

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO. 788 OF 2020**

Omkar Annasaheb Gaikwad. ... Applicant

V/s.

State of Maharashtra & anr. ... Respondents.

Mr. A.P. Mundargi, Sr. Counsel a/w. Mr. Meghdeep Oak i/b. Mr. Hrishikesh Mundargi, advocate for applicant.

Mr. Ketan A. Dhavale, advocate appointed for respondent/complainant.

Mr. K.V. Saste, APP for State.

CORAM : SMT. SADHANA S. JADHAV.

DATE : APRIL 26, 2021.

(Through Video Conferencing)

P.C.

1 Heard the learned Counsel for the applicant, learned Counsel appointed for respondent/complainant and the learned APP for State.

2 This is an application under section 439 of the Code of Criminal Procedure, 1973 seeking enlargement on bail. The applicant herein is arrested on 15/11/2019 in Crime No. 415 of 2019 registered at Phaltan Police Station for offence punishable under section 376(3), 354(D), 506 of the Indian Penal Code and under section 4, 12 of the

POCSO Act.

3 On 15/11/2019 Ms. X lodged report at the police station alleging therein that prosecutrix is studying in 10th standard. Since her father is posted in Animal Husbandry Department at Bhore, she is residing with her grand-mother. That, at the time of Ganesh Festival, she had met the present applicant. Her friend Anushka had informed her that the present applicant is in love with Ms. X and thereafter, they have exchanged their phone numbers. Her grand-mother had noticed that she was chatting with the applicant and therefore, she had also complained to the mother of the applicant and had warned Ms. X that she shall not contact the applicant anymore. According to her, on 3/6/2019 he had called upon her and had complained about not being in touch with him. In October, 2019, she had left for her classes at about 7 a.m. The applicant had allegedly taken her in his Swift car bearing No. MH-11- 7254. Thereafter, she had left her bicycle near the classes. According to her, since he had threatened that if she did not oblige, he would commit suicide, she accompanied him and there, he had forced himself upon her in his car. The said incident was repeated on 11/11/2019. Her friend Vaibhavi had informed her

grand-mother that she had not attended the classes and thereafter, she disclosed the whole incident to her grand-mother who gave her courage to lodge report.

4 She was referred for medical examination. There is no evidence of sexual assault. The investigation is completed and charge-sheet is filed.

5 The applicant had placed on record a letter written by the complainant to her friend Alfiya which was placed on record. By an order dated 23/10/2020, this Court (Coram: Bharati Dangre, J) had directed the learned APP to take instructions from the Investigating Officer in respect of the said letter. The letter was handed over to the applicant by Alfiya. The Investigating Officer recorded statement of the victim on 20/12/2020. Ms. X has agreed that 2 days prior to lodging of the FIR, she had written the said letter to Alfiya and had asked her to give the said letter to him. However, inadvertently, she had given the letter directly to the applicant instead of giving it to Alfiya. She had not disclosed about the same to her family members as she was scared. The said statement is also signed by her grand-mother Mrs. Khatate.

6 Learned Counsel Mr. Ketan Dhavale was appointed by the Court to espouse the cause of the applicant. He has vehemently opposed to grant of bail. According to him, statement under section 164 of the Code of Criminal Procedure, 1973 was also recorded by the complainant and it is consistent with her statement under section 161 of the Code of Criminal Procedure, 1973. He has placed implicit reliance upon the Judgment of the Apex Court in **Satish Kumar Jayantilal Dabgar v/s. State of Gujarat reported in (2015) 7 SCC 359** and has stated that the consent of minor cannot be taken into consideration as it is not a valid consent. The Apex Court observed thus :

“It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age.”

7 In the present case, taking into consideration the contents of the letter written to Alfia and the absence of any medical evidence,

it is doubtful as to whether the incident as narrated in the first information report had ever occurred or the said statement was given to the police under coercion of the parents and family members. The same can be determined only at the time of trial. In any case, it appears that an young boy of 19 years old (applicant) is in love with 15 years old girl. The contents of the letter shows that the complainant was fully aware of the steps being taken by her. The applicant is in custody for more than one and half years. Hence, his further incarceration is unwarranted. The applicant deserves to be enlarged on bail.

8 The Learned Counsel Mr. Dhavale has assisted the Court to the best of his capacity. He is entitled to the professional fees as per law.

9 Hence, following order is passed:

ORDER

- (i) The application is allowed.
- (ii) The applicant be enlarged on bail in Crime No. 415 of 2019 registered at Phaltan City Police Station on furnishing P.R. Bond in the sum of Rs. 25,000/- and one or more sureties in the like

amount.

(iii) The applicant shall not tamper with the evidence.

10 The application is disposed of accordingly.

(SMT. SADHANA S. JADHAV, J)