

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC APPLICATION (BAIL) NO. 207 OF 2017

Hiran Bhattacharya
son of Makkanlal Bhattacharya,
35 years, Married
r/o Bhat Wada, Nanora
Asnora – Goa
presently in Judicial Custody at Sub Jail Sada
Vasco-Da-Gama Goa. ...Applicant

Versus

1. State of Goa
Through Public Prosecutor,
High Court
2. The Police Inspector,
Women Police Station,
Panaji – Goa. ...Respondents

Shri Damodar Dhond with Shri Vibhav Amonkar, Advocates
for the Applicant.

Shri S. R. Rivankar, Public Prosecutor for the respondents.

CORAM: NUTAN D. SARDESSAI, J.

Reserced on : 14th September 2017

Pronounced on : 15th September 2017

ORDER :-

1. The appellant seeks his release on bail in terms of Section 439 of Cr. P.C. upon his bail application being rejected by the learned Presiding Officer of the Children's Court by her order dated 17/02/2017.

2. Heard Shri D. Dhond with Shri V. Amonkar, learned Advocates for the applicant and Shri S. R. Rivankar, learned Public Prosecutor for the respondents.

3. It was the contention of Shri D. Dhond, learned Advocate for the applicant that the medical examination of the victim girl evident from the testimony of Dr. Girish Kamat showed that there was no penetration nor was there any injury noticed on her physical examination. The victim, her mother and sister were examined whose testimonies were fraught with multiple contradictions. The relationship between the applicant and the victim's mother was strained and the present complaint was lodged as a fallout of such strained relations and after 57 days of the alleged incident. A bare perusal of the complaint revealed that the victim made a reference to five different incidents which had occurred in the span of 1 or 2 days of the duration ranging from 1/2 hr to 2 hrs and yet there were no injuries on her person. He adverted to the testimony of the victim to show the inconsistency therein, that of the mother and sister and, therefore, it was a fit case to secure the applicant with the order of bail and more so considering that he was in custody since the last about 37 months. He relied in **Sanjay Chandra v Central**

Bereau of Investigation [(2012) 1 SCC 40], Yerumalla Latchaiah v State of A.P. [(2006) 9 SCC 713], Sadashiv Ramrao Hadbe v State of Maharashtra and another [(2006) 10 SCC 92], Bhagirathsinh Judeja v State of Gujarat [AIR 1984 SC 372], Lalsing Sutarya Pawara v State of Maharashtra [2010 All MR (cri) 2857], Laxmibai w/o. Maruti Satpute & Ors. v State of Maharashtra [2010 All MR (Cri) 182] and Shiney Suraj Ahuja v State of Maharashtra [2010 All MR (Cri) 92] to buttress his case for his release on bail. He also placed a paper book/compilation of the testimony of the star witnesses being the victim, her sister and the mother apart from the medical evidence to substantiate his case.

4. Shri S.R. Rivankar, learned Public Prosecutor on behalf of the State contended that the offence under Section 376 was a serious offence and, therefore, the matter could not be considered lightly nor the case of the prosecution brushed aside for the mere asking. Moreover, the offence under Section 8 of the Goa Children's Act, 2003 was attracted and looking to the seriousness and gravity of the offence and more particularly considering that he was the father who had committed such heinous offence, he was not entitled to the benefit of bail. The

effect on the society had also to be weighed in the circumstances and, therefore, in the light of the evidence of the victim, her sister and mother, he was not entitled to the benefit of bail. It could not at all be conceived that his own child would falsely implicate him in the crime and there was no dearth of material to convict the accused. His application therefore had to be dismissed.

5. i have perused the complaint filed under Section 376(f) (k), 8(2) of Goa Children's Act and 3(b), 4, 8, 10, 11 and 12 of the Protection of Children from Sexual Offences Act, 2012.

6. i have examined the complaint dated 01/08/2014 which is lodged in respect of the incident which purportedly took place in the first week of June 2014 i.e. more than 57 days earlier. The victim had narrated at quite some length the act of the applicant pursuant to which he had de-robed her and tried to put his private part inside her private part and had rubbed his private part on her private part which incident was witnessed by her sister. It was also set out in the complaint that on the same night around 20.00hrs the applicant had done the same action and when she had resisted as it was paining her but he had

continued despite her protests. It was further her case in the complaint that the applicant had shown her dirty videos on his mobile in respect of similar incidents. In the next day which was a Sunday he had again repeated the act during the morning time in the absence of her sister between 10.30 hrs to 12.30 hrs. He had thereafter committed the said act of penetration on the same evening from 13.45 hrs to 15.00 hrs under threat to her life using a kitchen knife and followed by a similar act during the night time.

7. Therefore, as per her version in the complaint, the applicant had violated her person on the evening of Saturday followed by the night time and thereafter on the next morning, evening and night indicating in all five instances of forcible penetration at the instance of the applicant. However, unlike her statement in the complaint recorded more than 57 days later, the report of her medical examination in sexual offence by a forensic surgeon reveals that there was no evidence of genital penetration and even on physical examination no surface injuries were seen over her body. Besides, the Doctor had clearly opined that the vestibule was narrow, both labia minora were covering the introitus, hymen was intact, no

injuries were seen for clitoris, labia majora, labia minora of both sides, fourchette, Fossa navicularis and posterior commissure intact, perineum intact and anal opening intact and no injuries were seen.

8. Shri Dhond, learned Counsel for the applicant took me through the evidence of Dr. Girish Kamat in which he so opined on the physical and genital examination of the victim which is the material evidence questioning the very foundation of the case of the State against the applicant on forcible penetration when there was no reference of even healed injuries in his report and his examination in cross when tested on the anvil of cross-examination. Rather Dr. Kamat had clearly admitted during his cross-examination that in case the applicant had tried to put his private part in the private part of the victim, there was bound to be some injury to the private part of the victim. For that matter he also admitted that in case the accused rubbed his private part on the private part of the victim for a long time forcibly, there was bound to be some redness to the private part of the victim and the possibility of injury to the private part of the accused could also not be ruled out. The State did not rest easy on his testimony and with the leave of

the Court sought his re-examination and at that time too the Doctor clarified that in case there was penetration, there would be presence of healed hymenal tear. The testimony of Dr. Kamat more than prima facie seals the case of the State and the benefit enuring in the applicant's favour.

9. Shri Dhond, learned Counsel had made reference to the testimony of the victim and her sister who was the so called eye witness to the incidents of forcible penetration by the applicant. These were again shown to be fraught with multiple contradictions. At this juncture, i would not allow myself to be detained by the worth of the testimony of the victim and the so called eye witness apart from that of the mother, the intrinsic worth of which would be examined by the learned Trial Court while dealing with the case on its own merits. Suffice it to say that there was no single dispute about the fact that there was a delay of more than 57 days in filing the complaint alleging an offence which was very serious as contended by the learned Public Prosecutor and with no justifiable reason for the delay. That apart, there was no particular dispute that the applicant has been in custody since the last 37 months pending trial and whatever be the final outcome of the proceedings, the moot

question which was arose is whether his right to bail can be defeated on the premise that the offence is very serious and/or that the material on record would be adequate to sustain the conviction against him. In that backdrop, i would advert to the judgment relied upon by Shri Dhond, learned Counsel for the applicant.

10. In **Sanjay Chandra** (supra), the Hon'ble Apex Court observed as follows :

21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held

in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.

11. In **Yerumalla Latchaiah** (supra), a Three Judge Bench of the Hon'ble Apex Court while dealing with the appeal of the convict under Section 376 IPC held on the basis of the medical examination of the eight years old victim that there was no injury found on any part of her body much less on her private part, her hymen was intact and it was specifically stated that

there was no sign of rape at all, thereby, belying the case of the prosecutrix on medical evidence. In that view and the circumstances of the case the Apex Court held that the High Court was not justified in upholding the conviction.

12. In **Sadashiv Hadbe** (supra), the Apex Court reiterated that though the accused could be convicted on the sole testimony of the prosecutrix in a rape case if it was capable of inspiring confidence in the mind of the Court if the version given by the prosecutrix was unsupported by any medical evidence or the whole surrounding circumstances were highly improbable and belied the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix; while dealing with an appeal against the Judgement of the Division Bench, High Court of Aurangabad where it was alleged that the appellant as a medical practitioner had raped a patient who had visited his clinic for treatment.

13. In **Lalsing Sutarya Pawar** (supra), it was an admitted position that at the time i.e. on the date of incident, the witness Sanju (PW4) who had seen the deceased Yadibai in the company of Lalsing at the S.T. Stand of Thalner was 11 years

old and he was 12 years when he deposed before the Court. It was found on a careful scrutiny of the evidence brought on record, that there was no corroboration of his evidence. Though the learned A.P.P. had tried to submit that the statement of P.W.4 that he had last seen the deceased Yadibai in the company of the accused Lalsing was corroborated by the evidence of P.Ws.2 and 5, in their opinion, these witnesses had deposed before the Court only on the basis of the narration of P.W.4 i.e. hearsay evidence and there was no any other witness who had stated that he had also seen the deceased Yadibai in the company of the accused Lalsing. In that context, the Division Bench of this Court reiterated the principle laid down by the Hon'ble Apex Court time and again that the evidence of the child witness should be carefully evaluated and should find corroboration before being relied upon. Therefore, what follows from the authoritative pronouncements of the Hon'ble Supreme Court, while evaluating the evidence of child witness is that great care has to be taken and corroboration to his evidence is rule of prudence than of law.

14. In **Laxmibai Satpute** (supra), the Division Bench of this Court while assessing the evidence of a child witness,

daughter of the deceased who claimed that the accused had poured kerosene on her mother and the co-accused set her on fire by striking a match stick that she had not given any other details as to what had happened prior to the actual incident. Besides, the child had been residing with her mother's relatives and she was only 5 years when her deposition was recorded. She was certainly susceptible to tutoring and must have followed the instructions which she had received from her relatives and in that context discarded the evidence of the child witness. Moreover, in the facts of the case, it was revealed during the cross-examination that the maternal uncle and maternal grand-father kept on telling her what she should depose in the court and in that context they had observed that there was a strong possibility of tutoring of this witness.

15. In **Bhagirathsinh Judeja** (supra), the Hon'ble Apex Court reiterated the well settled principle that the power to grant bail is not to be exercised as if the punishment before trial is being imposed. The only material consideration in such a situation is whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with the evidence. If there is no

prima facie case there is no question of considering other circumstances. But even where a prima facie case is established the approach of the Court in the matter of bail is not that the accused should be detained by way of punishment but whether the presence of the accused would be readily available for trial or that he is likely to abuse the discretion granted in his favour by tampering with the evidence.

16. In **Shiney Ahuja** (supra), the learned Single Judge of this Court held while considering the bail application that the Court is not supposed to deal with the submissions in minute details and pronounce on the correctness or otherwise of the same. However, the Court is expected to broadly consider the evidence, material and circumstances on record and then form an opinion as to whether the Applicant is entitled to be released on bail or otherwise. Moreover, in the facts of the case it considered the well recognized two guiding factors being of great significance namely the possibility of the applicant fleeing from justice in the event he is enlarged on bail and the possibility of the applicant tampering with the evidence. It found that there was no possibility of these twin aspects and in

that view of the matter ordered his release on bail subject to certain terms and conditions.

17. At the cost of repetition, there is no material brought on record on behalf of the respondent-State that the applicant is either likely to flee the course of justice or otherwise tamper with the evidence. Even otherwise, the material witnesses namely the victim, the so called eye witness i.e. her sister and the mother have been examined apart from the Doctor who had medically certified what was the status of the case on the medical examination of the victim in the sexual offence, which is not in dispute. The applicant has been in custody for the last more than 37 months and it is not as if that he at any point of time tried to exert influence on the prosecution witnesses. Another vital aspect of the matter is that the complaint was lodged much after 57 days of the alleged incident which aspect would be considered by the learned Trial Court while assessing the evidence on merits. The relationship between the applicant and the mother of the victim is also strained which is a material fact and cannot at all be overlooked to consider the aspect of false implication. Although, the learned Public Prosecutor is right in his submissions that the offence of rape under Section

376 is applicable and the provisions of the Goa Children's Act and that under the POCSO Act, nonetheless, looking to the factual matrix, the evidence of the victim and the medical evidence in particular, itself is a matter in the realm of multiple possibilities on which i would refrain from expressing any opinion at this juncture lest it influence the Trial Judge. Suffice it to say that considering the probability of the incident and that even an accused is presumed to be innocent until proved guilty, his incarceration in custody in the circumstances would be treated as punishment pending trial. The anxiety if any, of the State can be set at rest by putting the applicant to terms and therefore in the peculiar circumstances of the case; i deem it appropriate to allow the application in the following terms:

O R D E R

- (i) The applicant is ordered to be enlarged on bail on executing a Personal Bond in the sum of ₹50,000/- (Rupees Fifty Thousand Only) with one local surety in the like amount to the satisfaction of the learned Presiding Officer of the Children's Court.
- (ii) He shall not tamper with the witnesses or otherwise intimidate the witnesses.

(iii) He shall not leave the State of Goa without prior permission of the Children's Court.

(iv) He shall not visit the residence of the victim and /or in any manner bring about any influence on them irrespective of the fact that their testimony stands recorded before the learned Children's Court and

(v) The applicant shall furnish his detailed local address and particulars of his mobile/ landline contact number to the Investigating Officer and also furnish the same before the Court seized off the proceedings.

(vi) The application stands disposed off in the aforesaid terms.

(vii) Parties to act upon the authenticated copy of this order.

NUTAN D. SARDESSAI J.

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