

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

BAIL APPLICATION NO.370 OF 2021

Dr.Khalid Salim Noorani and Anr. .. Applicants

Versus

State of Maharashtra .. Respondent

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Ms.Anjali Patil, Advocate for the Applicants.
Mrs.M.R. Tidke, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATED : FEBRUARY 15, 2021.

P.C. :

The applicants are arrested on 6th July, 2020 in connection with C.R.No.393 of 2020, registered with Nagpada Police Station, Mumbai, for the offences punishable under Sections 376, 354, 354A and 506 of Indian Penal Code (“IPC”, for short) and under Sections 4, 6 and 8 of Protection of Children from Sexual Offences Act (“POCSO Act”, for short).

2 First Information Report (“FIR”, for short) was lodged on 6th July, 2020. The complainant is mother of victim girls. Applicant no.1 is father and applicant no.2 is uncle of victim girls.

The marriage of complainant and applicant no.1 was performed in September, 2012. According to complainant, since last two years she is residing at her parents home with her parents, brother and two daughters aged 6 and 5 years. She had lodged complaint with Nagpada Police Station but due to pandemic and lockdown she has come to police station and her statement is recorded. Due to physical and mental harassment by her husband (applicant No.1), mother-in-law, father-in-law and brother-in-law (applicant No.2), she lodged complaint with Nagpada police station vide M.E.C.R.No. 1 of 2019, for offences punishable under Sections 354, 354 B, 498(A), 406, 420, 324, 504 and 506(II) read with 34 of IPC. Charge-sheet is filed and case is in progress before Court. After lodging complaint against her husband and in-laws, the complainant started residing at her parental home. At that time, her daughters (victims) were residing with her husband (applicant no.1). She had not taken her children to her parental home. She filed an application before the Court for custody of her daughters. By order dated 22nd February, 2018, the Court directed that the custody of the daughters be given to the complainant. She took both the daughters with her at her parental home. They were admitted in school. The elder daughter is studying in second standard. On 18th December, 2019, students

from her school including elder daughter were taken to the police station. They were appraised about their personal safety at police station. The photographs clicked on that occasion were received on the school group by the complainant on her mobile phone. On 1st March, 2020, while she was deleting some photographs from her mobile phone, her elder daughter told the complainant about the information given by the police about personal safety when they had visited police station. She also told that when she was residing with her father, her uncle and father used to touch her private part. They were not providing food to her and sister. They were threatened not to disclose the same to anyone. At the same time, her younger daughter told the complainant that her uncle (applicant no.2) had subjected her to similar act by touching her private part. He threatened her not to disclose the incident to anyone. When they visited to police station, they were explained good touch and bad touch and now after watching the photographs, she remembered the said incident. The complainant took both the victims in confidence and made further inquiry. They stated that under the pretext of cleaning, the applicants touched private part and pressed it. They were threatened not to disclose the incident to complainant or any other person. On completing investigation charge-sheet is filed.

3. The applicants had preferred application for bail before Special Court for POCSO Act. The said application was rejected by Order dated 22nd September, 2020.

4. Learned counsel for the applicant submitted that applicants are falsely implicated in this case. The complainant has tutored the victims to implicate the applicants in the false case. The applicant No.1 is Doctor by profession. He is working with Noor Hospital as a Chief Medical Officer. Applicant No. 2 is an Engineer by profession. The complainant wanted to deprive the applicant No.1 access and custody of children. Matrimonial dispute is pending between applicant No.1 and complainant. On 19th May, 2016 for the first time complainant filed an N.C. complaint against the father mother and sister of applicants under Section 506 of IPC. The applicant's mother filed N.C. complaint against the complainant under Sections 504, 506 of IPC on 15th December, 2017. On the same day, the complainant lodged N.C. complaint against the father and mother of applicants under Sections 323, 504, 506 of IPC. On 15th December, 2017 the complainant left matrimonial home. On 9th January, 2018 the applicant No.1 filed petition for restitution of conjugal rights before Family Court. The complainant filed a complaint to various

authorities on 16th January, 2018. Subsequently on private complaint filed by her offences under Sections 354, 354(B), 498(A), 406 r/w. 420 of IPC were registered vide MECR No. 1 of 2018. On 28th February, 2018 the complainant filed N.C. complaint against the mother and sisters of applicants under Section 504 of IPC. On 3rd April, 2018 the complainant filed the case under Domestic Violence Act against applicant No.1 before the Court of Metropolitan Magistrate Court. On 30th August, 2018 the learned Magistrate passed an Order of interim maintenance to the complainant. On 24th December, 2018 the learned Magistrate passed an order granting permission to applicant No.1 to take minor children to Nikah ceremony of applicant No. 2 on 26th December, 2018 and 27th December, 2018. The police programme about personal safety was allegedly conducted in the school on 18th December, 2019. On 23rd January, 2020 applicant No.1 filed an application for access to minor children. According to complainant on 1st March, 2020 the victim girls allegedly disclosed the incident which took place during the period from 15th December, 2017 to 22nd February, 2018. The age of the victim girls could be around two to three years at the time of alleged incident. On 5th March, 2020 the learned Magistrate granted access of children to applicant No.1. At that time, the

complainant did not raise any objection on the ground of alleged sexual assault upon victim girls, although the incidents were disclosed to her on 1st March, 2020. On 14th March, 2020 the applicant No.1 filed written complaint to Senior Inspector of Police complaining about disobedience of Court Order dated 5th March, 2020 by complainant. It is submitted that the alleged incident had occurred during the period from 15th December, 2017 to 22nd February, 2018 and the victim girls had allegedly disclosed the said incident to the complainant on 1st March, 2020. However, the FIR was lodged on 6th July, 2020. Even after the alleged incident was disclosed to the complainant by the victim girls, no complaint was filed by the complainant immediately. It is difficult to believe that the victim girls would recollect the incident which had occurred during the period from 17th December, 2017 to 22nd February, 2018 after a period of two years. After the programme conducted by police, the victims did not disclose the incidents immediately to complainant when their custody was with her. Statement of victim girls were recorded. The allegation made in the statement, does not constitute the offence under Section 376 of IPC or Section 4 and 6 of POCSO Act. There is no allegation of penetrative sexual assault. On 7th July, 2020 medical examination of the victim was conducted and

even in the history given before the medical officer, there are no allegation of offence under Section 376 of IPC and Section 4 and 6 of POCSO Act. There was no alleged sexual penetrative assault. Medical evidence does not support the case of the prosecution. Statements of victims are contradictory. Victims are under the influence of complainant. It is difficult to believe that the applicants would commit the alleged Act under the pretext of cleaning the victims. The applicants were not alone at the residence. The other family members used to be in house. The complainant had lodged the FIR for the offence under Section 498-A of IPC and other offences against the entire family, which would indicate that the other family members were also in the house. The applicants are in custody from the date of arrest. They have no criminal antecedents. Hence, bail may be granted to the applicants.

5. Learned APP submitted that there is sufficient evidence against the applicants about their involvement. There is no reason to falsely implicate the applicant. The statement of victims can be disbelieved. The victims were minors. No malafide can be attributed to the complainant. The version of victims is required to be accepted. There is no delay in lodging FIR. The

victims would recollect the incident after the programme was conducted by the police about personal safety and children were explained good touch and bad touch and while the complainant was deleting the photographs of programme, the victims disclosed the incidents to complainant.

6. The applicant No.2 is brother of applicant No.1. The marriage between the applicant No.1 and complainant was solemnized in September, 2012. Learned counsel for the applicant has placed on record the chronology of events and the complaints lodged by both the sides on account of matrimonial discord between them. The victims could be aged around four and three years at the time of alleged incident. The alleged incidents had occurred two years prior to lodging FIR. The complainant had left the matrimonial home on 15th December, 2017. The victim girls were in the custody of the applicants and their family. According to complainant, the custody of children was given to her on 22nd February, 2018 and thereafter, the victims were with complainant. Thus after the complainant had left matrimonial home, the victims were with applicants for two and half months. It is alleged that the sexual assault was committed during the period from 15th December, 2017 to 22nd

February, 2018. According to complainant, the personal safety programme was conducted by police on 18th December, 2019 and victims were explained good touch and bad touch. Thus the said programme was conducted almost after two years from 15th December, 2017. Complainant has alleged that she was deleting photographs of said safety programme from the mobile phone, which was noticed by the one of the victim girl on 1st March, 2020. At that time, victims had allegedly informed about incidents. On 18th December, 2019, the victims were in custody of complainant. They did not disclose the incidents to her immediately after the programme. Even after alleged disclosure of sexual assault on 1st March, 2020, the complainant was not filed immediately. FIR was registered on 6th July, 2020. The complainant has alleged that she had submitted her complaint and due to pandemic she visited police station on 6th July, 2020 and her statement was recorded. The complaint allegedly submitted by her is not part of charge-sheet. The proforma of FIR mentions that information was received by police on 28th April, 2020. What information was received is not clear. Even if it is assumed that complainant had approached police on 28th April, 2020, it is not clear that why complainant was silent from 1st March, 2020 till she approached police. There were series of

complaints filed against each other. The complainant had lodged N.C. complaint on 19th May, 2016 against the parents and sister of applicants. It was alleged that opponents had abused and threatened her. The applicants mother had filed N.C. complaint against the complainant on 15th December, 2017. It was alleged that opponent had abused and threatened mother and N.C. dated 15th December, 2017 was filed against parents of applicants. Apparently, the complainant had left the matrimonial home on 15th December, 2017. Applicant No. 1 had filed petition for restitution of conjugal rights on 9th January, 2018. In the said petition it was stated that complainant had left matrimonial home on 15th December, 2017. Complainant is trying to lodge false complaints against family of applicants. It was also stated that complainant had threatened that applicants father and brother would be booked under Section 354 IPC to teach them a lesson. In the interest of better future and that of his daughters, decree be passed against complainant to restore conjugal rights. The complainant filed complaint, and MECR No. 1 of 2018 was registered on 16th January, 2018 for the offences punishable under Sections 354, 354(B), 498-A, 406, 420, 324, 504 and 506 (ii) of IPC. It was alleged that she was harassed, abused, threatened and assaulted with intent to outrage her modesty.

From the tenor of the said FIR, it is apparent that the applicants and other family members including the parents of the accused were residing in the premises, where the alleged incidents had occurred. In the said FIR, the complainant had implicated both the applicants, sister and parents of the applicants. In the said FIR, it was alleged that she left matrimonial home on 15th December, 2017. She lodged N.C. complaint on the same day against her husband and in laws. According to applicants the complainant initiated proceedings under the Domestic Violence Act on 3rd April, 2018 viz. CC No. 34/DW/2018 against applicant No. 1. In the said proceedings by order dated 30th August, 2018 the Court directed applicant No.1 shall pay interim maintenance to complainant and minor daughters. The applicant No. 1 preferred application for custody of daughters for one week for marriage ceremony of his brother. The marriage was fixed on 26th December, 2018. The complainant had opposed grant of relief. By Order dated 24th December, 2018 the complainant was directed to give access of daughters to the husband (applicant No.1) on 26th December, 2018 and 27th December, 2018. The applicant No.1 had also preferred another application for access of daughters which was allowed by Order dated 5th March, 2020. According to the complainant, the incident of sexual assault was

disclosed by victim girls to her on 1st March, 2020. It is pertinent to note that in the application for access of victim girls preferred by the applicant No. 1, the complainant had filed her affidavit in reply, and objected the application on the ground that she was ill-treated by applicant No. 1 and kids were tortured. Both sides filed written submissions. Application was allowed by the Court by order dated 5th March, 2020. From the said order it does not appear that the complainant had alleged about the incidents of sexual assault. The incidents were allegedly disclosed to her by victims on 1st March, 2020. The Court directed the complainant to give access of daughters to applicant No.1 on everyday between 4.00 p.m. to 5.00 p.m. at any public place. The complainant was permitted to accompany the daughters. On the same day, the applicant No.1 was permitted to handover the maintenance of Rs.28,000/- to the complainant. The applicant No.1 filed a complaint to Nagpada Police Station on 14th March, 2020 stating that inspite of the order of the Court, allowing access of children, the complainant has failed to abide by the order.

7. The alleged incidents had occurred during the period from 15th December, 2017 to 22nd February, 2018. The FIR was registered on 6th July, 2020. The victim girls allegedly recollected

the incident after a period of about two years. According to complainant elder daughter told her on 1st March, 2020 that both applicants had sexually assaulted her. Younger daughter told her that she was sexually assaulted by applicant No. 2. Subsequently, they stated that under pretext of cleaning the alleged act as stated above was committed. Statements of victim girls were recorded. The elder daughter in her statement dated 7th July, 2020 stated that her father (applicant No.1) had committed alleged act. She also stated that she do not want to join her father. In this statement no role is attributed to applicant No.2. Complainant was present, while recording the statement. In the FIR it is alleged that, elder daughter has informed complainant that both the applicants had committed the alleged acts. Statement of younger daughter was recorded on 7th July, 2020. She stated that applicant No. 2 has committed the alleged act. She stated that her father has not committed act of sexual assault. Thereafter, on 11th August, 2020, statements of victims were recorded before CWC. The elder daughter stated that her father (applicant No.1) had committed alleged act and he has committed such act only with her. The younger daughter stated that, her uncle has committed alleged assault. Their father had assaulted them and their mother. In statement under Section 164

recorded on 10th August, 2020 the elder daughter stated that, father used to assault her, she was not allowed to visit her mother. Father and uncle used to commit bad act and threatened her. She was told that she should stay away from Nani, Mamu, mother and Nanu. The statement is contrary to previous statement. The younger daughter made similar statement of harassment and also stated that father and uncle both used to do bad acts. This is also contrary to previous statement. The tenor of these statements indicates that they have grievance against applicants and they do not want to join applicant No.1. It is pertinent to note that, the applicant No.1 had preferred application for access of children which was granted. The said orders were passed after the alleged incidents. Access was granted. At that time, no grievance was made by complainant and children. From the tenor of the statements and the factual aspects of this case possibility of victims being tutored cannot be ruled out.

8. The version of the complainant runs counter to the version of victims. It is true that this is not the stage to discard the version of child witnesses. Apex Court in the case of **Ratansinh Nayak v/s. State of Gujarat** has referred to decision

in the case of **Dattu Ramrao Sakhare v/s. State of Maharashtra** and observed that the child witnesses are amenable to tutoring and often live in world of make-believe. They are pliable and liable to be influenced easily, shaken and moulded, but it is also accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness. I am conscious that this exercise has to be done during trial. The question before the Court is of the grant of bail. Taking into the consideration the nature of material on record, the allegations attributed to applicants appears to be debatable. The applicability of Section 376 IPC and Section 4 and 6 is also debatable. The applicants need not to be subjected to further detention. Bail can be granted.

9. Hence, I pass the following order.

: ORDER ::

- (i) Bail Application No.370 of 2021, is allowed;
- (ii) Applicants are directed to be released on bail in connection with C.R.No.393 of 2020, registered with Nagpada Police Station, on executing P.R. Bond in the sum of Rs.30,000/-, each with one or

more sureties in the like amount;

- (iii) Applicants shall not tamper with the evidence;
- (iv) Applicants shall report the Nagpada police station once in a month on first Saturday of the month between 11:00 a.m. to 01:00 p.m, till further orders;
- (v) Applicants are permitted to furnish cash bail security in the sum of Rs.30,000/-, each, in lieu of surety for a period of eight weeks;
- (vi) Bail Application No.370 of 2021, stands disposed of.

(PRAKASH D. NAIK, J.)