

03.10.2023

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rejected

C.R.M. (DB) No. 2670 of 2023

In Re:- An application for bail under Section 439 of the Code of Criminal Procedure in connection with Rajarhat Police Station Case No. 341 of 2022 dated 11.11.2022 under Sections 328/376D of the Indian Penal Code.

And

In Re : Madhav Agarwal & Ors. Petitioners

Mr. Sekhar Basu, Sr. Adv.
Mr. Rajesh Kumar Sharma
Mr. Shiladitya Banerjee
Mr. Diptangshu Basu
Mr. Subhabrata Chowdhury
.....for the petitioners

Mr. Rudradipta Nandy, learned APP
Mr. Subroto Roy
..... for the State

Ms. Jhuma Sen
Mr. Dinesh Vishwakarma
..... for the victim

1. Learned Senior Counsel for the petitioners submits they are in custody for more than eight months. Victim had gone to the birthday party of one Yogesh Mishra, the third petitioner. At the party she did not raise any allegation of forcible rape. On the next day, she returned home and complained that she had been raped. Allegation of rape is an afterthought and has not been supported by medical evidence or other witnesses on record. Most of the vulnerable witnesses have been examined. Hence, petitioners may be enlarged on bail.

2. Learned Counsel for the State submits victim has been examined as PW 1. He stated she had gone to attend the birthday party. At the birthday party she was forced to consume alcohol and after consuming it she became unconscious. When she woke up she found herself in a room with the petitioners. Second petitioner was on her body and others were also present. Subsequently they also raped her. In the morning she left the venue and reported the matter to her friend and was medically treated. DNA report shows a match between the blood sample of the second petitioner and the swab taken from the victim. Her deposition is supported by the aforesaid DNA report and other incriminating circumstances. He opposes the bail prayer and assures the Court that the trial shall be concluded at an early date.

3. Learned Counsel for the victim submits her evidence read in the light of Section 114A of the Evidence Act proves lack of consent. DNA analysis report corroborates the allegation of sexual intercourse. Minor contradictions in the version of witnesses cannot be a ground to refute the prosecution case. During trial victim was threatened by a relation of a co-accused. She had to approach this Court to ensure police protection. It is apprehended in the event the petitioners are enlarged on bail she would be subjected to further intimidation and her quest for justice will remain illusory.

Principles governing bail:-

4. Grant of bail depends on multiple considerations which may be enumerated as follows:-

- (a) Gravity of offence;
- (b) Evidence in support of the accusation;
- (c) Involvement of the accused in the crime in light of the evidence on record;
- (d) Threat/intimidation/undue influence on witnesses and/or possibility of destruction of evidence;
- (e) Possibility of abscondence;
- (f) Impact of grant of bail on the victim in particular and the society in general;
- (g) Presumption of innocence of the accused;
- (h) Circumstances peculiar to the accused e.g. age, poor health, gender or other compelling circumstances;
- (i) Delay in trial impacting the accused's fundamental right to speedy trial.

5. Ultimate decision depends on the *inter se* weightage given to these issues in the facts of each case. For example, whether delay in trial would trump gravity of the offence or perception of threat may be countenanced through appropriate restrictions on movement of the accused instead of continued detention depends on subjective satisfaction of the Court based on an analysis of these parameters emerging from the facts of the case.

Gravity of offence and evidence in support of accusation:-

6. We have considered the rival submissions at the Bar in the light of the aforesaid legal proposition. This Court clarifies, reference to the evidence on record is not to pre-judge issues but to adjudicate the plea of bail in the light of relevant parameters that is gravity of offence and evidence adduced in support of accusation.

7. Gang rape is a very grave offence. Its gravity is not only premised on the severity of punishment prescribed in law but the indelible impact it leaves on the psyche of the victim. Victim has been examined as PW 1. She stated that she had gone to the birthday party of the third petitioner. At the birthday party she was offered alcohol and had consumed it. Thereafter she became unconscious. Upon regaining her consciousness she found that she was almost undressed and second petitioner was on her body. Other petitioners were also present in the room and they forcibly raped her. In the morning, she left the venue and went home. After reaching home, she informed her friend and was medically treated.

8. Learned senior Counsel for the petitioners submits version of PW 1 appears to be patently absurd and inherently improbable. She did not immediately protest. Her story does not find support from other witnesses. We have made an endeavour to test these issues in the light of the evidence on record. Most of the prosecution witnesses stated that the petitioners as well as the victim were present at the party. PW 4

stated that the victim had gone to the first floor and the room was closed from inside. Upon opening the room second petitioner had come out of the room and the victim was unconscious.

9. There is general corroboration with regard to the prosecution case from the evidence on record. DNA analysis report also shows a match between the DNA found in the blood sample of the second petitioner and the swab of the victim. These corroborative materials establish that the victim had been subjected to sexual intercourse on the date of the occurrence. In a charge of gang rape, prosecution need not prove each of the accused committed rape. Presence and sharing of common intention is sufficient. All the petitioners were present at the spot and their conduct before and after the incident shows they shared common intention to rape the victim.

10. Whether the victim consented to the intercourse or not is a moot question where the scale appears to be heavily weighed against the petitioners in view of the victim's stout denial of consent and the statutory presumption under Section 114A of the Evidence Act.

11. Victim had become unconscious after having a drink. In this helpless condition, petitioners took advantage of her. When she woke up, she found herself disrobed. The petitioners were in the bed with her. Naturally, she was dazed and apprehensive of her well-being in the presence of her

predators. This explains why she was unable to immediately protest at the party. Upon returning home, she confided in her friend and got medically treated. Thereafter, she lodged complaint.

12. Under such circumstances, we are of the opinion gravity of the offence and the evidence adduced in support of the allegation militates against the plea of bail at present.

Threats and undue influence of the petitioners:-

13. With regard to other issues like threat and/or intimidation, this Court places on record the incident of threat upon the victim held out by one of the relations of a co-accused during trial. This was brought to the notice of the Court earlier and orders had to be passed to restrain the movement of the said person who had intimidated the victim. The Court was also constrained to take note of lack of co-operation on the part of police administration to strongly act against the perpetrator and the manner in which the victim was treated in the course of the investigation¹. These unfortunate circumstances give an impression of deep and pervasive influence of the petitioners and co-accused over police administration. Accordingly, we are of the view release of the petitioners on bail would encourage these activities and severely impair the smooth course of administration of justice by derailing the trial.

¹ See CRR 2050 OF 2023 in CRM (DB) 1388 of 2023 order dt. 05.09.2023

Conclusion:-

14. Under such circumstances, we are not inclined to grant bail to the petitioners.

15. We are conscious that protracted undertrial detention is an anathema to the fundamental right of an accused to speedy trial. In order to balance the competing interests of the State to ensure just administration of criminal justice including rights of the victim on the one hand and the necessity to moderate the period of undertrial detention in light of his right to be presumed innocent till proven guilty on the other hand, we direct the trial court to proceed with the trial with utmost expedition and conclude the same within six months from the next date fixed for recording evidence without granting unnecessary adjournment to either of the parties.

16. Parties shall co-operate with the trial Court to enable the Court to conclude within the time schedule. Observations made in this order are for the disposal of the bail application and shall not have bearing on the trial which needles to mention shall be decided independently on the evidence on record and in accordance with law.

17. The application for bail is, thus, rejected at this stage.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)