

Uday S. Jagtap

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

BAIL APPLICATION NO. 492 OF 2020

Jamaluddin Allauddin Qureshi .. Applicant

Vs.

The State of Maharashtra .. Respondents
(at the instance of Oshiwara P.S.)

.....

Ms. Munira Palanpurwala a/w Deepa S. Amati and Mushtaq
Shaikh for the applicant

Ms. Geeta Mulekar, APP for the respondent -State

Mr. Sunil Gade, PSI, Oshiwara Police Station present in Court

CORAM : PRITHVIRAJ K. CHAVAN, J.

DATED : 31st JULY, 2021

(Through Video Conferencing)

P.C.

1. By this application under Section 439 of the Criminal Procedure Code, the applicant has invoked the jurisdiction of this Court to enlarge him on bail in respect of Crime No. 368 of 2019 punishable under Section 354 of the Indian Penal Code and Sections 8 and 12 of the Protection of Children from Sexual Offence Act (POCSO Act) registered at Oshiwara Police Station, Mumbai. The applicant has been in custody since 30th September, 2019.
2. Briefly stated the facts are :-

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3. In the intervening night on 18th September, 2019 and 19th September, 2019, the applicant had trespassed into the house of the victim in the midnight and allegedly outraged her modesty by touching her posterior body when the victim and her two siblings were sleeping at the ground floor. Their parents were on the first floor. When the victim asked as to who he was, it is stated that he escaped from the spot. The applicant's description has been stated by the victim and her mother before the Investigating Officer.
4. Earlier, by order date 13th January, 2020, the Special Judge under the Protection of Children from the Sexual Offence Act at Bombay had rejected his application for bail, mainly on the ground that the applicant is a habitual offender having 23 cases registered against him at Oshiwara Police Station, Mumbai, which are cognizable in nature including a few non-cognizable cases. The earlier application came to be rejected *inter alia* on the ground that looking to the antecedents of the applicant, there is every likelihood that the applicant can pressurize or threaten the victim and the witnesses of the case, apart from the fact that he had been duly identified by the victim at the police station.
5. I heard Ms. Palanpurwala, the learned Counsel for the applicant. She would argue that this is a case in which there is no test identification parade conducted by the Investigating Officer as according to the charge-sheet, the

offence had been committed by an unknown person. It is submitted that unless the identity of the applicant is established, it cannot be said to be a case in which the applicant's complicity has been established. The next limb of argument of the learned Counsel is that the maximum punishment provided under Section 354 of the I.P.C. as well as Section 8 of the POCSO Act is 5 years and the applicant has already been incarcerated for more than 1 years 10 months. Since the charge-sheet has already been filed, no fruitful purpose will be served in continuing his incarceration.

6. On the other hand, Ms. Mulekar, learned APP while objecting the release of the applicant on bail submits that the applicant being a resident of the same area, there is every likelihood of he pressurizing or threatening the victim and the witnesses. The learned APP submits that even if there is no test identification parade conducted by the Investigating Officer, yet, the statement of the victim and her mother gives description of the applicant which perfectly matches with him and, therefore, there is no question of miss-identification of the applicant, who is alleged to have committed the offence. It is further submitted that looking to the antecedents of the applicant having as many as 23 cognizable cases registered against him with Oshiwara Police Station, it would not be just and proper to release him on bail, as, in such case he would definitely threaten and pressurize the victim and the witnesses.

7. Having considered the respective submissions at the bar and after going through the material on record including the statement of the witnesses, I find that this is the case in which the applicant can be enlarged on bail for the following reasons :-
8. Admittedly, from the copy of the Aadhar Card tendered on record, the permanent address of the applicant appears to be from Rajastani Galli No.8, Link Road, Near Thaiyaba Masjid, Motilal Nagar, Goregaon (W), Mumbai whereas the victim is the resident of Sarvodaya Chawl, Behind Air India Building, Vijay Vishal, Nanand Nagar, Jogeshwari (E), Mumbai. In that view of the matter, the Investigating Officer ought to have conducted the test identification parade, at least to establish the identity of the applicant who is alleged to have trespassed into the house of the victim during the intervening night of 18th September, 2019 and 19th September, 2019 and outraged her modesty.
9. Even a bare look at the statement of the victim who was then aged about 15 years, reveals that an unknown person had improperly touched the posterior portion of her body at around 1.00 a.m. However, it seems that she was so scared as she could not immediately call her mother. It is not even in her statement that she identified the accused to be the assailant, who alleged to have committed the offence, though subsequently, she had given his description in her statement.

10. The learned Counsel for the applicant has placed reliance on an order of this Court passed in LDVC/Criminal Bail Application No. 330 of 2020 in case of *Haider Basharat Ali Deshmujkh Vs. State of Maharashtra*, dated 18th September, 2020. Paragraph nos.6, 7 and 8 of the said order can be quoted for advantage, which reads thus :-

6. Learned APP submitted that these contrary versions are not material. She pointed out that the victim was a special child and therefore contradictions in these statements should not help the Applicant. She further submitted that, in the past, the Applicant was externed from that area. He has antecedents against him and yet this offence is committed. Therefore there is threat to the victim and her family. Learned APP therefore submitted that bail should not be granted to the Applicant.

7. I have considered these submissions. As pointed out by the learned Counsel for the Applicant maximum punishment u/s 8 of POCSO is 5 years and minimum punishment is 3 years. The Applicant is already in custody for more than one year.

8. Learned Counsel for Applicant submitted that his externment period was over long back and he did not enter the area when the externment was in force. He submitted that the Applicant is already acquitted in two offences.”

11. As regards the pendency of 23 cognizable cases against the applicant, that itself would not dis-entitle him to be released

on bail as it is not the case of the prosecution that the applicant had been previously convicted in any of those cases.

12. The arguments of the learned APP that because of the Covid-19 situation, the Investigating Officer could not arrange for a test identification parade, cannot be accepted at this stage especially when the charge-sheet has already been filed.
13. Having considered the aforesaid facts and the circumstances and also having due regard to the fact that the applicant is being prosecuted in as many as 23 cognizable cases, by imposing appropriate conditions, he could be enlarged on bail since he has already been incarcerated for nearly 2 years in the alleged offence. In view of the aforesaid observations, following order is expedient :-

ORDER

(a) The applicant be released on bail in C.R. No. 368 of 2019 registered at Oshiwara Police Station, Mumbai for the offence punishable under Section 354 of the IPC and Sections 8 and 12 of the POCSO Act on furnishing a P. R. bond in the sum of Rs.50,000/- with one or two solvent sureties in the like to the satisfaction of the learned Special Judge on the following conditions :-

(i) The applicant shall not enter into the jurisdiction of Oshiwara Police Station till the conclusion of the trial.

(ii) The applicant shall attend the Special Court on each date without seeking exemption from appearance.

(iii) In case, the applicant remains absent on two consecutive dates before the Special Court, the Prosecution is at liberty to apply for cancellation of the bail.

(iv) The applicant shall not, in any manner, influence the victim or the witnesses of this case either directly or indirectly.

(v) The applicant shall not commit any offence or offence similar to the one for which he is being prosecuted.

(vi) Bail before the Special Court.

14. The application stands disposed of in the aforesaid terms.

(PRITHVIRAJ K. CHAVAN, J.)