

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

CRIMINAL APPLICATION NO.177 OF 2021

Shankar Makaji Mashal	 Applicant
Versus	
The State of Maharashtra	 Respondent

Mr. Rupesh A. Zade, Advocate for the Applicant.
Mr. Ajay Patil, APP for the Respondent-State.

CORAM : SARANG V. KOTWAL, J.

DATE : 26th FEBRUARY, 2021

P.C. :

1. Heard Shri Rupesh Zade, learned Counsel for the Applicant and Shri Ajay Patil, learned A.PP for the State.
2. This is an application for quashing and setting aside the order dated 23.12.2020 passed by the learned Extra Jt. Additional Sessions Judge, Pune below Exhibit-48 in Special Case No.469/2019 pending on his file. By the impugned order, the learned Judge had cancelled the bail granted to the Applicant by his own previous order.

3. Before adverting to various orders which are relevant for the purpose of deciding this case, it is necessary to refer to the basic facts in this case.

4. This case pertains to the investigation into C.R. No.290/2018 registered with Chandan Nagar Police Station, Pune City under Section 376 of the Indian Penal Code and under Sections 3, 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012. Subsequently, the investigation was transferred to Koregaon Park police station, Pune and they registered their own C.R. No.194/2018 on 7.11.2018 under the same Sections.

5. The FIR is lodged by the victim herself. At the time of lodging of the FIR, she was 18 years and 5 months of age. She had stated in her FIR that she got acquainted with one Sonu Tapkir when she was studying in 12th standard. She developed love affair with him. On 15.3.2018, after her examination she, her friend Swati, Swati's friend and Sonu Tapkir went to Koregaon Park in Sonu Tapkir's car. Swati and her friend got down from the car. The informant was left

alone in the car. It is mentioned in the FIR that he established forcible physical relations with her in the car itself. Even thereafter the incident was repeated on two more occasions. On 5.11.2018, she had pains in her stomach and, therefore, she was taken to hospital. There the Doctor told her mother that the victim was eight months' pregnant. She delivered her baby on 6.11.2018. After that her FIR was registered. She was a minor on the date of the incident.

. Subsequently, on 9.11.2018 her supplementary statement was recorded. In that statement, she explained that after she delivered the baby, a police officer came there. Her mother showed reluctance to make complaint. The police officer then suggested that she should give the FIR as suggested by him. He concocted a story and accordingly she gave same story in the FIR. After that the officers of Koregaon Park police station took up the investigation. They took her in confidence and because of their help, she narrated the true story. This time, she told the police, which was recorded by way of a supplementary, that in March, 2018 the informant

and two other friends had met at her friend's house and then they had gone to the house of one Vaibhav Ubale. For some reasons her friend left her and the informant was alone in the flat. Within a short time, Vaibhav Ubale's two friends came. The Applicant was one of them. She was forced to drink a spiked cold drink and thereafter Vaibhav Ubale, the present Applicant and one more person committed rape on her one after the other. That caused her pregnancy. Thereafter, the Applicant was arrested. The investigation is carried out.

6. At the first instance, the learned Special Judge under POCSO Act vide order dated 13.3.2020 rejected the Applicant's bail application. At that time, the specific ground was also argued on behalf of the Applicant that the DNA report showed that the Applicant was not the biological father of the baby of the victim. The learned Judge considering all the circumstances had rejected the Applicant's bail application.

7. Thereafter the Applicant again preferred another bail application before the Extra Joint Assistant Sessions

Judge, Pune vide Exhibit-17 in Special Case No.469/2019. It was specifically contended by the Applicant that at the time of decision of first bail application the DNA reports were not received by the Court. At the time of decision of second bail application, the DNA reports were received and it was found that the Applicant was not biological father of the child born to the victim. That was the change of circumstance. Specifically on that ground the second bail application was preferred by the Applicant and on that ground itself, the learned Judge granted bail to the Applicant vide his order dated 17.10.2020.

8. In the meantime, this Court (Coram : Bharati Dangre, J.) vide order dated 24.7.2020 passed in LD/VC/DIST/BA No.34/2020 rejected the co-accused Vaibhav Ubale's bail application. In that order also specifically the DNA report was considered. In that case also the DNA report did not show that the co-accused Vaibhav Ubale was the biological father of the child. This order was also not brought to the notice of the learned Sessions Judge when the bail was

granted to the Applicant. More importantly the prosecution through A.P.P. assisted by the investigating officer did not bring this fact to the notice of the Sessions Judge.

9. Subsequently, even after rejection of bail by this Court, the co-accused Vaibhav Ubale chose to approach the Sessions Court for his release on bail by preferring application vide Exhibit-20 in Special Case No.469/2020. The Application was heard by the same learned Judge, who had granted bail to the present Applicant on 17.10.2020. This time, the learned Judge realized that the Applicant had suppressed that on the first occasion the DNA report was considered by the Court and the Court had rejected his bail application. The learned Judge also found fault with the Applicant for not pointing out the order of rejection of bail passed by this Court in the case of the co-accused Vaibhav Ubale. The learned Judge, therefore, not only rejected the co-accused Vaibhav Ubale's application for bail but gave liberty to the A.P.P. to prefer application for cancellation of bail granted to the applicant. The learned Judge himself then heard that

application for cancellation of bail. Same learned Judge vide his order dated 23.12.2020 then cancelled the bail granted to the present Applicant. This order is under challenge in this application before this Court today.

10. Shri Zade submitted that it was not duty of the Applicant to point out the order passed in the case of the co-accused. The Applicant may not be even aware of the orders passed in the case of the co-accused and, therefore, this should not be a ground for cancellation of his bail. He further submitted that the prosecutrix had improved her version and, therefore, her supplementary statement was not reliable and the Applicant deserves to be released on bail.

11. Shri Zade relied on the judgment of Hon'ble Supreme Court in the case of **Kashmira Singh Vs. Duman Singh**, reported in (1996) 4 SCC 693 to contend that it was the prosecution's duty to bring to the Court's notice the fact of rejection of the bail to the co-accused and the accused could not be held responsible and the bail could not be cancelled on that ground.

12. Learned A.P.P., on the other hand, fairly accepted that it was the duty of the prosecution and the investigating officer should have brought this fact to the notice of the Court that the co-accused was denied bail by this Court whose case stood in the same footing as that of the present Applicant. He, however, supported the impugned order passed by learned Judge in cancelling the bail granted to the present Applicant.

13. I have considered these submissions. It is quite obvious that the Applicant on the second occasion had got bail by suppression of material facts from the Court. On the very first occasion, the Court while rejecting his bail application had taken into consideration the DNA report. In spite of that on the second occasion the Applicant approached the Court purportedly in the changed circumstances of having received DNA report after rejection of his bail application. This clearly was a wrong statement and definitely was a misleading statement. The prosecution also did not take care to point this out to the learned Judge when bail was granted to the present Applicant.

14. In the meantime, this Court had considered similar case of the co-accused Vaibhav Ubale in this very case and thereafter had rejected his bail application. The learned Judge realised that the applicant had suppressed material facts when the co-accused preferred application for bail claiming parity with the present Applicant. On that occasion, the learned Judge gave liberty to A.P.P. to take necessary action against the Applicant for cancellation of bail. Pursuant to it, the Application for cancellation of bail was filed and ultimately it was cancelled.

15. The judgment in the case of **Kashmira Singh** (supra) relied on by Shri Zade does not help the Applicant. It may not be his duty to point out to the Court about the order passed in the case of co-accused as there is a possibility that the Applicant may not be even aware of such order. But the Applicant's conduct in this very case shows that he had also suppressed material fact regarding DNA report from the Court. Even otherwise, on merits, the prosecutrix had explained the manner in which the offence was committed

and the circumstances in which she had to give a false story in her FIR. Therefore, looking at the case from every angle, the Applicant does not deserve to be released on bail. There is nothing wrong in the impugned order and, therefore, this Application challenging the impugned order is rejected. The Applicant at present is on bail pursuant to the earlier order passed by the Sessions Court. He shall forthwith surrender before the jail authorities. If he does not surrender, the police shall take immediate action in accordance with law to arrest him. The Application is rejected.

16. However, considering that the Applicant has abused the process of law and suppressed the material facts from the Court, a cost of Rs.25,000/- (Rupees Twenty Five Thousand Only) is imposed on the Applicant, which shall be deposited by him in the trial Court on or before 31.3.2021. If the Applicant fails to deposit the cost in the trial Court, as directed, the trial Court shall take steps to recover such amount in accordance with law and rules.

17. At this stage, learned Counsel for the Applicant

prays for stay of this order. The prayer is rejected considering the conduct of the Applicant in suppressing the material facts from the Court.

(SARANG V. KOTWAL, J.)

Deshmane (PS)