

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

916 BAIL APPLICATION NO.1223 OF 2021

**BHAGWAT ADINATH WAKADE
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER**

...
Advocate for Applicant : Mr.Chatterji Joydeep
APP for Respondents-State : Mr.R.D.Sanap
Advocate for Respondent No. 2 : Mr. Dhanraj Ingole
...

CORAM : M. G. SEWLIKAR, J.

DATE : 11th MARCH, 2022.

PER COURT :

1. The applicant is the owner of Mauli hotel at village Bramhani, Tq. Rahuri.

2. The informant/victim aged 17 years filed F.I.R. alleging therein that her paternal aunt (her father's sister) (hereinafter referred to as "X" to avoid identification of the victim) called victim in her house. She was quarantined at Bramhani, Taluka Rahuri in Primary School, as she was suffering from Corona. She stayed there for 14 days. Thereafter, she was shifted to the Child Welfare Committee. She stayed there for two and half months. Thereafter, "X" came to take her back along with step maternal uncle of the victim who is (hereinafter referred to as "Y" in order to avoid

identification of the victim). On their application, she was given in the custody of “Y”.

3. It is further alleged in the FIR that “Y” expressed his desire to marry the victim. He tied “Mangalsutra” around her neck. During the period from 15th September, 2020 to 13th October, 2020 “Y” had penetrative sexual assault on her. He had clicked her nude photos.

4. On 19th October, 2020 at 11.00 p.m. “Y” took her to the Mauli Hotel. She was introduced to a man, who was the owner of the Mauli hotel. According to the prosecution, he is the applicant and he had penetrative sexual assault on her. On 20th October, 2020, at 11.00 p.m., again she was taken to Mauli hotel and she was again subjected to penetrative sexual assault. Two to three times she was subjected to penetrative sexual assault on 20th October, 2020 at 11.30 p.m. She was dropped at the house of “Y”. On these allegations FIR came to be lodged against the applicant “Y” and on the basis of which offence under Sections 376, 376 (2) (f), 376 (2) (n), 323, 504, 506, 107 of the Indian Penal Code , under Section 4, 5 (l), 5 (n), 6 and 8 of the Protection of Children from Sexual Offences Act registered with Police Station Rahuri, District Ahmednagar, vide Crime No. 1817 of 2020 came to be registered.

5. Learned counsel Mr. Chartarji, submits that the name of the applicant does not figure in the FIR. There is no record to show that the applicant is the owner of the said Mauli hotel. He further submits that the identification parade has not been held. Charge sheet does not indicate that the identification parade was held. The statement under Section 164 of the Code of Criminal Procedure (for short Cr.P.C.) of the victim has been recorded. In the statement under Section 164 of Cr.P.C. she does not mention the name of the hotel. He further submits that after filing of the charge-sheet, identification parade of the applicant seems to have been conducted. The applicant seems to have been identified by the victim. He submits that there is evidence to show that the applicant was first shown to the victim and thereafter identification parade was held. He submits that in the supplementary statement dated 22nd January, 2021 the victim has mentioned the name of the applicant as Bhagwan Wakade, being the owner of the Mauli Hotel. He submits that earlier at any point of time, the victim did not mention the name of the applicant. While recording supplementary statement for the first time she has mentioned the name of the applicant. He submits that this is clear indication that the applicant was first shown to the victim and thereafter the identification parade was held. Therefore, the identification parade loses its efficacy. He further submits that the victim while recording her medical history, has stated that she

was subjected to penetrative sexual assault by a single person from 15th September, 2020 to 19th October, 2020. He submits that she does not state that she was subjected to penetrative sexual assault by multiple persons. He submits that because of this inconsistent versions of victim, the applicant is entitled to be released on bail. He further submits that the applicant is a married man. He has three children. His parents are disabled. There is no one to take care of them. He further submits that the victim had filed an application before the Special Court mentioning therein that the applicant should not be released on bail, and if he is released on bail, he should not contact her. The application further mentions that she has filed application at the instance of her paternal aunt "X" and she had asked her to take the name of the applicant on the assurance that she would get her released from Children's home.

6. Mr.Chatarji, learned counsel for the applicant submits that the applicant is innocent.

7. Mr. Sanap, learned APP for the respondent-State and Mr. Ingole, learned counsel amicus curiae, for the victim submit that the victim is illiterate. The application before the learned Special Court shows that she has affixed her thumb impression. They further submit that the applicant committed rape on her in the Mauli Hotel.

Identification parade has been held after filing of the charge-sheet. In the identification parade the applicant has been identified by the victim. They submit that the lapses in investigation cannot enure to the benefit of the applicant especially at this prima-facie stage. They submit that probably the identification parade was delayed because of the on going pandemic situation on account Covid-19. They further submit that all the contentions raised by the applicant can be considered during trial and not at this stage.

8. I have considered the submissions of all the learned counsel. Admittedly, the applicant was 17 years of age at the time of the incident. From the FIR it appears that, her mother is not alive. Her father is a labour. Therefore, she was at the mercy of her paternal aunt "X" and step maternal uncle "Y". In the FIR, she has given the detailed account of the incident. "Y" being the maternal uncle ought to have been protective of her, but it seems that he took undue advantage of she being the motherless child. The FIR further shows that she was taken to Mauli Hotel. In the Mauli Hotel she was subjected to penetrative sexual assault. This act was repeated two to three times. In the statement under Section 164 of the Cr.P.C. she has reiterated that she was subjected to penetrative sexual assault by the hotel owner. It is true that she did not mention the name of the hotel, however, it is a matter to be considered during trial. In

identification parade, she identified the applicant to be the person who had subjected her to penetrative sexual assault. Whether the applicant was shown to her prior to the holding of the identification parade is a matter which can be considered during trial. It appears that the identification parade was held after filing of the charge-sheet. However, that cannot enure to the benefit of the applicant. These are the lapses in investigation. The investigating officer can explain during the trial as to why the identification parade was delayed. There is nothing on record to show that the paternal aunt "X" has any axe to grind against the applicant. The application purported to be filed by the victim, shows that she was asked by her paternal aunt "X" to take the name of the applicant. Again this is a matter that can be considered during trial. I say so because the application bears her thumb impression and it will be clear during trial, whether the contents of this application were explained to her in the language she understands. Having regard to the evidence collected by the prosecution, I am not inclined to release the applicant on bail.

9. Learned counsel Mr. Chatarji, submits that in criminal jurisprudence, the applicant is considered to be innocent till proven guilty. However, the Protection of Children from Sexual Offences Act is an exception to this principle. Section 30 of the POCSO Act, provides presumption of culpable mental state. It states that the

Special Court shall presume the existence of such mental states. In this view of the matter, I am not inclined to release the applicant on bail. Hence the following order is passed :

ORDER

- a. Application is dismissed.
- b. Fee of the amicus curiae is quantified at Rs. 5,000/-.

(M. G. SEWLIKAR, J.)

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