

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPLICATION (BAIL) NO.71 of 2020

Mohammad Ishaq @ Azaan Hingora ... Applicant

Vs

State of Goa & Anr. ... Respondents

Shri Kautuk Raikar, Advocate for the Applicant.

Shri Mahesh Amonkar, Additional Public Prosecutor for the Respondents.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 2 NOVEMBER 2020

ORAL ORDER :

The applicant is accused no.1 in Crime No.90/2019, registered by Margao Town Police Station. The alleged offence attracts sections 354, 354(D), 384, 363, and 376 of IPC, read with Section 8 of the Goa Children's Act 2003, as well as Section 4 of the Protection of Children from Sexual Offences (POCSO) Act 2012.

2. Though the crime was registered on 24.05.2019, the accused was arrested, or instead surrendered himself before the court, on 05.09.2019. Over time, the police investigated the crime and filed the charge sheet in Special Case No.70/2019 before the Children's Court, Panaji.

3. But, while framing the charges, the trial Court discharged the applicant for the offences under sections 354(D), 354, and 363--after retaining sections 384 and 376 of IPC, read with Section 8 of the Goa Children's Act as well as Section 4 of the POCSO Act.

4. Seen from the record, the victim girl's mother complained to the police that the applicant lured her minor daughter with false promises and had sex with her. It amounted to rape. Besides, the complainant also alleged that using the girl's nude photographs, the applicant, with his

brother's help, extorted gold from the victim girl. That brother is the second accused in the crime.

5. Ever since he was arrested, the applicant has been in judicial custody. After his initial failed attempts before the trial Court, the applicant has filed this bail application for the regular bail.

6. Shri Kautuk Raikar, the learned counsel for the applicant, has submitted that when the alleged offence took place, the applicant himself was a teenager, hardly 19 years old. According to him, the applicant and the victim girl, though a minor, then studying in 10th class, were in love. To elaborate, he has submitted that as they were living in the same residential complex, they came in contact with each other and fell in love. Given their different religious backgrounds, the girl's mother never approved of it. Though the mother knew about the alleged love between the applicant and the victim in January 2019, she waited about five months to complain. Shri Raikar does accept that the complaint does speak about extortion based on nude photographs. Still, the police, he stresses, traced no incriminating material--not even the pictures, nude or otherwise. He has also read out a couple of WhatsApp messages from the victim to the applicant; they read as if the girl's family pressured her to speak against the applicant.

7. Eventually, Shri Raikar submits that the alleged offence in its entirety reveals no element of threat, coercion, inducement for anyone to treat the crime as heinous. It only shows a statutory rape between two consenting persons. Had it not been for religious differences, the girl's mother would not have had any grievance. Besides, Shri Raikar has also submitted that the applicant has no criminal antecedents and has been in judicial custody over 15 months.

8. On the other hand, Shri Mahesh Amonkar, the learned Additional Public Prosecutor, has submitted that the question of consent or absence of any violence assumes no importance because the victim, then, was a

minor. About the antecedents too, he submits that they assume no significance when the victim is a minor. As to the element of coercion, Shri Amonkar has submitted that the applicant and his brother secured about 500 gms of gold from the victim girl. But the police could recover so far only 350 gms; still 250 gms of gold is yet to be accounted for.

9. About the innocence, or the absence of incriminating material or the nude photographs, the learned Additional Public Prosecutor stresses that they are matters for trial. In the end, he has submitted that it is not a fit case for this Court to grant bail to the applicant until at least the victim girl has been examined.

10. Heard Shi Kautuk Raikar, the learned counsel for the applicant and Shri Mahesh Amonkar, the learned Additional Public Prosecutor for the respondents.

11. Indeed, indisputably, the crime involves a minor girl, then, about 15 years old, pursuing her SSC. Besides the victim's statement under sections 161 and 164 of Cr PC, the prosecution had examined her in chief before the pandemic broke out. But that examination is inconclusive. On the last occasion, Shri Amonkar wanted this Court to adjourn this matter for a reasonable time, so the prosecution could complete the victim girl's examination. Then, this Court might consider the bail application. Accordingly, I adjourned the matter and took it up today.

12. Today, the learned Additional Public Prosecutor informs me that the children's Court has no video facility for cross-examining the victim girl--virtually. He has also told me that the police are not prepared to produce the applicant before the Court physically during the pandemic. Thus, even if there were to be any arrangement to examine the victim girl, it could be only in the applicant's absence.

13. Granted that the victim is a minor, her partial chief examination, *prima facie*, shows that the victim girl and the applicant had been on friendly terms; the girl seems to have developed an adolescent

infatuation for the applicant. That has, as the prosecution insists, led to physical intimacy, too. According to the applicant, though the mother came to know about the relationship in January 2019, all her efforts to wean the girl away from the applicant proved futile. Then she lodged a police complaint. According to the prosecution, the complainant's husband – the victim's father – was in the USA. The mother tried to get the husband's concurrence for lodging the complaint. So it took time.

14. Though the applicant and his brother had been accused of extortion, the second accused has already been enlarged on bail. The police are said to have recovered 350 gms out of 500 gms of gold. With no prospect of the pandemic ending in the near future, I reckon, the trial Court is not in a position to proceed with the trial. To whatever extent the victim girl has been examined, as contended by the applicant's counsel, her testimony establishes the applicant, himself in teens, and the victim made friends with each other and developed intimacy. No element of heinousness or exploitation is seen. That said, I hasten to add, as the victim is a minor, nothing on the applicant's part mitigates the crime. And all aspects are matters of trial.

15. The standard of reckoning the gravity of an offence in the context of the trial and in the context of bail slightly varies. Besides the severity of the crime, the Court needs to look into these aspects: the applicant's antecedents, the possibility of his jumping the bail or his interfering with the trial or due process, and his threatening or inducing the witnesses.

16. Here, the applicant, now 20 years old, has been in judicial custody for about 15 months. He is said to come from Hyderabad, with no local base here. So, it is difficult for the Court to visualise the applicant's threatening the witness or interfering with the course of the trial. Even any such remote possibility could be curtailed with suitable conditions. As rightly submitted by the learned Additional Public Prosecution, the

questions of innocence or absence of incriminating material are matters of trial. This Court, at this juncture, has to balance the competing interests of the society (the victim included) and the applicant: safety versus liberty. Pretrial incarceration is no part of just deserts.

17. Under these circumstances, I reckon, it is a fit case for the Court to enlarge the applicant on bail subject to the following conditions :

ORDER

- (i) The application of bail is allowed.
- (ii) The applicant is directed to be released on bail on his executing P.R. Bond for ₹50,000/- and on his furnishing two sureties, each for the like sum, to the satisfaction of the learned President of the Children's Court, Panaji.
- (iii) The applicant should not leave the State of Goa, without prior permission of the learned President of the Children's Court, Panaji.
- (iv) The applicant shall attend the hearing of the case on the dates fixed by the trial Court.
- (v) The applicant is to attend the jurisdictional police station once in a week—11 am on every Saturday.
- (vi) The applicant shall not influence, induce, threaten, or coerce the witness; nor should he abuse the process.
- (vii) The applicant's failure to abide by these conditions will entail the prosecution to apply for the cancellation of bail now granted to the applicant.
- (viii) The Bail Application stands disposed of.

Parties to act on the authenticated copy of this order.

DAMA SESHADRI NAIDU, J.

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