years and a graduate in Mechanical Engineering, aspiring to pursue his career. It is not reported that he has any criminal antecedents. To the

contrary, he has firm roots in the Society; his father being engaged in a business of manufacturing and engineering goods and a resident of Kalyani Nagar in Pune and the likelihood of his absconding and fleeing the course of justice can be presumed to be minimal. Balancing deprivation of his liberty against the possibility of the trial being commencing and concluding in the immediate times is far beyond reality, particularly in the light of the huge galloping pendency which the judicial system would be staring at, at the end of the Covid pandemic. Incarceration of a young boy for an indefinite period would be antithesis to the concept of liberty. The investigation being completed and the charge-sheet having been filed and the prima facie material contained in the charge-sheet persuade me to release the Applicant on bail subject to certain stringent conditions that he will not enter in the jurisdiction of the police station where the victim girl is residing and also reserving liberty to the prosecution to move an application for cancellation of bail on being reported that the Applicant has misused the liberty or in any way attempted to interdict a fair trial while being on bail. Hence, the following order:

ORDER

- (a) The Applicant – Mr. Jitin Mothukiri shall be released on bail in C.R. No.472 of 2019 registered with Paud Police Station (Sessions Case No.282 of 2020) on executing P.R. bond to the tune of Rs.50,000/- and

on furnishing one or two sureties of the like amount.

(b) The Applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police Officer or tamper with the evidence or the witnesses of the prosecution.

(c) The Applicant shall not enter the jurisdiction of Undri Police Station, Pune or the area nearby the residence of the victim.

(d) The Applicant shall deposit his passport, if any, with the Investigating Officer and make himself available as and when required by the Investigating Officer.

(e) The Applicant shall provide his residential address and telephone number to the Investigating Officer.

14. The Application is allowed in the aforestated terms.

15. All parties are directed to act on the downloaded copy supplied by the Advocate under his seal and signature.

SMT. BHARATI DANGRE, J