

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION No. 2220 OF 2016

Jaykumar Bhagwanrao Gore	... Applicant
Vs.	
The State of Maharashtra	... Respondent

CRIMINAL APPLICATION NO. 16 OF 2017
IN
ANTICIPATORY BAIL APPLICATION No. 2220 OF 2016

Charushila Shivaji Mohite	... Intervener
In the matter between	
Jaykumar Bhagwanrao Gore	... Applicant
Vs.	
The State of Maharashtra	... Respondent

Mr. Harshad Ponda I.b. Mr. Taraq K. Sayed, Advocate for the Applicant
Mr. Arfan Sait, APP, for Respondent – State
Mr. N.R. Chaukande, A.P.I. Satara City Police Station present.
Mr. Prashant M. Patil, Advocate for the applicant/intervener.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **9th January, 2017.**

P.C.:

The applicant-accused is prosecuted for the offences punishable under sections 354A(ii)(iii)(iv), 354A(2), 354(D)(i)(ii), 354D(2), 506, 509 of Indian Penal Code and under section 67A of Information Technology Act, 2000, hence, this application for pre-arrest bail is filed. The offence is registered at the instance of one Charusheela Mohite, who is a resource partner in one company working for the rural development in Satara, Sangli and Kolhapur District.

2. The complainant got acquainted with the applicant-accused, who is M.L.A. of that constituency in 2015 and thereafter she used to meet him for work. It is the case of the complainant that she was also contacted by the applicant-accused on her cell phone. On 17th August, 2016 the applicant-accused sent her obscene messages and he continued sending such messages inspite of her warning to stop sending such messages. It is her case that the applicant/accused on cell phone no. 8007972111 and 9665685646 continued sending her lewd messages which she has saved. Thereafter he phoned her and demanded sexual favour. He also sent obscene images to her which are also saved. When she told him she would go for legal action against him, he threatened her directly and through other persons. His P.A. Abhijeet Kale also tried to contact her and pressurized her, however, she being aggrieved by all these SMS, obscene images, gave complaint on 25th November, 2016 against the applicant-accused. Hence, this Anticipatory Bail Application.

3. The learned counsel for the applicant-accused has submitted that the applicant-accused is innocent. He did not send messages or obscene video on cell phone of the complainant. Whatever cell phones are seized by the police, they belonged to some other persons and none of the cell phones belong to the applicant-accused.

4. He submitted that assuming that such obscene messages or videos were sent to the complainant, yet the offence under section 67A of the Information Technology Act is not constituted. He argued that requirement of Section 67A is different from the ingredients of Section 67 of Information Technology Act. To fulfill the act under section 67A of I.T. Act, it is necessary for the prosecution to show that sexually explicit act or conduct on the part of the accused. He submitted that Section 67 of Information Technology Act is bailable and section 67A is not bailable. He argued that “explicit” means there should be a detailed complete activity and no such video or pictures were sent. Assuming there may be some obscene pictures or messages, which are lascivious or appealing to the prurient interest, yet it will fall under the Section 67 which is bailable. The learned counsel further submitted that *prima facie*, no non-bailable offence under Information Technology Act is committed and other offences under section 354A are all bailable.

5. The learned counsel on facts has submitted that the complainant was interested in the applicant-accused and she also participated in sending obscene messages to the applicant-accused. Therefore, *prima facie* no such offence is made out against the applicant-accused and no custodial interrogation is required, the applicant-accused is entitled to pre-arrest bail. He further submitted that under section 67A of Information

Technology Act, the punishment is upto 5 years and so it is necessary for the police to give him notice under section 41 of Cr. P.C. to explain the allegations.

6. Learned APP while opposing this Application has relied on the statement and supplementary statement of the complainant, panchnama of the seizure of the handset and so also the statements of other witnesses. Learned APP further submitted that police have seized three handsets which were produced by the relatives and PA of the applicant-accused. He further submitted that the police have recovered lewd messages and videos were sent to the complainant from two cell numbers which are mentioned in the FIR. He further submitted that cell phones stand in the name of three different persons, namely, Umesh Kiran Pise, Suraj Pradip Kale and Savitridevi Pramodkumar. The police have sent the letter to the concerned cell companies. They require custody of the applicant-accused to find out these persons in whose names these cell phones stand. He further relied on the affidavit of Ningappa Rangappa Choukhande, Assistant Police Inspector attached to Satara City Police Station, who affirmed that as on today, 9 cases are pending against the applicant-accused with Satara district. He further submitted that if the applicant-accused is not taken in custody, it will not be possible for the police to complete the investigation in proper manner. Learned APP

informed that in his declaration at the time of election, the applicant-accused has given his cell phone No.8007972111, however, it does not stand in his name. Thus, the applicant-accused who is MLA is powerful and criminal has not cooperated the police when he was on interim bail.

7. The learned counsel Mr. Ponda while meeting the submissions in respect of criminal antecedents pointed out that out of 9 cases as mentioned in the affidavit, only 3 cases, i.e., 143/2015 in Satara City Police Station, 39/2015 in Dahiwadi Police Station and 37/2015 in Mhaswad Police Station are pending against the applicant-accused and these cases are during the election period. He further submitted that the applicant-accused has been acquitted from other cases which are shown in the affidavit.

8. Perused the FIR, statements of the witnesses to whom the complainant has informed about the act of sending obscene messages and videos by the applicant-accused. *Prima facie* it shows that these witnesses have confirmed that such messages and images were sent and complainant had objected to the same.

9. I have perused the obscene images which were sent to the cell phone of the complainant. As per the submissions of learned APP, the

images were received by the complainant and it appears that the images were sent from the cell phones mentioned herein. The images do not show the actual act of sexual intercourse, but are of erected penis with hand. Insofar as the meaning of sexually explicit act under section 67A is concerned, submissions of learned counsel Mr. Ponda are to be accepted, as he pointed out from the dictionary that "explicit" means "describing or representing sexual activity in a direct and detailed way". Thus, sexually explicit activity covered under section 67A is necessarily to be lascivious or of prurient interest, but the act within section 67 though is lascivious not necessary sexually explicit activity. However, it needs to be interpreted further. It does not require a bilateral sexual activity, it can be unilateral sexual activity but it should be explicit and not implied. Image exhibiting penis is lascivious, so is covered under section 67 of the Act which is bailable. The obscene image in the present case of erected handled penis is sexually explicit activity contemplated u/s 67A of the IT Act and hence, directly falls under section 67A of Information Technology Act.

10. The police have recovered 3 handsets with one SIM card. None of the cell phones stand in the name of present applicant-accused. As it is the offence under Information Technology Act and considering the allegations made by the complainant, it was necessary for the applicant-accused to handover his own cell phones, so also phones which he was

using, however he failed to do so. Whether he was having cell phone or not is a matter of investigation for the police. He is a Member of the Legislative Assembly and it is difficult to believe that is not using a cell phone. The purpose of Section 41 of Cr.P.C. is to give opportunity to the police to interrogate the accused and to the accused to give give explanation about the allegations. In the present case, the applicant-accused was protected by the interim bail by the Sessions Court granted by order dated 2nd December, 2016 and it continued till today. The applicant-accused in between informed the police that he is not available due to winter session of Assembly. However, it appears that he avoided visiting police station. The learned Sessions Judge has passed the detailed and well reasoned order. *Prima facie* the applicant-accused has committed illegal act and in view of the nature of offence, custodial interrogation is required to find out the details of the cell phones, as it is an offence under section 67A. I also take into account the criminal antecedents against the applicant/accused who is MLA. Hence, Anticipatory Bail Application is rejected.

11. The learned counsel Mr. Ponda prays that time be granted to challenge this order before Hon'ble Supreme Court especially for the purpose of interpretation of Section 67A.

12. Considering the nature of offence, I am not inclined to grant time.

13. In view of dismissal of Anticipatory Bail Application, Intervention Application is also accordingly disposed of.

(MRIDULA BHATKAR, J.)