

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**CRIMINAL MISC.APPLICATION NO. 32313 of 2016
(FOR REGULAR BAIL)**

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JAYESH KHEMCHANDBHAI PATEL....Applicant(s)

Versus

STATE OF GUJARAT....Respondent(s)

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Appearance:

MR HARSHAD H. PONDA, SR. ADVOCATE for MR PRADEEP PATEL, ADVOCATE for the Applicant No. 1

MR AMIT M NAIR, ADVOCATE for the Respondent No. 1

MR MITESH AMIN, PUBLIC PROSECUTOR for the Respondent No. 1

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CORAM: HONOURABLE MR.JUSTICE A.J.DESAI

Date : 09/02/2017

CAV ORDER

1. By way of the present application filed under Section 439 of the Code of Criminal Procedure, the applicant - accused has prayed to release him on regular bail during pendency of the trial in connection with F.I.R. registered at **C.R.No. I - 70 of 2016 with Vaghodiya Police Station, District Vadodara**, for the offences punishable under Sections 376(2)(f), 323, 506 and 114 of the IPC.
2. The brief facts arise from the record are as under :
 - 2.1. The prosecutrix, who is a second year student of nursing course of a private university namely Parul University, lodged an FIR on 18.06.2016 with the aforesaid police station and alleged the aforesaid offences against the present applicant - accused, who is the Managing Trustee and the Founder as well as the President of the said university. It was alleged that she was residing in room

No. 105 of Multi Girls Hostel in Parul University situated at Village Limda, Taluka Vaghodiya, District Vadodara.

With the help of women helpline (known as 181 helpline), the counselor namely Manishben Dindor, she declared before the police that she was residing in the nursing girls hostel with 35 girls and a female rector is Bhavnaben Patel. On 15.06.2015 at around 8.00 p.m., the rector visited the applicant and informed that the applicant has called her and therefore, the prosecutrix went at the residence of the present applicant, who is residing alone in the said quarter. The applicant informed that he had talked with her parents that she was not regularly attending the classes and scolded her. Thereafter, she was sent back to her hostel.

- 2.2. On the next day i.e. on 16.06.2016 at around 5.00 p.m., the applicant called her from his mobile phone and informed that she should remain present at his quarter along with rector at 8.00 p.m. and therefore, she went to the residence of the applicant along with rector. The rector Bhavnaben Patel was informed by the applicant in a peculiar style that the prosecutrix would return the hostel after taking dinner and thereafter, the rector was sent back by the applicant. At that time, other four girls of Homeopathy students were present there but those girls were not known to her. The applicant along with those girls was consuming beer and therefore, the prosecutrix was offered for taking beer, but she refused. Thereafter, three girls left the place and the prosecutrix offered to watch movie, which she also refused. At that time, the applicant assured that he will make correction in her attendance sheet to 100% presence and she would get good

marks in the examination. When the applicant insisted to watch the movie, she along with the applicant and another girl started watching the movie. At that time, the fiance of the prosecutrix namely Sachin Rameshbhai Patel called her, however, the applicant snatched the mobile and switched off the mobile. The other girl, who was present there and watching the movie, was asked by the applicant to go to the other room and therefore, she left the place. At that time, when the prosecutrix was all alone, against the will of the prosecutrix, the applicant removed all her clothes, removed all his clothes. Thereafter, the applicant applied some medical ointment on the private part of the prosecutrix and committed sexual intercourse against her will and therefore, committed offence of rape. The medical ointment was applied two to three occasions and she was almost unconscious. However, when she gained fully conscious, the applicant threatened her that if she would inform about the incident to anybody, she would be rusticated from the college and her life as well as her educational carrier would be ruined. The applicant asked the prosecutrix to sleep with him and when she denied not to sleep with him, at that time, he offered the prosecutrix to collect Rs.3,000/- daily from him and would be able to go outside the hostel without any formal permission, which she also refused. When she tried to left the place, she was not permitted and ultimately, she slept with the other girl in the adjoining room. She left the place on the next day at early in the morning. She was shocked and under fear that she and her parents may lose the reputation in the society and her fiance may break the relationship with her and therefore, she did not inform anybody about the said incident.

2.3. The prosecutrix further alleged in the FIR that on 17.06.2016 at

about 5.00 p.m., when she received a phone call from her fiance, at that time, she gathered courage and thought it fit to inform about the incident, which took place on 16.06.2016. Her fiance was also shocked and asked her to inform the women helpline, which is known telephone number 181 helpline. She, therefore, called the helpline and continued in talking with the lady as well as her fiance and ultimately, the FIR was lodged with the help of counseling officer at the aforesaid police station at 0.45 hours on 18.06.2016.

2.4. The applicant came to be arrested on 22.06.2016 and was sent for police custody for eight days. On completion of investigation, the charge sheet came to be filed against him. The applicant preferred an application under Section 439 of the Code of the Criminal Procedure, 1973 before the learned Sessions Judge, Vadodara for getting regular bail, which was rejected by the learned Sessions Judge, Vadodara by order dated 28.11.2016.

2.5. Hence, the present application.

3. Pursuant to notice issued by this Court, Mr. Mitesh Amin, learned Public Prosecutor, appeared and opposed the grant of any relief, as prayed for, by the applicant. The relief, as prayed for, is also opposed by Mr. Amit Nair, learned advocate appearing for the complainant - prosecutrix. The affidavit filed by the complainant - prosecutrix is taken on record.

4. Mr. Harshad H. Ponda, learned senior advocate assisted by Mr. Pradeep Patel, learned advocate appearing for the applicant has vehemently submitted that the FIR lodged against the applicant making serious allegation is far from truth and is concocted. He

would further submit that the applicant is a reputed doctor, who had established the private university in Vadodara since last 10 years and is highly reputed person in the State of Gujarat. Different types of courses are imparted and about around 25,000 students are imparting education in the university. There are no such allegations ever made by any of the students in past. However, the prosecutrix, for the reasons best known to her, her parents and fiance, have made allegations for alleged serious crime, which the applicant cannot thought of committing with his own students.

5. Learned senior advocate, would further submit that the FIR is filed at a belated stage. He would further submit that the alleged incident has taken place on 16.06.2016. However, the FIR has been lodged with the help of the counselor after more than 24 hours. He would further submit that she did not inform her parents or her fiance about the incident for 24 hours, though she had talked with her fiance on numerous occasions during those 24 hours. By taking me through the details of phone calls supplied by the investigating agency, he would submit that she was constantly in touch with her fiance and had prolonged the conversation during those 24 hours, however, nothing came on record that she had whispered about the alleged incident which took place on 16.06.2016 at night. He would further submit that the phone call details suggest that she had talked with her fiance between 16.06.2016 mid-night and 17.06.2016 mid-night on numerous occasions, however, it is not the case of the prosecutrix that she had ever informed about the so-called incident to anybody. He would submit that this create suspicious about the conduct of the prosecutrix, who is a well educated and studying in second year of

nursing course. He would further submit that since the prosecutrix was not regularly attending the classes, as a Trustee, it was the duty of the applicant to inform her parents as well as the prosecutrix about the same and accordingly, he had informed the prosecutrix by making a phone call and thereafter, telling her about the same itself would not establish that the applicant had called her with ulterior motives as alleged by the prosecution.

6. By taking me through the transcript of conversation between the prosecutrix, her fiance and counselor of helpline, learned senior advocate appearing for the applicant would submit that initially she had informed that the applicant had only touched her, however, by asking several questions in different manner, she was compelled to say that rape has been committed by the applicant. He would further submit that when her fiance namely Sachin Rameshabhi Patel as well as counselor repeatedly asked the prosecutrix, she ultimately stated that against her will, the applicant had entered into sexual intercourse, which creates doubts about her conduct. He, therefore, would further submit that the story has been created by the prosecutrix to malign the reputation of the applicant, which he has gained after his long hard work in the educational field.
7. He would further submit that even otherwise, the allegation levelled against the applicant having committed rape is far from truth since the applicant is aged about 66 years and is unable to perform any sexual act. By taking me through the medical papers about his ill-health and ailment, he would submit that it was not possible for him to commit any offence of rape.

By taking me through a certificate issued by the Medical

Officer of Vaghodiya Primary Health Centre addressed to the Police Sub Inspector, Vaghodiya that though tried three times, he could not collect the semen for further report. He would further submit that it is the case of the applicant from the beginning that he is an impotent man since the year 2003 and therefore, the allegations levelled against him are baseless. He would further submit that he is suffering from Hypertension, Prostate problems, diabetes Mellitus type II and Cirrhosis of Liver. He would further submit that the reports of the years 2008, 2012 and 2013 etc. and therefore, the allegations of committing rape are baseless. He would further submit that even certificate was issued on 01.10.2016 by the Central Jail Dispensary suggests that the applicant is suffering from hypertension from last 30 years, diabetes from last 20 years and Cirrhosis of Liver from the year 2000. He would further submit that the aforesaid diseases are the root cause of the Erectile Dysfunction as per the medical jurisprudence. These certificates establish that the allegations made against him are contrary to the evidence procured by the Investigating Agency.

He would further submit that the method adopted by the Investigating Agency to collect the semen of the applicant is not full proved method to establish that whether the present applicant is suffering from Organic Erectile Dysfunction. He, therefore, would submit that the allegations are baseless and the applicant is required to be enlarged on bail and there are no antecedents and investigation is over and there are no chances to tamper with the evidence.

8. Learned senior advocate appearing for the applicant, has relied

upon the following judgements and submitted that it is a case of bail and not jail till the trial is over:

- (i) In case of **Premjibhai Bachubhai Khasiya V. State of Gujarat & Anr.** reported in 2009 (2) GLR 1268.
 - (ii) In case of **Gudikanti Narasimhulu and Ors. V. Public Prosecutor, High Court of Andra Pradesh** reported in AIR 1978 SC 429.
 - (iii) In case of **Bhagirathsinh Jadeji V. State of Gujarat** reported in 1984 Cr.L.J.160.
 - (iv) In case of **Kalyan Chandra Sarkar V. Rajesh Ranjan @ Pappu Yadav and Anr.** reported in (2005) 2 SCC 42.
 - (v) In case of **Ranjitsinh Brahmajetsinh Sharma V. State of Maharashtra** reported in 2005 (5) SCC 294.
 - (vi) In case of **Vasanthi V. State of Andhra Pradesh** reported in 2005 Cri.L.J. 3075.
9. On the other hand, Mr. Mitesh Amin, learned Public Prosecutor, has vehemently opposed this application and submitted that the applicant is facing the serious offence punishable under Section 376(2)(f) of the Code. The applicant is the Managing Trustee and the head of the institution and when a girl is residing in a hostel and the applicant being the head of the institution under whom the hostel is being managed, becomes the guardian and when such person indulges in such a heinous crime, no leniency should be shown to such person. He would further submit that young girl-student is residing in the women hostel, was called by the applicant through the rector (who is also co-accused) in the matter and therefore, on the next day i.e. 16.06.2016 in the evening, the applicant himself called the prosecutrix and asked her to meet him at his residence. He would further submit that it

is unbelievable that a Managing Trustee would take so much interest in a girl-student that too with regard to alleged trivial issue of insufficient presence in the college and would call at his residence after 8.00 p.m. When a girl, who is already got engaged with a boy, might not have ever thought of any ill will of the applicant. The applicant being the head of the institution was in such a position that any student can easily put trust in him and visit his residence.

By taking me through the FIR as well as further statements of the prosecutrix recoded, he would further submit that specific and serious allegations have been made by the prosecutrix against the accused and there is no reason for a girl, who is already engaged and likely to marry in a near future would put her life at a stake. He would further submit that a young girl aged about 20 to 21 years when raped in a quarter by a top most person of the university, would naturally afraid of disclosing the same before anybody including her parents.

He would further submit that there is no delay on the part of the prosecutrix to inform about the incident to her fiance i.e. only about 12 hours since she had left the place of incident (quarter) in the morning on 17.06.2016 and she had informed her fiance on 17.06.2016 at evening itself. He would further submit that when applicant went to the residence of the applicant, she found that some girls were taking beer with the applicant. The said aspect is supported by those girls, whose statement have been recorded by the Investigating Agency. He would further submit that when a courageous girl decides to come forward to lodge an FIR against the accused with the help of his fiance cannot be

discarded only on the ground that though she had talked with her fiancée on numerous occasions between 16.06.2016 night to 17.06.2016 evening, no reference about the incident was discussed. He would further submit that the detail of phone call establishes that the applicant had called from his mobile to the prosecutrix on 16.06.2016 at about 5.00 p.m and therefore, *prima-facie*, it is established that she was called by the applicant from the residence of the applicant, where the alleged incident has taken place.

10. Learned Public Prosecutor, would further submit that much emphasis have been put by the learned advocate appearing for the applicant on the conversation between the prosecutrix, her fiancée and the counselor of helpline, but contrary to the submissions made by the learned advocate appearing for the applicant, the same, *prima-facie* establishes the case of rape. He would further submit that the entire conversation between all the three, *prima-facie* establishes that the incident has taken place as narrated by the prosecutrix in her FIR as well as in her further statements.

He would further submit that an amount of Rs.57,000/- was paid towards the fees of the prosecutrix at the instances of the applicant, which is referred in the conversation. The statement of the accountant of the University does support the said aspect. He, therefore, would further submit that there is no reason for the Managing Trustee to pay such huge amount of fees of a student.

11. Learned Public Prosecutor would further submit that during the investigation, another lady, who had already left the University, has come forward making allegations about the intentions of the applicant. She has alleged that when she was studying in the

university, the applicant had tried to control her, however, she was able to save herself from ill will of the applicant. She has also alleged that when she did not succumb to the demand, she was declared fail in oral examination at the instance of the applicant. The said lady was also compelled to change her services from the said hospital where she was working due to harassment by the present applicant.

12. Learned Public Prosecutor would further submit that the investigating agency was successful in collecting the semen of the applicant, which was sent for laboratory test. The clothes of the prosecutrix were also sent for the report and the final report *prima-facie* establishes that DNA test of the semen found on the clothes of the prosecutrix matches with the DNA test of the applicant and the opinion of the Urologist regarding non-impotency of the applicant.

By taking me through the certificate issued with regard to the medical examination of the prosecutrix, he would further submit that there are multiple nail injury mark on supraclavicular region (both sides), suprascapular region (both sides); red colour semilunar and tenderness on breast were recorded in the certificate and she had complain of pain in vaginal canal, *prima-facie*, suggest that she was subjected to force intercourse. History about the incident was given before the Medical Officer when she was examined describing the incident. The report also discloses that several abrasions were found on the body of the prosecutrix. Thus, the investigating agency would be able to collect the material, which *prima-facie* establishes the involvement of the applicant.

13. By taking me through the several evidence, he would further submit that whether the manner and method adopted by the investigating agency to collect semen of the applicant is proper or not would be subject to the cross-examination of concerned medical officers and other corroborative evidence available on the record.
14. Learned Public Prosecutor would further submit that the applicant is an influential person and during the investigation, he has tried to collect some evidence in the nature of affidavits of several witnesses. However, those witnesses have stated before the Investigating Agency that they were asked to sign such affidavits and have clarified that writing in those affidavits is not correct. He, therefore, would submit that there are all chances that he may tamper with the evidence and therefore, the present application requires rejection.
15. Learned Public Prosecutor would further submit that the case has already been committed to the learned Sessions Judge, however, the learned advocate appearing for the applicant is filing application for adjournment on different grounds and the same has not been proceeding. He, therefore, would submit that the present application be rejected.
16. Mr. Amit Nair, learned advocate appearing for the original complainant - prosecutrix adopted the arguments advanced by the learned Public Prosecutor. By taking me through the affidavit-in-reply filed by the prosecutrix, he would submit that the prosecutrix could gather the courage to lodge the FIR so that every girl, who are students of the said University, in which the

present applicant is whole and sole, can be safely study. He would further submit that though the affidavits, which were prepared at the instance of the applicant in his favour, suggest that the applicant is an influential person and if the relief, as prayed for, is granted, there are all chances that he may tamper with the evidence. He would further submit that the applicant is in a position that he can easily empower the lady and that too, young student, who was in his college and unable to resist when she was completely under control of the applicant. He would further submit that there is no delay in lodging the FIR.

Even in several cases, the Hon'ble Supreme Court has held that delay in lodging FIR in rape case would not fatal the case of the prosecutrix. In support of his submissions, learned advocate appearing for the prosecutrix has relied upon unreported judgement of the Hon'ble Supreme Court in case of **Sant Shri Asharam Babu Vs. State of Rajasthan** passed in Special Leave Petition (Criminal) No. 3852 of 2014 and cognate matters; he would further submit in the said case, the Hon'ble Supreme Court has refused to entertain the bail application of an administrator of Ashram where the girl was raped and the FIR was filed at belated stage. He also relied upon the order passed by this Court as well as the Coordinate Bench of this Court wherein the delay in lodging the FIR by the resident of the Ashram and the resident of the Ashram lodged the FIR after number of years having been committed rape by the "guru".

17. I have heard learned advocate appearing for the respective parties and perused the papers of investigation. I have also gone the the statement of the several witnesses supporting the case of the

prosecutrix including the statement of the girls (names of the girls are not reflected for the sake of disclosure of their identity at this stage). I have also gone through the medical certificate with regard to the different type of ailments being suffered by the applicant and his claim about impotency. I have also gone through the transcript of the talk between the prosecutrix, her fiance and counselor of the women helpline describing the incident, which took place on 16.06.2016 as well as relevant phone calls.

18. The incident, as per the allegations, has taken place on 16.06.2016 night, prior to which she was called by the present applicant through his mobile phone at around 5.00 p.m. and she was called at his residence after 8.00 p.m. The phone call record does *prima-facie* establishes that from the mobile of the applicant, he had called the prosecutrix, who is student of second year of nursing course. The applicant is residing alone in the staff quarter situated within the University campus, near Vaghodiya village. The prosecutrix is also residing in hostel with other girls.

It is possible that the prosecutrix might not have attended all classes and therefore, having some hopes for regularization of her absence, she visited the applicant along with the rector on 15.06.2016 i.e prior to the date of incident. On 15.06.2016, the prosecutrix was scolded by the present applicant, however, she was permitted to go to her hostel. On 16.06.2016, an amount of Rs.57,000/- was paid through one Ashoksinh Narvatsinh Rathod, driver of the applicant towards the fees of the prosecutrix. He was given a chit wherein name of the prosecutrix was mentioned was referred and cash of Rs.57,000/- was handed over by him to the head of the account department. The said statement is supported

by the head of the account department, who is also a lady. This conduct of the applicant i.e paying an amount of Rs.57,000/- towards the fees of a girl is, in my opinion, not a normal behaviour of a Managing Trustee because in the evening, he himself had called the prosecutrix from his mobile and asked her to remain present at his residence in the night hours.

19. Now, the allegations levelled against the present applicant in the FIR are seen, she had stated that some girls were taking beer with the applicant, which are supported by the statement of those girls, who had consumed beer with the applicant at his residence. Thus, *prima facie*, in my opinion, those girls have also accepted the presence of the prosecutrix on 16.06.2016 night at the place of the incident.

The medical evidence and the injury referred therein, which have already been described in the earlier part of the order, I am of the opinion that she was subjected to force.

20. As far as the delay in lodging the FIR is concerned, I am not in agreement with the submissions made by the learned advocate appearing for the applicant since, in my opinion, when a young girl, who is already engaged with a boy, would take sometimes to come forward for lodging the FIR, it would have been, in her opinion, destroy the reputation of her family. In the catena of the decision of the Hon'ble Supreme Court, in which, it has been held that if the statement of the prosecutrix is found reliable, the delay in lodging the FIR would not fatal the case of the prosecution. In the case of **P. Vijayan vs. State of Kerala & Anr**, as reported at **(2010) 2 SCC 398**, a cognizance of an offence was permitted to be taken after about 28 years of the incident and, therefore, also the

delay itself is not a reason for releasing the accused, who is facing serious charges of rape, etc. In the case of **Shri Bodhisattwa Gautam vs. Miss Subhra Chakraborty**, as reported at **AIR 1996 SC 922**, the conviction of the offence of rape was confirmed by the Hon'ble Supreme Court solely on the statement of the prosecutrix. It has been held by the Hon'ble Supreme Court in the case of **Kamalanantha & Ors vs. State of T.N.**, as reported at **(2005) 5 SCC 194**, if the accused had dominion or control over the victim, would not help the accused even there might be a consent by a woman. He would therefore submit that the ground taken by the applicant as far as delay is concerned would not help the applicant for getting the bail.

21. As far as the arguments advanced by the learned advocate appearing for the applicant with regard to the impotency is concerned, I have gone through the material supplied by the learned advocate appearing for the applicant about Organic Erectile Dysfunction as well as the several diseases which suggest that he is suffering from various ailments like Hypertension, Prostate problems, diabetes Mellitus type II and Cirrhosis of Liver etc. but whether the applicant is/was able to perform sexual intercourse would be subject to examination of medical officers and particularly, when the investigating agency was able to collect Urologist opinion. The DNA Report *prima-facie* supports the case of the prosecution. The FSL report with regard to clothes of the prosecutrix do match with the DNA Test of the applicant.
22. As observed by the Hon'ble Apex Court in catena of decision, this Court has not discussed the evidence in detail at this stage. It is hereby made clear that the observations made herein above are of

tentative nature and would not come in the way of either the accused or prosecution.

23. As far as the judgement relied upon by the learned advocate appearing for the applicant is concerned, I am not in agreement with the submissions made by the learned advocate appearing for the applicant so far as the judgements cited by him laying down any ratio for granting bail in the matter like this. However, considering the dominion or control of the applicant over the prosecutrix, who is a college student, place of incident, medical evidence as well as attempt to get the affidavits prepared of the other girls in support of him and the severity of the punishment for the offence punishable under Section 376(2)(f), I am of the opinion that the present applicant is not entitled for the relief as prayed for. Hence, the present application is rejected. Rule is discharged.

(A.J.DESAI, J.)

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