

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 418 OF 2021

Jamil Amir Shaikh,
Age : 31 years, Occ : Business,
R/o, Post Loni Budruk, Tq. Vaijapur,
Dist. Aurangabad.

...Petitioner

Versus

1. State of Maharashtra,
Through Police Inspector,
Vaijapur Police Station,
Dist. Aurangabad.

2. XYZ
Through : Mother : Chhaya Kakasaheb
Tribhuvan, R/o. Loni, Budruk, Tq. Vaijapur,
Dist. Aurangabad.

...Respondents

Mr Gaurav L. Deshpande, Advocate for Appellant
Mr R.D. Sanap, A.P.P. for Respondent No.1-State
Mr M.B. Sandanshiv, Advocate for Respondent No. 2.

**CORAM : V.K. JADHAV AND
SHRIKANT D. KULKARNI, JJ.**

DATE : 21st SEPTEMBER, 2021

ORAL JUDGMENT : (PER SHRIKANT D. KULKARNI, J.)

1. Feeling aggrieved and dissatisfied by the impugned order of rejection of bail below Exh. 5 in Special Case No. 46/2021 by the Additional Sessions Judge, Vaijapur, Dist. Aurangabad, the appellant/accused has preferred this appeal by taking aid of 14-A (2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "Act of 1989").

2. The appellant is seeking bail in connection with Crime No. 0186/2021 registered with Vaijapur Police Station, Dist. Aurangabad for the offences punishable under section 376(DA), 506 (2), 507 of Indian Penal Code and under sections, 4, 6, 8 and 12 of The Protection of Children from Sexual Offences Act, 2012 and section 3(1) (w) (ii) and 3(2) (va) of the Act, 1989 by taking aid of section 439 of the Code of Criminal Procedure Code.

3. According to the prosecution, on 12.05.2021, at about 01:30 hours at night, the appellant had called on the mobile phone of the father of the victim, who is stated to be 13 years of old and called her at his house. The appellant alleged to have threatened to the victim, if she did not respond, he would kill her family members. The victim went to the house of the appellant. The appellant alleged to have committed sexual assault on the victim. The victim returned back to her house and disclosed the incident to her mother. Her mother disclosed the incident to her father on the very night. The sister of the victim washed of her clothes. The victim along with her parents came to Vaijapur Police Station. The victim lodged the FIR about the incident and on that basis, the Crime No. 0186/2021 came to be registered at Vaijapur Police Station for the offence punishable under sections 376(DA), 506 (2), 507 of Indian Penal Code and under sections, 4, 6, 8 and 12 of The Protection of Children from Sexual Offences Act, 2012 and section 3(1) (w) (ii) and 3(2) (va) of the Act, 1989.

4. The accused came to be arrested in connection with the above said crime on 12.05.2021. The medical examination of the appellant and the victim as well was conducted. The Investigating Officer after completion of investigation has filed the charge sheet against the appellant for the above said offences.

5. The appellant/accused has filed the application for bail after filing charge sheet before the Additional Sessions Judge, Vaijapur. The Additional Sessions Judge was pleased to reject that application by impugned order dated 02.07.2021.

6. In the above premise, the appellant/accused has challenged the impugned order of rejection of the bail before this court on various grounds by way of this appeal.

7. Heard Mr G.L. Deshpande, learned counsel for the appellant/accused, Mr R.D. Sanap, learned A.P.P. for the State/Respondent and Mr M.B. Sandanshiv, learned counsel for respondent No. 2/victim.

8. We have perused the written notes of argument submitted by Mr G.L. Deshpande, learned counsel for the appellant.

9. Mr Deshpande, learned counsel for the appellant vehemently submitted that section 376(DA) of I.P.C. alleged against the appellant does not attract. He submitted that the investigation of the case is over and the Police have filed the charge sheet. There is no need to keep the appellant behind bars. The trial court may take considerable time.

10. Mr Deshpande, learned counsel for the appellant submitted that the allegations made in the FIR are not supported by medical evidence. The medical evidence produced on record along with the charge sheet does not speak that victim was subjected to rape. The entire charge sheet is silent about CDR record which goes to the root of the case. He submitted that the medical report is silent whether the so-called hymen 11 O clock torn is fresh or old. As such, no indication of sexual assault or aggravated sexual assault. The appellant has been falsely implicated in this case. He submitted that the appellant has four children and he is alone bread earner in the family.

11. Mr Deshpande, learned counsel submitted that study on child sexual abuse and medical legal analysis by department of forensic medicine University of Shree Jaya Wardenpuira, Nugegoda Shri-Lanka and has published International General of Medical Toxicology and Forensic Medicine. In the said detailed study on child sexual abuse, hymen at 11 O' clock in position is considered as hymen intact in case of sexual abuse. Mr Deshpande, learned counsel has also referred "Parikh's Text Book of Medical Jurisprudence, Forensic Medicine and Toxicology for Classrooms and Courtrooms (eighth Edition) and submitted that victim was not subjected to sexual assault. The appellant needs to be enlarged on bail.

12. Per contra, Mr R.D. Sanap, learned A.P.P. for the State/Respondent strongly opposed to grant bail. He submitted that prima

facie, there is evidence against the appellant. It is a rape on a minor girl of 13 years age. The medical evidence is supporting to the prosecution case. The victim pertains to the Scheduled Caste family. If the appellant is released on bail, he may tamper with the prosecution witnesses. He submitted that provisions of The Protection of Children from Sexual Offences Act, 2012 are also invoked against the appellant which provides stringent punishment. He submitted that it is not a fit case to grant bail to the appellant.

13. Mr M.B. Sandanshiv, learned counsel for respondent No.2/victim echoed the argument advanced by Mr R.D. Sanap, learned A.P.P. for the State. He submitted that it is a case of sexual assault on a minor girl from Scheduled Caste family. By looking to the seriousness of the crime and punishment provided thereunder, it may not be appropriate to release the appellant on bail.

14. We have considered the argument advanced by Mr Deshpande, learned counsel for the appellant/accused, Mr R.D. Sanap, learned A.P.P. for the State/Respondent and Mr M.B. Sandanshiv, learned counsel for respondent No.2/victim.

15. Mr Deshpande, learned counsel for the appellant/accused has referred number of citations in support of his argument. However, it would be suffice, if we rely upon the citations of the Hon'ble Supreme Court where the factors for consideration of bail in heinous offence have been indicated.

16. What are the factors to be kept in mind while considering the bail application relating to heinous offences have been indicated by the Hon'ble Apex Court in the case of Prasanta Kumar Sarkar Vs. Ashis Chatterjee & another, reported in (2010) 14 SCC 496, wherein by relying on its earlier decisions in the case of State of U.P. Vs. Amarmani Tripathi, reported in (2005) 8 SCC 21 and in the case of Ram Govind Upadhyay Vs. Sudarshan Singh reported in (2002) 3 SCC 598, the Hon'ble Apex Court has indicated the following factors to be borne in mind while considering the bail application:-

- i) Whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
- ii) nature and gravity of the accusation;
- iii) Severity of the punishment in the event of conviction;
- iv) danger of the accused absconding or fleeing, if released on bail;
- v) character, behaviour, means, position and standing of the accused;
- vi) likelihood of the offence being repeated;
- vii) reasonable apprehension of the witnesses being influenced; and
- viii) danger, of course, of justice being thwarted by grant of bail.

17. On perusing the FIR and papers annexed to the charge sheet, the victim seems to be 13 years old at the time of incident occurred on 12.05.2021 at night. The victim has narrated incident in detail as to how and in what manner, the appellant has committed sexual assault in his

house in the wee hours of 12.05.2021. The appellant is running his grocery shop in the same locality where the victim resides. Much was argued by Mr Deshpande, learned counsel about false implication of the appellant in this case at the instance of the parents of the victim, we do not find any material in this regard.

18. So far as the application of section 376(DA) of IPC is concerned, it is not case of gang rape. Obviously, the trial court would apply the appropriate sections while framing of charge against the appellant. It is for the trial court to apply correct sections of the Penal code as well as other sections of the Special Acts. Certainly that cannot be a ground to grant bail.

19. Mr Deshpande, learned counsel for the appellant has heavily placed reliance on the research material published by the department of forensic medicine of the University of Shrilanka in order to show that if hymen is at 11 O clock in a position, it cannot be a case of rape. It is stated as hymen intact. We have gone through the Chapter 25 of the "Parikh's Text Book of Medical Jurisprudence, Forensic Medicine and Toxicology for Classrooms and Courtrooms (eighth Edition) as well as material relied upon by Mr Deshpande, learned counsel for the appellant/accused. While deciding the bail application, we are not supposed to look into the niceties of medical terminology. The trial court may look into it while appreciating the evidence during the course of trial. We have to consider whether victim was prima facie subjected to sexual assault. In this context, the statement of victim/FIR and statements of her

parents are important. As evident from the record, victim and her parents have supported the prosecution case. On perusing the medical examination report on sexual violence pertaining to the victim, the Doctor has opined as under :-

“There are no signs of use of force. However, final opinion is reserved pending availability of forensic laboratory reports. Sexual violence cannot be ruled out.”

20. Further, it is opined by the Doctor while external examination of genital of the victim more particularly regarding hymen, it is opined that it is torn at 11 O Clock position. Prima facie, we cannot overlook that Doctor has opined that hymen of the victim was found torn though it is stated to be 11 O Clock in a position. The trial court would appreciate that position of hymen after recording evidence of Doctor. At this stage, we cannot overlook that piece of evidence when it is opined by Doctor that sexual violence cannot be ruled out in this case after examination of the victim. We do not agree with the argument advanced by Mr Deshpande, learned counsel for the appellant that it is not a case of sexual assault in view of the 11 O Clock position of hymen.

21. On careful scrutiny of the charge sheet and the papers annexed thereto, there is prima facie case against the appellant/accused. It is a case of rape against a minor girl. The provisions of The Protection of Children from Sexual Offences Act, 2012 are also invoked coupled with Atrocities Act of 1989.

22. Having regard to the nature of accusations levelled against the appellant, punishment provided under the respective offences, no case for bail is made out by the appellant/accused. The appellant/accused is resident of same locality where the victim resides, and there is reasonable apprehension putforth by the prosecution side of the witnesses being influenced.

23. Having regard to the above reasons and discussion, we are not convinced to grant bail to the appellant/accused. Needless to say that appeal needs to be dismissed. Hence, the following order :-

ORDER

The Criminal Appeal stands dismissed.

[SHRIKANT D. KULKARNI, J.]

[V.K. JADHAV, J.]

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