

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 128 OF 2018**

XYZ

(Name & Address Withheld)

...Applicant

Versus

1. Brilliant Patrick Jacky Henry Mauris,
Aged 55 years, French Citizen,
residing at Flat No. 48, RAC-6.
Malad (West), Mumbai – 400 095

2. State of Maharashtra,
At the instance of the
MIDC Police Station

...Respondents

**WITH
CRIMINAL APPLICATION NO. 199 OF 2018
(FOR INTERVENTION)
IN
CRIMINAL APPLICATION NO. 128 OF 2018**

1. Vahida Nainar,
Age-Adult, Residing at C 14,
Divine Light Society,
Road, Chakala, Andheri (E),
Mumbai – 400 093
2. Yogita Bhansali,
Age-Adult, Residing at-Flat No. 307/B Wing,
Amarnath Apartment,
Gundavali Lane No. 3,
M. V. Road, Andheri East,
Mumbai – 400 069

3. Amit Das,
Age-Adult, Residing at- J 1104,
Raheja Vistas, Raheja Vihar,
Chandivali, Mumbai – 400 072
4. Reva Kakar,
Age-Adult, Residing at- 110,
Mysore Colony, Mahul Raod,
Chembur (E), Mumbai – 400 074
5. Rama Shyam,
Age-Adult, Residing at 301, 3rd Floor,
K. S. Chohan Building,
Gaothan Lane 2, S.V. Road,
Opp. Andheri West Police Office,
Andheri West, Mumbai – 400 058
6. Srinath Raghavan,
Age-Adult, Residing at G 1005,
Oberoi Splendor,
Jogeshwari Vikhroli Link Road,
Andheri East, Mumbai – 400 060
7. Hemant Bohra,
Aged- Adult, Residing at-301,
Shivam Apartment, Sant Janabai Road,
Vile Parle (E), Mumbai – 400 057
8. Preeti D'Mello,
Age-Adult, Residing at-
3 Palm Grove Apartments,
Convent Road, Bandra West,
Mumbai – 400 050

...Applicants/
Intervenors

IN THE MATTER BETWEEN :

XYZ

(Name & Address Withheld)

...Applicant

Versus

1. Brilliant Patrick Jacky Henry Mauris,
Aged 55 years, French Citizen,
residing at Flat No. 48, RAC-6.
Malad (West), Mumbai – 400 095

2. State of Maharashtra,
At the instance of the
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...Respondents

Mr. Vijay Hiremath for the Applicant in Criminal Application No. 128/2018

Mr. Shirish Gupte, Sr. Counsel with Mr. H. D. Buch with Mr. A. K. Menon
and Mr. S. B. Shetty I/b Kumar & Co. for the Respondent No. 1

Ms. A. A. Takalkar, A.P.P for the Respondent No.2-State

Mr. Mihir Desai, Sr. Counsel with Ms. Devyani Kulkarni for the
Applicants/Intervenors in Criminal Application No. 199/2018

ACP Mr. Milind Khetle from Meghwadi Division, Presently working in
Sakinaka Division, is present

CORAM : REVATI MOHITE DERE, J.
MONDAY, 2nd APRIL, 2018

ORAL ORDER :

1 Heard learned counsel for the parties.

2 Rule. Rule is made returnable forthwith, with the consent of the parties and is taken up for final disposal. Respondents waive service through their respective counsel.

3 By this application, the applicant (original complainant) seeks cancellation of the bail granted to the respondent No. 1- Brilliant Patrick Jacky Henry Mauris, by the learned Additional Sessions Judge, Dindoshi, Mumbai, vide order dated 24th November, 2017 and in the alternative, certain other reliefs.

4 Mr. Hiremath, learned counsel for the applicant (original complainant) submitted that the impugned order dated 24th November, 2017 is perverse, unsustainable in law and contrary to the material on record. He submitted that the observations made by the learned Additional Sessions Judge, whilst enlarging the respondent No. 1 on bail, that there is *prima facie* no incriminating evidence against the applicant (respondent

No. 1 herein) is contrary to the overwhelming evidence on record, showing respondent No.1's complicity in the crime. He further submitted that the respondent No. 1 is the founder and trustee of the School, where the alleged incident took place, and hence the possibility of the respondent No. 1 tampering with the witnesses and influencing them, cannot be ruled out. He further submitted that even after the respondent No. 1 was enlarged on bail, the respondent No. 1 was trying to intimidate the parents of some children studying in the School by insisting that they should support him and not question him regarding the case. According to the learned counsel, if the bail granted to the respondent No. 1 is not cancelled, it would be difficult for the witnesses to depose without fear, freely and truthfully as against the respondent No. 1. Learned counsel relied on the judgment of the Apex Court in the case of ***State of Bihar vs. Rajballav Prasad Alias Rajballav Prasad Yadav Alias Rajballabh Yadav***¹, in support of his submission.

5 Mr. Shirish Gupte, learned senior counsel for the respondent No. 1 opposed the application. He submitted that no interference is warranted in the impugned order enlarging the respondent No. 1 on bail.

1 (2017) 2 SCC 178

He submitted that there is no perversity in the order enlarging the respondent No. 1 on bail. He further submitted that there is a delay of three days in lodging the FIR; that there was no loft (play area in the school) as alleged by the survivor; that the respondent No. 1 had come to India, on learning of the FIR as against him; and that the respondent No. 1 had cooperated with the investigation. He further submitted that the learned Judge has imposed several conditions and as such the question of absconding or tampering with the witnesses does not arise. He further submitted that the survivor had not mentioned the name of the respondent No. 1 and had merely referred to him as a 'boy teacher'.

6 Learned A.P.P supported the applicant. She submitted that there is no discrepancy in all the three statements of the survivor, aged 3 years. She submitted that there is ample evidence to show the complicity of the respondent No. 1. She further submitted, on instructions, that the bail application filed by the respondent was opposed to by the learned A.P.P and that the Investigating Officer had submitted his say i.e. Exhibit 5 to the bail application.

7 Mr. Mihir Desai, learned senior counsel for the intervenors (parents of some students studying in the said School) also supported the applicant. He submitted that the students studying in the said School are traumatised by the said incident and are questioning their parents the reason for the respondent No. 1 going to jail. He submitted that the presence of the respondent No. 1 in the school premises would vitiate the school environment. He further submitted that the respondent No. 1 has been attending the School and as such the intervenors have concerns about the well-being of their children.

8 Perused the papers, including the impugned order dated 24th November, 2017, by which, the respondent No. 1 was enlarged on bail by the learned Sessions Judge. The applicant is the original complainant and mother of the survivor, aged 3 years at the time of the alleged incident. According to the applicant, on 15th May, 2017, when she was putting her daughters to sleep, she saw her younger daughter (survivor) aged 3 years scratching her private part. Pursuant thereto, the applicant asked her if there was a problem, to which, her daughter informed her that she and her

friend from school (a boy aged 4 years) also does the same. Finding the behaviour of her daughter strange, she took the daughter into confidence and asked her in detail, if something was wrong. The applicant's daughter informed her that while she was in school, her class teacher Mrs. Mitali would take her and her friend, a boy to the loft (play area) and that a 'boy teacher' would come there and put his hand inside her underpants and insert his fingers in her private part. The daughter further disclosed that whenever she complained of pain, the 'boy teacher' would stop. The applicant's daughter further disclosed that the boy teacher did the same thing with the boy and that he too would wriggle in pain and cry. She disclosed that her class teacher Mrs. Mitali was present at the relevant time and that when she and the boy complained to her, she told them that it was a secret between them i.e. her, the boy teacher and the two children and that they should not disclose the same to any person. It appears that the said acts took place between the period after Diwali 2016 to March, 2017 on several occasions. Pursuant to the disclosure made by the applicant's daughter, the applicant informed her husband and on 16th May, 2017, called the small boy's parents and informed them about the incident narrated to her, by her daughter. The small boy's mother took her son into

confidence and informed the applicant on 17th May, 2017 that the incident was true. The applicant has further stated that when she asked the boy's mother, as to who the 'boy teacher' was, she disclosed that his name was Brilliant Patrick i.e. respondent No. 1 and that he was the trustee of the School. Pursuant thereto, the applicant lodged a complaint/FIR as against the respondent No.1 on 18th May, 2017 alleging offences punishable under Section 376(2)(i) of the Indian Penal Code ('IPC') and Sections 4, 6 and 10 of the Protection of Children from Sexual Offences Act ('POCSO'). The survivor's (aged 3 years 11 months) statement (Question-Answer Form) was recorded by the police on 8th June, 2017; her 164 statement was recorded on 20th June, 2017; and on 27th June, 2017, the survivor's statement was recorded by the Child Welfare Committee. It is pertinent to note, that on 8th June, 2017, the survivor was shown several photographs and from those photographs, she identified the photograph of the respondent No. 1 as being the 'boy teacher'. Prior thereto, i.e. on 3rd June, 2017, the survivor was examined and the opinion given by the doctor is "history of sexual violence cannot be ruled out" and in the clinical findings, it was mentioned as "history of fingering and touching". The statement of the applicant (original complainant) as well as all the statements of the

survivor are consistent with each other and there is no infirmity in the same. Even the history given by the applicant to the doctor on 3rd June, 2017 is consistent with the statements. She has stated in the history given to the doctor as under :

“History given by survivor's mother that since last 5 to 6 months, survivor used to rub her genitals on & off since 6 months though survivor's mother used to tell her not to do so, she used to stop doing that. Then on one day on 15/05/2017 at 11 pm when her mother was lying on bed with her then survivor had rubbed her genitals. Then her mother asked her not to do so. Then survivor told her that her class teacher Mrs. Mitali used to bring her to another room & then a boy teacher used to come and touch her genitals and buttocks & used to unwear her lower garments & used to insert his finger in genitals in front of Mrs. Mitali. Survivor also told that with xxx (name withheld) 4 yr old boy her classmate, that boy teacher used to put finger. Then the survivor's mother confirmed it with boy's (name withheld) mother telephonically, went to school to enquire but did not get any cooperation; lodged FIR on 18/5/2017.”

9 A perusal of the statement of the survivor which is in question and answer form, shows the nature of sexual violence perpetuated by the respondent No. 1, on her, on several occasions, during the period after Diwali 2016 to March 2017. The learned Sessions Judge in the order dated 24th November, 2017 has observed in para 7 that “perusal of the case diary

reveals that there are two statements of victims. *Prima-facie* her first statement recorded immediately after lodging of FIR does not support allegation levelled against accused No. 1,” however, the said observation is contrary to the statement dated 8th June, 2017 recorded of the survivor. It is pertinent to note that all the statements i.e. first statement dated 8th June, 2017, the statement dated 20th June, 2017 (164 statement), statement dated 27th June, 2017 (recorded by the Child Welfare Committee) and the panchanama of the photo identification of the respondent No. 1, dated 8th June, 2017 are consistent with each other and point to the complicity of the respondent No. 1. The said observation of the learned Judge is contrary to the statements on record. It also appears that despite the prosecution having opposed the bail application as is reflected in para 4 of the order, the learned Judge in para 6 of the said order has observed that the learned A.P.P has fairly submitted that *prima facie* there is no incriminating evidence against the present applicant and has gone on to consider this as one of the criteria for enlarging the respondent No. 1 on bail. The said observations are completely contrary to the evidence on record and as such are perverse, unsustainable in law and contrary to the evidence on record. The facts reveal that *prima facie* there is overwhelming incriminating evidence

against the respondent No. 1. It is also pertinent to note that the survivor's friend's (boy) mother has in her statement dated 5th November, 2017, stated that her son would refuse to go to school after Diwali 2016 and would cry, but despite this, she would send him to school compulsorily. She has corroborated the applicant's complaint/FIR, that she received a call from the applicant, disclosing what was told to her by her daughter (survivor), pursuant to which, she took her son into confidence and asked him about the person doing bad things. She has stated that her son replied that “that he is dirty, he touches him with his hand here and there”, and on asking where?, her son pointed inside the pant (front and back). She has further stated that when she showed the photos of all the persons on the school website, on seeing the respondent No.1's photo, he replied ‘he is dirty and did not want to see’. Both, the children who were sexually assaulted were aged 3-4 years.

10 It is pertinent to note, that pursuant to the sexual assault on the survivor, aged 3 years, the survivor is taking psychiatric help of a well-known Psychiatrist, Dr. Harish Shetty. Dr. Harish Shetty, in the Medical Certificate, which is on page 148 of the application, has recorded his

findings on examining the survivor. He has observed that he found that there was evidence of child sexual abuse and has noted his findings in the said Certificate (The details being confidential, are not being reproduced).

11 It is also pertinent to note, that after the FIR was registered as against the respondent No. 1 alleging the aforesaid offences punishable under Section 376(2)(i) of the IPC and Sections 4, 6 and 10 of the POCSO Act, there was hardly any investigation done by the MIDC Police Station and hence, the applicant was constrained to file a writ petition, being Writ Petition No. 3265 of 2017 in this Court, seeking the transfer of the investigation. The Division Bench in its order dated 1st November, 2017, observed as under :

“3. We are not at all satisfied about the manner in which the investigation is carried out by the investigating officer of the subject FIR. The FIR is registered on 18th May, 2017 for serious offences viz. Offences under Section 376(2)(i) of the Indian Penal Code, 1860 and Sections 4, 6 and 10 of the Protection of Children from Sexual Offences Act, 2012. Perusal of the FIR clearly disclosed commission of cognizable offences. In the circumstances, we fail to understand as to why the statement of the accused were recorded by the investigating officer. In that view of the matter, we find prima facie substance in the allegations made by the petitioner that the investigating officer wants to shield the accused.”

12 In view of the observation made by the Court, the learned A.P.P stated that the investigation in the said case would be transferred to ACP, Meghwadi Division and that the same will be supervised by the DCP, Zone-X. Accordingly, the Division Bench directed the Senior Police Inspector of MIDC Police Station to immediately hand over all the papers of the subject crime to the ACP, Meghwadi Division in order to enable him to carry out further investigation and to take immediate action in accordance with law. The ACP, Meghwadi Division was directed to file a fresh report regarding the progress made in the investigation, on the next date. On 9th November, 2017, a report was submitted by the ACP, Meghwadi Division, and more time was sought to carry out further investigation and hence, the hearing of the petition was deferred till 23rd November, 2017 and the ACP, Meghwadi Division was directed to file a fresh report in respect to the progress of the investigation. On 23rd November, 2017, the writ petition was disposed of as the Investigating Officer had arrested the respondent No. 1 as well as the co-accused and as the grievance of the petitioner (applicant herein) did not survive in view of the same.

13 It may be noted that when the FIR was lodged, the respondent No. 1 was in France and returned to India only on 3rd July, 2017. It is also pertinent to note, that it was only pursuant to the orders passed by the Division Bench of this Court that investigation progressed and the respondent No. 1 was arrested on 7th November, 2017. The respondent No. 1 was sent to police custody till 14th November, 2017 and thereafter was remanded to judicial custody. On 23rd November, 2017, the Division Bench of this Court disposed of the writ petition as the accused (respondent No. 1 and co-accused) were arrested and as such the grievance of the applicant did not survive. On the very next day i.e. on 24th November, 2017, the respondent No. 1 was enlarged on bail by the learned Sessions Judge, despite the fact, that the allegations were serious in nature and the investigation was in progress (charge-sheet was not filed). It is pertinent to note, that on 24th November, 2017, the respondent No. 1 was enlarged on bail on his executing personal bond and surety bond of Rs. 1,00,000/- with one local solvent surety in the like amount, and on the very same day, on an application of the respondent No. 1, he was released on provisional cash bail of Rs. 1,00,000/- for three months.

14 It appears that pursuant thereto, after the respondent No. 1 was enlarged on bail, he started attending the school. Several representations were made by anxious parents, to the police and Deputy Director of Education, expressing concern over respondent NO.1's presence in school, influence over children and influencing witnesses, however, they got no response. It is pertinent to note, that, after respondent No. 1's release, the respondent No.1 sent a long e-mail dated 7th February, 2018 to one of the parents, wherein, he had stated that the parents should tell their children that 'he was sent to judicial custody for being wrongly accused of an action that he has infact been fighting against, for decades'. It appears that some of the parents had informed the school authorities that it may not be appropriate for the respondent No. 1 to join the school in view of the nature of allegations as against him, however, the respondent NO. 1 continued attending school.

15 The Apex Court in the case of ***State of Bihar vs. Rajballav Prasad Alias Rajballav Prasad Yadav Alias Rajballabh Yadav (supra)***, has observed that the Court can cancel bail under Section 439 (2) of the Code

even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. It is also observed that if the Court granting bail ignores relevant material indicating *prima facie* involvement of the accused or takes into account irrelevant material which has no relevance to the question of grant of bail, the High Court or Sessions Court would be justified in cancelling the bail. The prime consideration of the Court is to protect the fair trial and ensure that justice is done. In the present case, the respondent No. 1 is the trustee of the school. *Prima facie*, there is sufficient evidence as against the respondent No. 1 to show his complicity in the present crime. Some of the witnesses are still working in the same school. The possibility of the witnesses being able to depose without fear or freely and truthfully, in the facts of this case, is bleak. The importance of fair trial was emphasized in ***Panchanan Mishra v. Digambar Mishra***², wherein, in para 13, the Apex Court has observed as under :

“13. The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime”.

² (2005) 3 SCC 143 : 2005 SCC (Cri.) 660

16 No doubt, the liberty of an accused is a relevant consideration, however, equally important consideration is the interest of the society and fair trial of the case. The order releasing the respondent No. 1 is perverse and contrary to the facts on record and as such cannot be sustained. In the present case, as noted above, the applicant (original complainant) had to run pillar to post, to ensure that the perpetrators of the heinous crime are brought to book. The applicant was even required to approach the Division Bench of this Court, as the investigation in the said case was not being conducted properly. It is only when the applicant approached this Court that the investigation started moving, which finally led to the arrest of the respondent No.1 and co-accused Mrs. Mitali.

17 The allegations as against the respondent No. 1 are extremely serious. The sections with which the respondent No. 1 is charged are Sections 4, 6 and 10 of POCSO and the punishment prescribed for Section 6 of POCSO offence extends upto imprisonment for life. The respondent No. 1 is the trustee of the school, where the survivor aged 3 years and her friend, who were sexually assaulted, were studying. It appears from the applicant's statement and the Medical Certificate of Dr. Shetty that after the

incident, the survivor would refuse to go to school and was wetting her bed. It appears that the survivor aged 3 years, has undergone physical and emotional trauma, and it will take a couple of years to overcome the same. No reason whatsoever, has come on record to even remotely suggest, the possibility of a false implication. No parent would put their child through this traumatic experience. As noted above, the survivor is taking counselling sessions. Infact, having regard to the tender age of the survivor, the case is required to be expedited. The earlier the better, lest, the survivor is unable to recall the incident, due to passage of time, leading to travesty of justice.

18 During the hearing of this application, it was pointed out that the parents of the boy, who was sexually assaulted, were summoned by the police to the police station. Learned A.P.P assures that there will be strict compliance of the provisions of the POCSO Act. The POCSO Act is a special enactment, enacted to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. Section 24 of the POCSO clearly states that

the statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector. Clause (2) of Section 24 states that the police officer while recording the statement of the child shall not be in uniform. Learned A.P.P also assures that the police will ensure that the child and their families are also apprised of their rights under Sections 39 and 40 of POCSO. (Section 39 which is with respect to guidelines for the child to take assistance of experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child; and under Section 40, the family or the guardian of the child has a right to take assistance of a legal practitioner of their choice for any offence under POCSO and if the family or the guardian of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them.) Statement of the learned A.P.P is accepted.

19 Accordingly, for the reasons aforesaid, the following order is passed :

ORDER

(i) The impugned order dated 24th November, 2017 is quashed and set-aside. The respondent No. 1 shall surrender forthwith before the appropriate Authority.

(ii) The hearing of the case is expedited. The learned Sessions Judge shall decide the case as expeditiously as possible on a day-to-day basis, and in any event, within four months from the date of receipt of this order.

20 Application is disposed of on the above terms.

21 In view of the above order, the intervention application being Criminal Application No. 199 of 2018 also stands disposed of.

22 Learned counsel for the respondent No. 1, at this stage, prays for a stay. Having come to the conclusion that the impugned order is

perverse, unsustainable and contrary to the evidence on record and as such, cannot be sustained, the request for staying the order is rejected.

23 All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.