

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

BAIL APPLICATION NO.3426 OF 2019

Adil Ali Khan @ Kashmiri

.. Applicant

Versus

State of Maharashtra and Anr.

.. Respondents

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Ms.Falguni Bhrahmbhatt, Advocate for the Applicant.

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

Mr.Aashish Satpute, Advocate for Respondent No.2.

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CORAM : PRAKASH D. NAIK, J.

DATED : JULY 19, 2021.

P.C. :

This is an application for bail in connection with C.R.No.299 of 2018, registered with Mira Road Police Station, for the offences punishable under Sections 328 and 376 read with 34 of Indian Penal Code (“IPC”, for short) and Sections 4 and 6 of the Protection of Children from Sexual Offences Act (“POCSO Act”, for short). The applicant was arrested on 17th December, 2018.

2 First Information Report (“FIR”, for short), was lodged on 30th August, 2018, by the father of victim against one

unknown person. It is alleged that, the victim is daughter of the complainant. She was aged about 13 years and 9 months. The wife of the complainant informed him that there is change in behaviour of the victim. She returns home late in the night and give evasive answers. She suspected that the victim is addicted to drug. The victim was taken to doctor for psychiatric treatment. It was noticed that she was addicted to drug. Treatment was being given to her. She was not in sound state of mind. She disclosed that about one year ago she got addicted to drug through one boy who was known to her. She was subjected to sexual assault while she was under intoxication. The incident had occurred in the area of Mira Road. She could not disclose the name of the boy who got her addicted to drugs and subjected her to sexual assault. The victim was admitted in hospital for treatment. On the basis of information received by the complainant, FIR was lodged against unknown person.

3 During the course of investigation accused were arrested. The applicant was arrested on 17th December, 2018. Ajit Pathak and Adil Javed Shaikh were arrested on 8th December, 2018.

4 The accused Adil Javed Shaikh preferred application for bail before this Court, which was allowed vide order dated 16th November, 2019. While granting bail to the said accused, it was observed that the FIR came to be lodged a year after the incident. In the FIR or in the statement, the presence of the said accused was not admitted. Test identification parade was not conducted by the police. The prosecution has not taken pains to identify who are the 3 to 4 persons.

5 The applicant preferred an application for bail before the Court of Sessions which was rejected by order dated 5th November, 2019.

6 Learned advocate for the applicant submitted that the applicant has been falsely implicated in this case. No overtact is attributed to the applicant. There is inordinate delay in lodging the FIR. The statement of the victim refers to only one unknown person. During the course of investigation, several persons were arrested. The alleged incident had occurred on 15th October, 2017. FIR was lodged on 30th August, 2018. Statements of victim recorded on 23rd November, 2018 and 20th December, 2019, are contradictory to each other. The applicant is in custody for a

period of 2 and ½ years. There is no progress in trial. There are no criminal antecedents against the applicant.

7 Learned APP submitted that specific role has been attributed to the applicant. The victim was addicted to drug at the instance of one of the accused. All of them used to consume drug. All the accused had subjected the victim to sexual assault. At this stage, the version of victim and the other witnesses cannot be discarded.

8 Learned counsel for the complainant submitted that specific role has been given to all the accused including the applicant. The victim was a minor. She was subjected to sexual assault. She was addicted to drugs. While the victim was under the influence of drug, she was sexually assaulted by the accused. Video of the incident was recorded. The victim was threatened not to lodge complaint. Statement of the victim under Section 164 of Cr.P.C. involves the applicant. Statement under Section 161 of Cr.P.C. also show the involvement of the applicant. Section 29 of the POCSO Act with regards to the presumption has to be taken into consideration. He relied upon the decision of the Supreme Court in the case of ***State of Bihar Versus Rajballav Prasad alias Rajballav Pd.Yadav alias Rajballabh Yadav***¹.

1 AIR 2017 SCC 630

9 The FIR as stated above was lodged by the father of the victim girl. The victim was minor. According to the prosecution, she got acquainted with one of the accused. She was also friendly with all the accused persons. FIR was lodged on the basis of information provided by the victim to her father. There is reference of one person who had allegedly subjected the victim to sexual assault and induced her to take drugs. The statement of the victim was recorded under Section 161 of Cr.P.C. on 23rd November, 2018. On perusal of the said statement, it can be seen that no role is attributed to the applicant. There is no reference to any video while victim being subjected to sexual assault by all the accused being shown to her after the incident. The statement of the victim was also video recorded on 21st December, 2018. In the said statement, she has stated that from October 2015 to 2017, the co-accused arranged party and she has visited house of one of the accused. She was administered drug as a result of which she was unconscious, and, thereafter, when she regained consciousness, she found that she was without clothes. The co-accused then threatened her that they have recorded the video and the same would be uploaded on social media. The said statement is apparently contrary to the previous statement. No

specific role of sexual assault is attributed to the applicant. The statement of the victim was recorded under Section 164 of Cr.P.C. on 20th December, 2018. In the said statement, she has given a different version. It is stated that one of the girl who was also friend of the entire group was at the place of incident. Victim was injected with the drug, and, subsequently, she found that she was undressed. She also stated that a video recorded by the accused was shown to her wherein the act of sexual assault by all accused was recorded. In the previous statement recorded under Section 161 of Cr.P.C., there is no reference of such video being recorded, and, that it was being shown to her. There is no recovery of any video clip from the cell phone of the accused. It is also pertinent to note that panchanama with regards to identification by photographs of accused was recorded on 21st December, 2018. Prior to that the statements of the victim was recorded under Section 164 of Cr.P.C. on 20th December, 2018. Statement under Section 161 of Cr.P.C. was recorded on 23rd November, 2018. Statement of Samarin @ Najiya Shakil Shaikh was recorded on 14th December, 2018. She has not corroborated the version of the victim and she has also not corroborated the version of sexual assault. History was provided during the examination to the Doctor, in which there is no reference of the name of the

applicant. Considering these circumstances and the fact that the applicant is in custody for a period of 2 and ½ years, bail can be granted to the applicant.

:: ORDER ::

- (i) Bail Application No.3426 of 2019, is allowed;
- (ii) Applicant is directed to be released on bail in connection with C.R.No.299 of 2018, registered with Mira Road Police Station, on executing P.R. Bond in the sum of Rs.25,000/-, with one or more sureties in the like amount;
- (iii) Applicant shall report concerned police station once in three months on 1st Saturday of the month between 11:00 a.m. to 01:00 p.m., till further orders;
- (iv) Applicant shall not tamper with the evidence and he shall not approach the victim and shall not enter into vicinity of the place of residence of the victim;

- (v) 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) Bail Application No.3426 of 2019, stands disposed of accordingly.

(PRAKASH D. NAIK, J.)