

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

ANTICIPATORY BAIL APPLICATION NO.287 OF 2022

ASIF ILAYAT KHAN PATHAN
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

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Advocate for Applicant : Mr. M. S. Kulkarni
APP for Respondents-State : Mr. V. M. Kagne
Advocate for Assist to APP : Mr. V. Y. Bhide h/f Mr. Shaikh Mazhar A.
Jahagirdar

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**WITH
CRIMINAL APPLICATION NO.939 OF 2022
IN ABA/287/2022**

ALTAFKHAN IMAMKHAN PATHAN
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

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Advocate for Applicant : Mr. Shaikh Mazhar A. Jahagirdar
APP for Respondents-State : Mr. V. M. Kagne
Advocate for Respondent No.2 : Mr. M. S. Kulkarni

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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving the Order :
21-03-2022**

**Date of Pronouncing the Order :
11-04-2022**

ORDER :

1. Criminal Application No.939 of 2022 has been filed for assist to learned APP. The said application is allowed and disposed of.

2. The applicant is apprehending his arrest in connection with Crime No.994 of 2021, registered with Newasa Police Station, District Ahmednagar, for the offence punishable under Section 67, 66-C, 67-A of Information Technology Act read with 292 of IPC.

3. Heard learned Advocate Mr. M. S. Kulkarni for applicant, learned APP Mr. V. M. Kagne for respondents-State well assisted by learned Advocate Mr. Mr. V. Y. Bhide h/f Mr. Shaikh Mazhar A. Jahagirdar for informant.

4. It has been vehemently submitted on behalf of the applicant that the applicant is innocent. The FIR was lodged by one Altafkhan Imamkhan Pathan against unknown person. In remand report dated 04-02-2022 it was disclosed to the learned Judicial Magistrate First Class, Newasa that one Nikhil Ravikiran Potdar is the accused who has been transpired from the investigation done till that date. Thereafter, in the remand report dated 07-02-2022 the present applicant was shown as accused No.6, by that time only accused No.1 and 2 were arrested. It was then stated that the present applicant had a political background so also the informant is having political background. In that case to settle the personal score under

the political rivalry, the applicant has been falsely implicated. What has been alleged is that the nephew of the informant had received some videos through What's App wherein the face of the informant was morphed and it was then made obscene. The informant states that it was made to defame him. According to the police, the same has been done by accused No.1 Nikhil Ravikiran Potdar, but then he has stated that it was done at the behest of the present applicant. The custodial interrogation is not necessary unless there is some concrete evidence to establish connection between accused No.1 and the present applicant. The applicant is ready to abide by the terms of the bail.

5. The learned Advocate for the applicant relied on the decision in *Pramod Anand Dhumal Vs. State of Maharashtra, reported in [2021 (3) Mh.L.J. (Cri.) 147]*, wherein it has been held that :-

"5. So far as Section 67 is concerned, before offence thereunder can be said to be complete, publication or transmission of material in the electronic form is essential. If such material; is lascivious or appeal to prurient interest or its effect is such as to tend or deprave or corrupt persons, who are likely, having regard to the all relevant circumstances, to read, see or hear the matter contend or embodied in it. Material in

the electronic form could be video files, audio files, text messages, animation, etc. Lascivious means lewd, lustful or feeling and or revealing an overt or offensive sexual desire or which tend to excite lust. As against this, before the offence can be said to be complete under Section 67-A of the IT Act, prosecution must demonstrate or show that accused has published or transmitted material containing sexually explicit act. Explicit means "clear and detail", with no room for confusion or doubt or when sexual activity is graphically described or represented electronically. When such act is electronically published or transmitted particularly amongst adult, it is punishable under Section 67-A of the IT Act. Expression Explicit means "Stated clearly and precisely and or prescribing or representing sexual activity in direct and detailed way". Expression "Sexual Activity" is defined in Black's Law Dictionary as "Physical sexual activity or both persons engaged in sexual relations".

It is then submitted that what has been alleged is that face of the informant has been encompass on half necked woman in the video. It cannot be said to be lascivious or appeal to prurient interest or its effect is such as to tend or deprave or corrupt persons. The ingredients of the offences are not made out against the present applicant, and therefore, he deserves to be released on bail.

6. The learned APP well assisted by learned Advocate Mr. V. Y. Bhide h/f Mr. Shaikh Mazhar A. Jahagirdar for the informant strongly opposes the application and submits that from the number from which the nephew of the informant had received those videos and with the help of Cyber Police Station it could be traced out that the mobile number is of Nikhil Ravikiran Potdar. He came to be arrested on 07-02-2022. In his statement he has submitted that the SIM Card which he used for creating those videos, was in the name of one Furkan Ansari and Pappu @ Tausif Gulam Dastgir. Accused Pappu @ Tausif was arrested and he had given names of four persons including that of present applicant. It is the prosecution story that the present applicant is the co-opted corporator and in the near future the elections of the Nagar Panchayat would be held in Newasa, and therefore, such kind of act appears to have been done. The custodial interrogation of the applicant is necessary because those videos got viral from Pune, and for the accused who was in Pune, who had supplied the mobile numbers of those persons who are residing in Newasa, is required to be revealed. The mobile used for the creation of the videos is required to be seized. It has been revealed that about 25 to 30 obscene videos have been prepared.

The applicant is the mastermind and at his behest everything has been got prepared. Statements of witnesses have been recorded who had received those videos and they have stated that they felt bad after watching the videos in which the face of the informant was used above the semi nude body of a lady.

7. The learned APP submitted that the photographs from the said videos are forming part of the police papers which do show that those photographs are attracting offence under Section 67-A of the Information Technology Act. Reliance has also been placed on the CDR in which it is stated that the present applicant was in contact with Nikhil Potdar. When there is prima facie case against the present applicant, he does not deserve to be released on anticipatory bail.

8. At the outset, it is to be noted that what material was forwarded, whether it amounts to lascivious or appeal to prurient interest or its effect is such as to tend or deprave or corrupt persons, would depend upon the circumstances and the evidence that is adduced. At this stage we are more concern with the with the material before the Investigating Officer to connect the present applicant with the crime. Basically the FIR was against unknown

persons. It was not even suspected by the informant that the applicant would be the person behind such act. There is absolutely no direct involvement of the mobile number of the applicant in this case. The mobile number from which the nephew of the informant received the videos, so also from the statements of the witnesses who have also stated that it is the same number from which they had received the alleged obscene videos, was in the name of accused No.1. There is statement of one witness by name Bhoopsingh Shrimangalsingh Rajput who has carrying out Tours and Travells Mobile Shoppe near Shani Temple in Budhwar Peth, Pune, that he knows Nikhil Potdar. He had sold the SIM Card of Airtel Company on 04-03-2021 to Nikhil Potdar and it is the same number which has been referred in the FIR. He has also produced the documents to show that the said SIM Card was issued to accused No.1. In order to connect the said chain with the present applicant at present except the statement of co-accused, that too before the police, which is not admissible under Section 25 of the Indian Evidence Act; there is nothing. It is to be noted that there is no discovery or recovery at the hands of accused No.1 Nikhil Potdar after he was arrested. Except two mobile phones and one PEN Drive, nothing has been seized. Therefore, how the police want to

connect the applicant with the crime, is a question. At the cost of repetition, it can be said that except statements there is nothing, which is inadmissible in nature. In order to attract the ingredients of offence punishable under Section 67 and 67-A of the Information Technology Act, as held in *Pramod Anand Dhumal (Supra)*, it is stated that Section 67 of the Information Technology Act refers to publishing or transmitting obscene material in electronic form whereas Section 67-A of the Information Technology Act refers to transmitting or publishing material containing sexually explicit act. When its connection with the applicant is not shown and which cannot be only on the basis of CDR, definitely the applicant is entitled to get protection under Section 438 of Cr.P.C., however, it would be with stringent conditions. Hence, following order.

ORDER

- 1) Application is hereby allowed.
- 2) In the event of the arrest of the applicant Asif Iliyat Khan Pathan, in connection with Crime No.994 of 2021, registered with Newasa Police Station, District Ahmednagar, for the offence punishable under Section 67, 66-C, 67-A of Information Technology Act read with 292 of IPC, he be released on P.R.Bond of Rs.50,000/-

with two solvent sureties of Rs.25,000/- each.

3) He shall not tamper with the evidence of the prosecution in any manner.

4) Applicant to produce the mobile phones as and when demanded by the Investigating officer.

5) He shall not indulge in similar activities.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.