

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

LD-VC Criminal Application [BA] No.155 of 2020

Bhimrao Manikrao Dhole

vs.

The State of Maharashtra, through PSO, Karanja (Ghadge), Dist. Wardha

 Office notes, Office Memoranda of
 Coram, appearances, Court's orders
 or directions and Registrar's orders.

Court's or Judge's Orders

Shri S.V. Sirpurkar, Advocate for the Applicant.
Shri H.D. Dubey, A.P.P. for the Non-Applicant/State.

CORAM : S.M. MODAK, J.

DATE : 16th JUNE, 2020

Hearing was conducted through Video Conferencing and the learned Counsel agreed that the audio and visual quality was proper.

02] Heard the learned Counsel for the applicant and the learned A.P.P. for the State.

03] The applicant, resident of Yengaon, Tahsil Karanja (Ghadge), District Wardha, is accused of sexually abusing and harassing a minor and hearing impaired girl, aged about 8 years. She is also resident of the same village. The applicant runs a pan-shop and he is aged about 65 years. The incident took place on 13/11/2019 at about 01:30 p.m. One Leelabai Pathade gave a partly sum to the victim girl and she went to the pan-shop of the applicant at the material time. The applicant thought of taking disadvantage of the situation, he took the victim inside the pan-shop. He removed her frock and her

slacks also. He slept over the body of the victim and kissed her stomach. In the meantime, Sapna Dhole, being the relative of the victim, came there. She noticed the above obscene incident. On seeing her, the applicant controlled himself and went out of the shop.

04] Then, witness Sapna Dhole took the victim girl to the house. When, Jyoti Pathade, mother of the victim girl, returned home at 02:30 p.m. from the agricultural field, she was told about the incident and then complaint was lodged on the next day i.e. on 14/11/2019 at Karanja (Ghadge) Police Station. The police have registered an offence under Section 376(AB), 376(2)(J), 342 & 511 of Indian Penal Code and under Sections 4 & 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act" for brevity).

05] The applicant came to be arrested. Police carried out investigation and filed charge-sheet. Request for bail came to be rejected by the trial Court and, hence, he has approached this Court.

06] It is true that witness Sapna Dhole had seen the obscene incident. The entire emphasis of the applicant is on absence of penetration. There is also emphasis on absence of medical opinion to the effect that sexual intercourse has been committed. There is emphasis on completion of investigation and old age of the applicant. As against this, the prosecution submitted that the applicant has taken disadvantage

of the disability of the victim and stage for appreciation of material has not yet reached. According to the learned A.P.P., it will be too early to opine on merits of the case.

07] With the assistance of both the sides, I have perused the papers annexed to the application. It is very well true that this Court, while deciding bail application, cannot appreciate the material. While deciding the bail application, the Court can only express *prima facie* opinion after reading the material as it is.

08] With this exercise, when the papers are perused, we can find that the Medical Officer Wardha has given an opinion. He has opined as follows :

“According to history, only sexual assault occur. No history of sexual intercourse.”

09] The Medical Officer has given the opinion after examining the victim girl. There is a difference in between sexual assault and sexual harassment and even the POCSO Act recognizes it. Section 2(i) defines sexual assault, whereas Section 3 defined penetrative sexual assault. Section 7 defines sexual assault, whereas Section 11 defines sexual harassment. There is less punishment to sexual harassment as laid down under Section 12 of the said Act. It is indicative of the fact that the offence of sexual harassment is less serious than the offence of sexual assault.

10] Considering the limited enquiry contemplated at the time of hearing the bail application, *prima facie* opinion can be formed by reading the papers. Witness Sapna Dhole has seen the incident. She has nowhere said that there was a penetration. That might have taken place earlier to her arrival there, but medical opinion does not say about sexual intercourse. Even Section 375 of Indian Penal Code lays down different ways of committing rape. Section 376-AB is a specified offence of rape when the victim is below 12 years of age. Whereas, Section 376(2)(j) classifies the offence of rape committed on a woman incapable of giving consent. Hearing impairment can be one of such kind.

11] It was not pointed out to me from the investigation papers that any semen stains were noticed on either the clothes of victim or that of the accused. We cannot predict why there was no penetration, it may be for several reasons. It may be due to timely arrival of the witness Sapna or for other reason. The fact remains that investigation papers do not indicate sexual intercourse.

12] It is true that when the victim is a hearing impaired girl, the Court will have to be more cautious, because there is every likelihood of taking disadvantage of her deafness by the wrong doers at the time of commission of the offence. At the same time, the Court will have to peruse the material in the light of allegations and will have to balance the right. After doing this exercise, this Court is of the opinion

that the applicant has made out a case of grant of bail. His old age also weighs the mind of this Court. The above observations are the *prima facie* observations. Ultimately, which offence is made out, can be decided by the trial Court only. The applicant can be put to strict conditions, so that chances of interaction between the witnesses and the accused can be minimized. Hence, the order :

ORDER

- I. The application is allowed.
- II. The applicant be released on bail on furnishing P.R. Bond and Surety Bond of Rs.25,000/-.
- III. The applicant is directed not to enter Tahsil Karanja (Ghadge), District Wardha till completion of the trial.
- IV. The Court is conscious about loosing the livelihood by the applicant, if such condition is put, but the Court has given priority to his freedom than his livelihood.
- V. The applicant is also directed not to tamper with the prosecution witnesses or allure them in any manner.
- VI. If there is breach of any of the conditions, the prosecution is at liberty to move for cancellation of the bail and if such application is filed, it will be decided on merits.

VII. The applicant to furnish his temporary address along with the proof to the trial Court while furnishing bail (without that the bail should not be accepted)

VIII. The application is disposed of.

IX. This order be communicated to the learned Counsel appearing for the parties, either on the email address or on WhatsApp or by such other mode, as is permissible in law.

JUDGE

**sandesh*

Sandesh
Waghmare

Digitally signed by
Sandesh Waghmare
Date: 2020.06.18
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