

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

BAIL APPLICATION NO.233 OF 2022

SHOEB @ SURAJ LATIF SHAIKH
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

...
Advocate for Applicant : Mr. S. S. Thombre
APP for Respondent No.1 : Mr. S. B. Narwade
Advocate for Respondent No.2 : Ms. Harsha Lomate (*Appointed*)
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CORAM : S. G. MEHARE, J.

DATE : 22-06-2022

PER COURT :-

1. Heard the learned counsel for the applicant, the learned A.P.P. for the respondent No.1/State and the learned counsel for the respondent No.2/victim.

2. The victim was 15 years and 3 months old at the time of the incident. It has been alleged that the accused asked her to elope; accordingly, she eloped and went to various places with him. She eloped with the accused on 13th August 2021 and resided together till 28th August 2021.

3. The learned counsel for the applicant would submit that in her first statement before police recorded on 20.05.2021, she had not complained against the accused that he did sex with her

except pressing her breast. The learned counsel for the applicant referred to the medical examination report and would submit that she did not complain before the Medical Officer about any history of sexual intercourse and physical assault. He has also referred to page no. 27 of the medical report, which shows that the victim once again denied a history of sexual intercourse.

4. Learned counsel for the applicant argued that the prosecution has incorrectly applied Section 376 of the Indian Penal Code read with Section 3, 8 (21) of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). He has further advanced arguments that subsequent to her first statement and medical examination; she was in the custody of her parents; therefore, she has changed the version and alleged that they got married and the accused did forceful sexual intercourse with her. He also added that her supplementary statement and statement under Section 164 of the Code of Criminal Procedure ("Cr.P.C.") are inconsistent. The supplementary statement has no evidentiary value, and the statement under Section 164 of the Cr.P.C. is used for contradiction. There is a great possibility of tutoring the victim and pressurising her to depose against the applicant. The charge sheet is filed. The applicant has been behind bars since 03.09.2021. The applicant has no antecedents to his discredit. Hence, he may be released on bail. He is ready to abide by the conditions if imposed

by the Court.

5. Learned A.P.P. has vehemently argued that there is a strong evidence of sexual intercourse. The supplementary statement and statement under Section 164 of the Cr.P.C. of the victim shall be considered at this juncture, which is apparently against the accused. He has referred to page no. 93 and would submit that her hymen was ruptured and there was abrasion present on the fourchette. He has also referred to the statements of various witnesses to point out that the accused/applicant has taken the victim at various places. He has also relied on the lodging register. He would submit that the offence is serious. The victim is a minor. Hence, she needs to be protected from sexual assault. The applicant has no case to grant the bail.

6. Ms. Lomate, the learned counsel for the victim, has also argued that the victim was a minor and was kidnapped by the accused. Considering her age, the applicant is not entitled to bail. To buttress her arguments, she relied on the order dated 21.02.2022 passed by the Honourable Apex Court in the matter of ***X (Minor) Versus The State of Jharkhand and another, Criminal Appeal No. 263 of 2022 (arising out of S.L.P. (Cri) 9371 of 2021.*** The facts of that case were that the victim was 13 years old and the offence was under Section 376 of I.P.C. read with

Section 6 of the Protection of Children from Sexual Offences Act 2012, was applied. Considering the said facts, learned Apex Court set aside the order of the High Court granting bail.

7. While considering the bail application, the Court has to consider the material before it, the age of the victim and the nature and gravity of the offence. The Court has also to consider whether releasing the accused on bail may cause interference in the investigation. As far as interference by the accused is concerned, the prosecution has to show that the accused is so influential and powerful that he may interfere with the Investigating agency.

8. Be that as it may, the investigation is complete in this case, and the charge sheet is filed. The law is settled that the statement made first in time has more evidentiary value than the supplementary statement. In the first statement, the victim would state nothing adverse against the applicant except pressing her breast. They lived for a long period, but she made no complaint at any point. She was also referred to Medical Officer. She did not give a statement against the accused before the Medical Officer. The said statement has a bearing on the prosecution case. The medical report shows that she did not give any history of sexual intercourse and physical assault and denied the history of sexual

intercourse. However, the same report shows that the hymen of the victim was ruptured and abrasion present on the fourchette. Needless to state that there are many reasons for hymen rupture. The victim was the best witness to disclose the sexual intercourse forcibly done by the applicant. The apprehension raised by the learned for the applicant that she may be tutored and hence she has subsequently stated against the applicant/accused by way of supplementary statement and statement under Section 164 of the Cr.P.C. cannot be ruled out.

9. The prosecution has to prove the case during the trial. The prosecution has to satisfy the Court that the detention of the accused after filing the charge sheet is fruitful. The case law relied on by the learned counsel for respondent No.2/victim is on the different facts. The evidence collected by the Investigating Officer, as discussed above, shows that the victim had never complained of forceful sex, and there is no history of sexual intercourse. Merely rupturing the hymen would not be considered as strong adverse evidence against the accused at this juncture. Merely applying the provision of the POCSO Act is not the thumb rule that no bail should be granted. Nevertheless, if the fact permits and supports the case for the bail, the Court may exercise the discretion under Section 439 of the Cr.P.C.

10. After having gone through the material placed before this Court and the discussion made above, this Court is of the opinion that there shall be no harm to the prosecution if the applicant is released on bail.

11. Hence, the following order -

- i) Application is allowed.
- ii) The applicant Shoeb @ Suraj Latif Shaikh shall be released on bail on furnishing P.B. and S.B. of Rs.20,000/- with one solvent surety of the like amount, in C.R. No. I-279 of 2021 registered with Police Station Sonai, Taluka Newasa, District Ahmednagar, for the offence punishable under Sections 363, 366, 354, 109, 376(2)(1) of the Indian Penal Code and Sections 3(1)(w), (i)(ii), 3(2) (v-a) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, and Sections 3, 4, 8 and 21 of the Protection of Children from Sexual Offences Act, 2012; on the conditions that, he shall not contact the victim or any witnesses in any manner or mode. If he attempts to contact the victim or witnesses, the prosecution will be at liberty to file an application for cancellation of bail.

- iii) The applicant shall attend the trial court on each date of material hearing and co-operate with the trial before the Special Court.
- iv) Bail before the Special Court.
- v) Hamdust allowed.

12. Needless to state, the observations made in this order are restricted to the bail order, and the trial court should not be influenced by these observations while deciding the case on merit.

(S. G. MEHARE)
JUDGE

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