

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION (BA) 555 OF 2021

(Shabbir Shaha Mehboob Shaha..vs..State, thr PSO, PS Ashti, Dist. Wardha)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.*

Court's or Judge's orders.

Mr. O.D. Kakade, counsel for applicant.
Mrs. K.R. Deshpande, APP for non-applicant /State.
Ms. Sneha Dhote, counsel (appointed) to assist victim.

CORAM: ROHIT B. DEO, J.

DATE: 27.09.2021.

Heard.

2. The applicant is seeking bail in connection with Crime 182/2020, registered with Police Station, Ashti, Dist. Wardha, for offences punishable under sections 323, 376(a), 376(b), 506 of Indian Penal Code ("IPC") and sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act").

3. It is the case of the prosecution that the alleged incident occurred 10 to 12 days prior to the lodging of report dated 10.12.2020.

4. The father of the 10 years old victim has alleged,

that at 10.00 p.m. on 9.12.2020, his wife disclosed that she was informed by a friend of the victim that the applicant is prone to indulge in unsavory acts and that 10 to 12 days prior to such disclosure, when the victim and her friend were playing in front of the house of the applicant, the friend was sent off and the applicant took the victim inside his house by holding her hand, and closed the door. Pursuant to such disclosure, the father of the victim inquired from her and she disclosed that she was taken by the applicant inside the house, slapped four or five times on the cheek, made to lie on the bed, her clothes were removed, the applicant undressed and then inserted his private organ in her genitalia. The victim disclosed that she was suffering from pain. The applicant allegedly threatened the victim should she disclose the incident.

5. The first submission of the learned counsel Mr. O.D. Kakade is that the medical evidence on record does not corroborate the version of the victim. The submission is noted only for rejection. The medical examination reveals tear to the hymen at 6'clock position.

The learned counsel Mr. O.D. Kakade would invite my attention to certain extracts placed on record which according to him are from Modi's Medical Jurisprudence. Ordinarily, I would not have even referred to the extracts. It is unfortunate that the High Court is required to remind the concerned that if an authoritative text is to be relied upon, the least which is required is that the text or commentary is relied upon and not an extract therefrom. The learned counsel is relying on another extract which according to him is from Medical Jurisprudence and Toxicology by Parikh.

6. It would be necessary to notice the statutory provisions, as they now stand. Section 3 of the POCSO Act defines penetrative sexual assault thus:

“3. Penetrative sexual assault. - A person is said to commit “penetrative sexual assault” if -

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other

person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body or the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

The emphasis is penetration of the penis, to any extent, into the vagina, mouth, urethra or anus of the child.

Section 375 of IPC which defines rape is amended by Act 13 of 2013 and the amended definition is in tune with the definition of penetrative sexual assault in section 3 of the POCSO Act. The absence of external injury, on which Mr. O.D. Kakade is placing heavy emphasis, is absolutely irrelevant in the context of the age of the victim, the improbability of any resistance being offered and the definition of penetrative sexual assault. I am refraining from making any further observation lest the accused is prejudiced in the trial.

7. Mr. O.D. Kakade would then submit that the only

evidence on record is the uncorroborated version of the victim. Again, the said submission is not consistent with the material available in the chargesheet. I have perused the statements recorded under section 164 of the Code of Criminal Procedure, 1973 ("Code"). The version of the child victim is confidence inspiring. Her version is more than amply corroborated by the statement of her friend, who is also aged 10 years, although she appears to have given a wrong timeline, that the applicant drove her away and took the victim inside his house and closed the door.

8. Considering the prima facie material on record and the nature of the accusation, I am not inclined to grant bail although it is vehemently argued that considering that the applicant is aged 70 years, he is entitled to be shown some indulgence.

9. In view of the age of the accused, it would be appropriate if the trial is expedited. In any event, the mandate of the POCSO Act is an expedited trial.

10. While I am not inclined to grant bail, I am reserving liberty with the accused to approach this Court again if there is no significant progress in the trial in the next four months.

11. The Application is rejected, subject to the liberty reserved.

12. Fees of the learned appointed counsel be quantified and paid in accordance with Rules.

Judge

Belkhede