

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.441 OF 2015

Shri Bharat Vishnu Goregaonkar	..Applicant
<i>Versus</i>	
The State of Maharashtra	..Respondent

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Mr. S.R. Chitnis, Senior Advocate i/b. Yogesh Prabhakar Rane,
Advocate for the Applicant.

Ms. Veera Shinde, APP, for the State.

Mr. A.B. Lengare, PI, Goregaon Police Station, District – Raigad is
present.

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CORAM : A. R. JOSHI, J.

DATE : 7th MAY, 2015

P.C.

1. Heard learned Senior Counsel for the applicant. Also heard learned APP for the State.
2. This is an application for regular bail in the matter of offences punishable under Sections 376, 354B and 354C of Indian Penal Code and offences punishable under Sections 3, 4, 12, 13 and 14 of Protection of Children from Sexual Offences Act, 2012.
3. At the threshold it must be mentioned that this is the

second bail application before this Court and filed second time on the change of circumstances which came to the notice of the applicant after getting access to the police station diary entries, mainly, of the date 25th April, 2014 and thereafter.

4. Though the earlier bail application was heard and disposed of by this Court by a detailed order, it is strenuously submitted by the learned Senior Counsel on behalf of the applicant that the matter is again required to be reheard in the light of additional material available which was not available to the applicant at the time of hearing and disposal of the first bail application.

5. It is also brought to the notice of this Court that after rejection of the first bail application on merits by this Court, when the matter was taken before the Hon'ble Apex Court, it was thought fit by the applicant to withdraw the same with liberty to go before the Sessions Court as by that time certain record and copies of the station diary entries were made available to the applicant after his prolonged persuasion by filing applications under the Right to Information Act. Initially the applications under the Right to Information Act were

rejected by the authorities but the Appellate Authority allowed the same and directed to supply all copies of such documents. This happened on or about 27th February, 2014.

6. Under the above premise, the present application is being heard in the light of the arguments advanced on behalf of the applicant and also on behalf of the State. Prior to this, the admitted factual position is required to be narrated in order to have proper perspective of the matter considering the seriousness of the allegations inasmuch as initially there was a charge against the applicant for the offences punishable under Sections 354B and 354C of IPC and subsequently charge under Section 376 of IPC was inserted after about a week. The details shall be mentioned hereunder at the appropriate place.

7. The factual admitted position is that the FIR was given by the prosecutrix, a girl then aged about 17 years. It was so given and registered as C.R. No.14 / 2014 by the Goregaon Police Station at 11:00 p.m. on 25th April, 2014. In the said FIR there were allegations against the present applicant regarding the incident happened on 14th April, 2014. Allegedly on that day the applicant had taken some nude photographs of the prosecutrix

and thereafter published them and transferred them on 'WhatsApp' and sent them to the group members of 'Om Foundation', apparently a group of some known boys in the said locality. This was only the complaint filed by the prosecutrix and there was no allegation regarding any forcible sexual intercourse made at any time. Accordingly, the offence was reportedly registered at 11:00 p.m..

8. However, prior to that there were station diary entries which are brought to the notice of this Court and which were revealed to the applicant after receiving all the documents under the Right to Information Act as mentioned above. Much emphasis was placed on the contents of the said station diary entries in support of the argument that there was very much political pressure on the police machinery in order to register an offence and to take a severe action against the applicant. The relevant first entry dated 25th April, 2014 is of the time 13:10 hours (i.e. 1:00 p.m.) on that date. The entry details show that the father of the prosecutrix brought her to the Goregaon police station and narrated the incident regarding the applicant taking out photographs. On such intimation given to the police, the

present applicant was immediately called to the police station and he was enquired. That time in fact it was cleared by the family of the prosecutrix that the applicant being in relation, the cousin brother of the prosecutrix herself, they do not want to proceed with the matter and they want to compound. They also requested the police officer to reprimand the applicant and to give him a sort of understanding. Even according to the said station diary entry, report was given by the family of the prosecutrix to the effect that the matter has been amicably settled between them. However, at the end of the said entry, it is mentioned that if at all any concrete complaint would be given by the prosecutrix in future, the police had made all the preparation to register the offence and take action.

9. The second station diary entry is of the same date of timing 17:00 hours (i.e. 5:00 p.m.). In the said station diary entry it is specifically mentioned that some local politicians including some women went to the Goregaon police station and enquired regarding the incident of the applicant taking out illicit photographs of the prosecutrix girl and they tried to emphasis on the police that this is a case which is required to be

registered against the applicant and action was required to be taken. However, the said station diary further reveals that the police officers informed said mob of the political party that there was no any concrete complaint given by the father of the prosecutrix or the prosecutrix herself but still assurance was given to the members of the political party that if at all any concrete complaint is lodged, the action shall be initiated. Under this backdrop of the situation at 5:00 p.m. on 25th April, 2014, the First Information Report was lodged and registered at 23:00 hours (i.e. 11:00 p.m. in the night) on the same day in which, as earlier mentioned, the prosecutrix revealed regarding the activities on the part of the applicant so as to taking illicit photographs of her private parts and giving her threats of dire consequences not to disclose this incident to anybody. Again at this juncture it must be mentioned that there is no reference about any forcible sexual intercourse or any such act on the part of the applicant at any time prior to that incident.

10. Thereafter there are various such station diary entries of the dates 27th, 28th, and 29th April, 2014. Without much going into the details of those entries, suffice it to say that all these

entries again do mention that attempts were made by the police machinery to contact the prosecutrix and her family members and it was apparently at the behest of the political parties. Still upto 1st May, 2014 there was no complaint from the prosecutrix or from her father and it is so specifically mentioned at 13:00 hours in the station diary entry dated 1st May, 2014 which shows that the investigating officer along with staff came back and reported that the prosecutrix and her father had not given any more complaint. As such by 1st May, 2014, there was C.R. No.14 of 2014 only for the offences punishable under Sections 354B and 354C of IPC.

11. However, thereafter the scenario changed and on 2nd May, 2014 which was in fact the day on which reportedly the present applicant was to be produced before the Magistrate for the second remand. On that day, supplementary statement of the prosecutrix was recorded by the police and in the said statement the prosecutrix came with another story regarding the activities at the hands of the applicant as to having forcible sexual intercourse with her on two occasions – one in the year 2013, without there being any specific date or month and

second, on 8th February, 2014. In this supplementary statement, there are specific allegations regarding forcible sexual intercourse on the prosecutrix and as such this statement was recorded and even signatures of some two ladies apparently the members of one Mahila Dakshata Samiti were taken on the said statement. This is the circumstance on which the offence punishable Section 376 of IPC was inserted in C.R. No.14 of 2014 and at about 1:00 p.m. on that day the applicant/accused was taken to the concerned Magistrate Court for the second remand and on that day it was reported to the remanding Court that now there is an offence of 376 of IPC applied against the applicant. Consequently, the situation so happened that the applicant remained in custody, though not in police custody but in the jail custody, and till date he is in custody as he was earlier arrested on 28th April, 2014 on the basis of initial FIR registered on 25th April, 2014.

12. It is vehemently argued by learned Senior Counsel on behalf of the applicant that the addition of penal section 376 IPC is in fact doubtful and there is no material on record even *prima facie* to accept that such two alleged incidents must have

happened, much less without the consent of the prosecutrix and by force. In order to substantiate this argument, attention of this Court is drawn towards the medical report which is filed in the charge-sheet as the investigation is already over. The said medical examination was conducted at 3:00 p.m on 2nd May, 2014 on which day the supplementary statement of the prosecutrix was recorded. Much emphasis was placed on the outcome of examination of the prosecutrix and specifically in para No.4 of the said report which reads thus :

4.	Secondary Sex Character : Full Developed / Not Developed :	Fully developed - habitual sexual intercourse +
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. Said medical examination report further reveals that there was no examination of clothes for presence of any tears on the cloth etc., and obviously not done because the allegations of forcible sexual intercourse by the prosecutrix in her supplementary statement was of the incident alleged to have taken place in 2013 and on 8th February, 2014. As such, definitely examination of the prosecutrix was not in the immediate proximity of any such forcible sexual intercourse as alleged. Moreover there was no observation as to any injuries

found on the person of the prosecutrix except mention in para No.6 to the following effect.

6.	Examination of the evidence of any violence on the body :	Faded bite marks on the left antero medial aspect of thigh.
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. On this observation in the medical certificate as to bite mark on the thigh, learned APP vehemently submitted that this is indicative of some force applied on the prosecutrix while committing the offence but while arguing this it is specifically not argued that this violence was at the time of commission of the forcible sexual intercourse, as allegedly such allegations were of the year 2013 and of 8th February, 2014. However, still it is submitted on behalf of the State that this bite mark could have been the result of the incident which took place on 14th April, 2014 when the photographs of the prosecutrix showing her private parts and her nude body, occurred. Without there being any further clarification as to further details of the bite mark, it is difficult to accept this argument that this bite mark must have been result of the incident which was alleged to have occurred on 14th April, 2014.

13. At this juncture, it must not be lost sight of the fact

that even on 25th April, 2014 for the first time when the prosecutrix was taken to the police station by her parents there was no medical examination and apparently it was so because the parties were bent upon compounding the matter as the applicant was also called at the police station and it was so reported in the station diary entry of the time 13:10 hours of 25th April, 2014 and which has been detailed earlier.

14. In any event, even considering the findings of the medical examination report, further argued on behalf of the applicant that definitely the further statement of the prosecutrix had not strengthen the case for application of Section 376 of IPC. If this is so, then the case of the prosecution rests only on the earlier sections which were applied when the First Information Report was initially lodged and recorded at 11:00 p.m. on 25th April, 2014. At the cost of repetition, it must be mentioned that in the said FIR the allegations were only of taking photographs of the prosecutrix and giving her threat of dire consequences and subsequently publishing the said photographs and sending them on 'WhatsApp' service. On this aspect, it must be noticed that Section 354B is only cognizable

and non-bailable and attract minimum punishment of three years and it could be maximum upto seven years and with fine. So far as section 354C of IPC is concerned, it is bailable offence. So, now the question so far as Section 354B is concerned, which is non-bailable, the present applicant is in custody since 28th April, 2014 i.e. more than one year and whether it would be prudent to release him on bail during pendency of the matter in which now subsequently offence punishable under Section 376 of IPC has been inserted.

15. In order to determine above, during the arguments learned Senior Counsel for the applicant stated that the mobile phone which was seized from the possession of the applicant was sent for forensic examination and there is nothing incriminating so far as finding of any such alleged illicit photographs of the prosecutrix either on internal memory of the mobile phone or on the SD card, as apparently the SD card was also available in the mobile phone which was seized and it was not removed.

16. Counter to this argument, learned APP for the State brought attention of this Court to other part of the report of

forensic science examination of various other mobiles which were recovered of the 'WhatsApp' group of 'Om Foundation'. Even the illicit photographs which were found from the mobile phones of the members of said 'Om Foundation' group show that these mobile phones had actually containing such photographs. By pointing out this to the Court, learned APP submitted that there was in fact transmission of these contents from the mobile phone of the applicant. In order to accept this argument it is required to be established even *prima facie* that the mobile phone of the applicant at least contained some such material or at least indication in the forensic report that some material or some data from the mobile or from the SD card has been erased. But no such finding is there in the forensic report. Under such circumstances finding of such naked photographs in the mobile handsets of the members of 'Om Foundation', cannot be considered as an act of transfer of such photographs from the mobile instrument of the present applicant.

17. In view of this factual position, now as mentioned earlier, it is to be ascertained whether the present applicant can be released on bail during pendency of the trial when

reasonable doubt can be entertained as to the application of Section 376 of IPC.

18. The applicant is in custody for more than one year, as mentioned above, and so far as his availability is concerned, certain directions can be given moreover certain checks can be imposed on the applicant so as to see that he shall not tamper the prosecution witnesses in any manner mainly considering that the prosecutrix is his own close relative i.e. cousin sister.

19. In view of the above, there is definitely a case made out by the applicant to view the matter in different perspective though the earlier bail application was rejected by this Court vide order dated 3rd November, 2014. In the result, the present application is allowed with following order :

:: O R D E R ::

- [i] Criminal Bail Application No.441 of 2015 is allowed;
- [ii] The applicant shall be released on bail on his executing a PR bond in the sum of Rs.25,000/- (Rupees Twenty Five Thousand Only) with one or two sureties for the like amount;
- [iii] In the event of availing the bail, as above, the applicant

shall attend Mangaon police station on every Sunday between 10:00 a.m. to 12:00 noon for the period of six months;

- [iv] Any attempt on the part of the applicant or his associates directly or indirectly to influence the prosecution witnesses and to tamper with the prosecution witnesses will render him liable for cancellation of bail on appropriate application to be made to that effect by the aggrieved party;
- [v] The applicant shall not reside in the territory of Goregoan village, Taluka-Mangaon, District – Raigad. The learned Senior Counsel for the applicant, on instructions, stated that the applicant will reside at Mangaon and will attend the Mangaon Police Station as per the above directions;
- [vi] With these directions, present application is disposed of;
- [vii] Oral request made on behalf of the State for giving stay to the present order is not accepted;
- [viii] All the concerned to act on an authenticated copy of this order.

(A. R. JOSHI, J.)