

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**BAIL APPLICATION NO. 198 OF 2020
WITH
INTERIM APPLICATION NO. 1839 OF 2021**

Kamlesh Gajaraj Sharma ... Applicant

Versus

The State of Maharashtra & Anr. ... Respondents

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Mr. B. J. Shaikh, Advocate for the Applicant.

Mr. S. R. Agarkar, APP for the Respondent – State.

None for the Complainant.

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CORAM : PRAKASH D. NAIK, J.

DATE : 16th SEPTEMBER, 2021

PER COURT:

1. The applicant is arrested on 5th October, 2017 in connection with C.R. No. 657 of 2017. The First Information Report (for short 'FIR') was lodged on 2nd October, 2017 with Dindoshi Police Station, Mumbai for offence punishable under Section 363 of Indian Penal Code (for short "IPC"). The complainant is the mother of victim.

2. In the FIR, the complainant has alleged that the victim is her daughter aged about 17 years. In the past she had left the house in October, 2016 and thereafter, on 15th July, 2017. On 28th September, 2017, the victim was missing from the house. The

complainant tried to search her, she could not be traced. The FIR was lodged under Section 363 of IPC against unknown person.

3. The victim returned home on 3rd October, 2017. Supplementary statement of complainant was recorded on 5th October, 2017. According to complainant the victim disclosed that on 28th September, 2019 rickshawala Kamlesh, who drops the son of the complainant to school had visited house. The victim had attended Garba and she met the rickshawala/Kamlesh (Allegedly applicant). The victim was taken to the house where no other person was available. The accused subjected her to sexual intercourse. On 29th September, 2017 one unknown person came to the premises where she was residing. Rickshawala/Kamlesh was also present. The victim was subjected to sexual assault. She was confined in the house. On 3rd October, 2017 while the door of the premises was open, the victim managed to escape and returned home. Sections 376, 342 r/w Section 34 of IPC and Section 3 & 4 of Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') were invoked. The third statement of the complainant was recorded on 7th October, 2017 which indicate that the victim and the complainant took the Police to the place where incidents had occurred. However, the victim could not show the place where

she was confined by applicant and subjected to physical relationship. The supplementary statement further mentions that according to the victim she was abused by one unknown person at various places. She showed the places of incident. Statement of the victim was recorded on 5th October, 2017. She stated that Kamlesh/Rickshawala took her to a place where she was subjected to sexual assault on 28th September, 2017. She was again subjected to sexual assault by applicant and another person. According to prosecution Kamlesh/Rickshawala is applicant. It is also alleged that the victim was mentally challenged. Applicant and the co-accused were arrested. On completing investigation charge-sheet was filed against them.

4. The applicant had preferred an application for bail before the Sessions Court which has been rejected by order dated 22nd January, 2019.

5. Learned Advocate for the applicant submitted as follows :-

- i) The applicant is in custody for 3 years and 11 months. There is no progress in trial.
- ii) The applicant has been falsely implicated in this case. The version of the complainant and the victim is concocted.

iii) The complainant is using the victim to lodge false complaint against several persons for vested gain. She has lodged about three FIRS alleging sexual assault upon the victim with the same Police Station. Most of the accused in all these cases were arrested and granted bail.

iv) The co-accused had collected the information through RTI about number of cases lodged by the complainant alleging assault upon the same victim and it was disclosed that other than the present FIR i.e. C.R. No. 657 2017, the complainant had lodged 2 other FIRs vide C.R. No. 808 of 2016 and C.R. No. 534 of 2017.

v) The complainant is habitually making the complaints for gaining compensation. The co-accused in the present case were granted bail by this Court.

vi) Complainant had filed affidavit before Sessions Court supporting application for bail preferred by co-accused.

6. Learned APP submitted that there is no reason for the victim and the complainant to falsely implicate the applicant in the crime. He is known to the family of the complainant. He drives rickshaw and used to visit the house of complainant. The statement of the complainant and victim attributes specific overt act of sexual

assault to the applicant. The victim was confined to the premises. The statement of the victim was recorded under Section 164 of Cr.P.C. on 18th June, 2018 which supports her version.

7. I have perused the charge-sheet and the orders granting bail to the co-accused which are annexed to this application. The victim was missing from the house in the present case from 28th September, 2017 and she has returned home on 3rd October, 2017. She has stated that she had left the house and attended Garba, thereafter, she was approached by the applicant. Before She left the house, the applicant had visited her house when no one else in the house. The complaint mentions that, in the past on two occasions the victim has left the house on her own without informing anyone. Such incident had occurred in October, 2015 and July, 2017. The supplementary statement of the complainant was recorded. The victim could not point out the place where she was subjected to sexual assault by the applicant. She also implicated two other unknown persons having sexually assaulted her. It is pertinent to note that the complainant had lodged two other cases with the same Police Station vide C.R. No.808 of 2016 for offences under Sections 363, 376-D of IPC and Sections 3 & 4 of POCSO Act. Thereafter, another FIR was registered in C.R. No. 534

of 2017 initially for offences under Section 363 of IPC and subsequently under Section 376 r/w Section 34 of IPC and Section 3 & 4 of POCSO Act and thirdly the present case was registered on 2nd October, 2017 under Section 363 of IPC and subsequently under the penal provisions as stated herein above. It is the case of the prosecution that the victim is mentally challenged. Reliance is placed on the report dated 3rd August, 2017. Apparently the report was obtained before the registration of the present FIR or may be during the course of investigation in the previous case. The mental health report mentions that the victim is aged about 17 years. She has left the house on 15th July, 2017 saying that she is going to aunts place for having dinner. She returned after 3 days on her own. The report further mentions that while she was going to her aunts place, the rickshaw driver called her and told her to accompany him for which she agreed and she returned home after 3 days. She could not disclose the events. The rickshaw driver and others misbehaved with her. There is history of similar acts before 9 to 10 months ago. There is no family history of psychiatric illness or no medical history of surgical illness. The assessment dated 25th July, 2017 indicate moderate mental retardation. She is communicative. No delusions, speech continuous and coherent. No perceptual abnormality. No active psychopathology at present and

IQ-43 suggestive of moderate mental retardation. Her mental age is 7 years. From the statements of the victim recorded on two occasions would indicate that she is conscious of circumstances and she has narrated the incidents which would indicate that she understands what is happening around. It is also apparent that in all three cases the statements of victim were recorded.

8. The medical examination of the victim was conducted on 3rd October, 2017. The victim did not provide any history. The medical examination report indicates that there is no evidence of external injuries on the body. There is no evidence of external injuries on genital. The provisional medical opinion mentions that the type of sexual violence is not known and the clinical findings indicate that there is no evidence of external injuries. The final opinion mentions that the victim is not able to recollect history. There is no evidence of external injuries however, sexual assault cannot be ruled out. It is pertinent to note that the medical examinations of the victim was conducted on 3rd October, 2017 and the victim could not give the details of incidents. However, her statement is recorded on 5th October, 2017 which gives graphic details of the alleged incidents. The statement under Section 164 of Cr.PC. was recorded on 18th June, 2018 after the period of about 8

months from the date of incidents.

9. The complainant had filed an affidavit before the Court of Sessions while the co-accused Ramtehal Yadav was arrested in this case had preferred an application for bail stating that her daughter went missing on 28th September, 2017 and she lodged the FIR on 2nd October, 2017. Her daughter is suffering from certain level of psychiatric disorder. Upon taking her daughter in confidence and conducting fair inquiry with her, her daughter had revealed that accused No.2 had not done anything wrong with her and he had never committed any crime alleged in the FIR. She had repeatedly confirmed the said fact with her daughter. The accused may be granted bail. The said affidavit was filed on 14th December, 2017 before the Court of Sessions at Dindoshi, Mumbai. Although the affidavit may not be significant to grant bail, the averments in the said affidavit would indicate that the complainant is in habit of changing her version. Apparently, the said accused was granted bail by this Court. The order granting bail to accused Ramtehal Yadav is annexed to this application. Bail was granted vide order dated 1st October, 2018. While granting bail it was observed that the said accused was implicated on the basis of statement made by the victim during search of the accused,

wherein he was found in company of accused No.1 Abdul Kher Abdul Hasan Shaikh who was granted bail by this Court vide order dated 6th December, 2018. While granting bail it was observed that there was history of victim leaving the house in the past. The only person allegedly known to her is rickshaw driver. The applicant Kamlesh was unknown to her. The first statement refers to involvement of two persons and subsequently statements mentions that there is involvement of third person. The history indicate that she was not clear in disclosing the history of assault. One of the accused in C.R. No.808 of 2016 was also granted bail by this Court vide order dated 13th December, 2018. While granting bail to the said accused Naveen S/o Kirsan Sarsar, this Court has observed that several complaints were registered by the complainant with the same police station. C.R. No.808 of 2016 was lodged on 28rd October, 2016. The incident alleged therein had occurred in July, 2016, 21st to 25th October, 2016. C.R. No.534 of 2015 was lodged under similar penal provisions. The incident therein had occurred on 15th July, 2017 and the FIR was lodged on 16th July, 2017 and the present FIR was lodged on 2nd October, 2017. In all these cases, the case of the prosecution case is apparently similar. The victim had allegedly left the house and the offence was registered under Section 363 of IPC, thereafter, the accused were implicated and the

provisions of POCSO were invoked. The applicant is in custody for a period of about 3 years and 11 months. In the statement under Section 164 of Cr.P.C. the victim mentions that the applicant used to take her out by auto rickshaw and bring her back in the premises, where she was kept. On 3rd October, 2017, the door of the house was open and she approached the rickshaw driver who dropped her home.

10. Considering the factual aspects, further detention of the applicant is not necessary. Bail can be granted.

11. Hence, I pass the following order:

ORDER

(i) Criminal Bail Application No. 198 of 2020 is allowed and disposed of;

(ii) The applicant is directed to be released on bail in connection with C.R. No. 657 of 2017 registered with Dindoshi Police Station, Mumbai on executing P.R. Bond in the sum of Rs.25,000/- with one or more sureties in the like amount;

(iii) The applicant shall report concerned Police Station once in three month on first Saturday of the month between 11:00 a.m. to 1:00 p.m. till further order;

(iv) The applicant shall not approach the complainant or any other witnesses and shall not tamper with the evidence;

(v) The applicant is permitted to furnish provisional cash bail in the sum of Rs.25,000/- for a period of eight weeks in lieu of surety;

(vi) Interim Application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)