

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

BAIL APPLICATION NO.1366 OF 2021

Shankeshwar @ Shambhu s/o Bhausahab Dhakne ... Applicant
Versus
1. The State of Maharashtra
2. XYZ ... Respondents

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WITH

BAIL APPLICATION NO.1345 OF 2021

Sopan s/o Sarjerao Dhakne ... Applicant
Versus
1. The State of Maharashtra
2. XYZ ... Respondents

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Mr. S. S. Thombre, Advocate for the applicant in BA/1366/2021.
Mr. P. P. More, Advocate for applicant in BA/1345/2021.
Mr. N. T. Bhagat, APP for the respondent – State in both matters.
Ms. Shital E. Waghmare, Advocate for respondent No.2 in both matters.

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CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 21.12.2021

Pronounced on : 03.01.2022

ORDER :-

. The applicants are the accused persons, who have been arrested in connection with Crime No.281 of 2021 registered with Badnapur Police Station, Dist. Jalna for the offences punishable under Sections 376, 376(D), 341, 323 of Indian Penal Code and under Sections 4, 6, 8 and 12 of the Protection of Children from Sexual Offences Act (herein

after referred to as the “POCSO Act”).

2. Heard learned Advocate Mr. S. S. Thombre for the applicant in Bail Application No.1366 of 2021, learned Advocate Mr. P. P. More for the applicant in Bail Application No.1345 of 2021, learned APP Mr. N. T. Bhagat for the respondent – State in both matters and learned Advocate Ms. Shital E. Waghmare for respondent No.2 in both matters.

3. It has been submitted on behalf of the applicants that the applicants have been falsely implicated. The victim informant, who is stated to be 17 years old girl, states that she resides with her father, who is devotee in Mahadev Temple. She was proceeding at about 4.00 p.m. on 13.08.2021 on a scooter owned by one Baba near her house, at that time, she was stopped by both the applicants. She was dragged near *Mosambi* garden. After outraging her modesty, they had ravished her. Thereafter, she was allowed to go. It is, in fact, outcome of the actions taken by the present accused persons. Affidavits have been filed before the learned Additional Sessions Judge stating as to what the applicants have done and what the villagers had done with the Baba under whose influence the informant and her father was doing. Said Baba along with some other disciples were given shelter in the temple premises itself about 9 to 10 years prior to the incident. It was assured by him and his

disciples that they would carry the Pooja and other activities in the temple. All was going on well for about 2 to 3 years, but thereafter, misbehavior of the Baba and his disciples started. They used to consume *Ganja*, *Bhaang* and slowly they started collecting youth from the village for such activities. Even a Gramsabha was organised on 09.03.2021 and it was decided that said Baba and other disciples along with the victim should be asked to leave the temple premises. Thereafter, the said action carried forward and said Baba and others were asked by the Grampanchayat to leave the premises. The said resolution which was passed in the Gramsabha was seconded by one of the accused. The photocopy of the proceeding book and complaint that was given to the police patil about the illegal activities those were carried out by said Baba in the temple premises has been attached.

4. It was also submitted on behalf of the applicants that the investigation is over and charge-sheet is filed on 21.09.2021. The further physical custody of the applicants is not required. The entire charge-sheet does not show the birth date evidence, though in the FIR she has given her birth date. Under such circumstance, the provisions of POCSO Act are not applicable *prima facie*. As regards the medical opinion is concerned, there were absolutely no signs on the body of the girl which would indicate that the act was forcible. The final opinion can be given

after the receipt of CA report, since the girl was aged below 20 at that time. Though the medical papers say that the age of the girl is 17 years 9 months, yet on 06.09.2021, a reminder was given by the investigating officer to the medical officer for his opinion in view of the fact that the X-ray report gives her age between 17 to 19 years. Therefore, with this kind of evidence, the applicants need not be asked to remain in jail. They are ready to abide by the terms of the bail.

5. Per contra, the learned APP as well as the learned Advocate for respondent No.2 vehemently submitted that there is ample evidence collected against the applicants. The act done by the applicants is heinous. The victim had given her date of birth in her FIR itself and that was sufficient, though at this stage the radiological age of the girl is stated to be between 17 to 19 years, yet the date of birth can be proved at the time of trial. Further, the learned Advocate for respondent No.2 has filed a photocopy of Aadhar card of victim, which is now marked as Exhibit- 'X' showing the same date of birth as stated by her in the FIR. The girl, in categorical terms, has stated that she has been ravished by both the applicants and supported by her own statement on oath under Section 164 of the Code of Criminal Procedure. Case is not made out to release the applicants on bail.

6. In the FIR, though the victim – informant had given her age and the date of birth, the investigating officer has not collected any documentary proof. She could have produced her Aadhar card before the investigating officer also. It was tried to be contended that the father of the girl used to go from one place to another and, therefore, there is no record of her birth with any municipal authorities. The father of the girl stays with the Baba along with the girl's brother. In her first information report, she says that she was ravished on the same day of FIR. She had disclosed the said fact to one Sanjay Rathod. It is to be noted that when the name of Sanjay Rathod could be revealed by her on 13.08.2021, the statement of that person has been recorded on 17.08.2021. The distance between the place of offence and Laxman Nagar Tanda where this witness stays is not on record right now, but then he says that he was knowing the victim since prior to the incident. If we consider the medical evidence, it states that the hymen was ruptured, however, it is also stated that she was menstruating at that time. The medical officer could not find any injury to geneteria, however, there was some tenderness on the chest. It is then stated that the medical officer cannot exclude the possibility of sexual assault, yet the final opinion appears to have been reserved till the CA report. The CA reports have not been produced along with the charge-sheet. Since

the charge-sheet has been filed, the physical custody of the applicants is not required for the purpose of investigation.

7. Though the defence of the applicants appear to be the fact that they had taken active part in holding of Gramsabha and a resolution has been passed by the Grampanchayat that the priest in the temple who is stated to be the Baba with whom the father of the girl is residing consumed narcotic drugs and he is driving certain persons to the addiction and, therefore, he should be asked to leave the temple premises. Such complaint was made to the police officer also on 11.03.2021. The affidavits filed by various persons in support of the applicants giving history as to what prompted them to have the Gramsabha and take the decision that the said Baba and his disciples should be removed from that place. This aspect will have to be noted.

8. Now the investigation is over. Charge-sheet is also filed. Taking into consideration the evidence that has been collected, this would be the fit case to release the applicants on bail, however, with stringent conditions.

9. Before parting, a fact which has come on record through the respondent No.2 is worth noting and disturbing. Photocopy of the document styled as 'Danpatra' on stamp paper of Rs.100/- executed on

29.08.2018 between the father of the girl and the Baba has been produced. It is stated that the father of the girl has given his daughter in donation (*Daan*) to the Baba and it is stated that the said *Kanyadan* has been made in presence of the god. When the girl as per her own statement is minor, then why the father who is in all respect guardian of the girl should give the girl as *Daan* ? **A girl is not a property which can be given in donation.** In view of this disturbing fact, this Court had given directions to the respondent No.2 to file an affidavit about the incident. On 20.12.2021, a statement was made by the learned Advocate for the respondent No.2 that though this Court by order dated 08.12.2021 had asked the father of the victim to file the affidavit, he had not contacted her for drafting the affidavit, but he informed the learned Advocate that he is unwell and he is admitted to hospital in Jalna. This Court then asked the learned APP to collect the information as to whether the information given to the Court is correct either through the investigating officer or any responsible officer of the rank of Deputy Superintendent of Police. The report was given by the investigating officer that in view of the order, when he went to the place of the victim, he could find the victim and her father as well as the Baba in the temple. Thus, a misguiding statement was made before the Court. However, affidavit has been filed before this Court on 21.10.2021.

Perusal of the said affidavit would show that it is filed by Baba and not by respondent No.2 i.e. the father of the girl, because the charge-sheet gives different name of father of the girl. In view of Section 228(A) of the Indian Penal Code, which prohibits disclosure of identity of the victim of the offences, this Court is constrained not to disclose not only the victim's name, but also the name of her parents. But certainly the affidavit that has been filed appears to be by the Baba, who is not the father of the victim. However, if it is filed by the father of the victim whose name has been given in the charge-sheet, then it can be seen that he was aged 91 years on the date of affidavit. He says that he is the father of the girl. The mother of the girl had expired long back and then he had given his daughter in adoption to Baba on 29.08.2018. Interestingly, the name of the person to whom the daughter has been given in adoption is the same to that of the person who has filed the affidavit i.e. affiant. The learned Advocate for the respondent No.2 has not even taken care while drafting the affidavit that it should be in the proper name. The affiant, therefore, further states that proper adoption deed has not been executed and the adoption process will be followed. He says that the girl is residing with him as on today. In fact, when the opportunity was given to explain all the circumstances, he has not stated as to what prompted him to give the girl in adoption. It was even orally

asked to the learned Advocate for the respondent No.2 as to under which provisions of law, the said adoption has been done. She tried to contend that it is as per the Hindu Adoption and Maintenance Act. But, taking into consideration the fact that the said act gives eligibility criteria, whether this could have been done is a question and if it was adoption, then why the document styled as “*Danpatra*” has been executed. There is no explanation for the same in the affidavit. This Court is concerned with the future of the minor girl and in view of such document coming forward, can’t shut the eyes. This drives the Court to consider the definition of the words child in need of care and protection as defined in Section 2(14) of the Juvenile Justice (Care and Protection of Children) Act. Further, this Court considers the provisions of Section 29 of the said Act which gives powers to the Child Welfare Committee. Section 29 of the said Act runs thus :-

“29. Powers of Committee :- (1)The Committee has powers to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection.”

Further, Section 30 of the said Act deals with the functions and responsibilities of the Child Welfare Committee. The relevant functions and responsibilities of Section 30 of the said Act reads thus :-

“(ii) conducting inquiry on all issues relating to and affecting the safety and well-being of the children under this Act;

.....

(iv) conducting inquiry for declaring fit persons for care of children in need of care and protection;”

10. Therefore, under these circumstances, this would be the fit case where the directions need to be given to Child Welfare Committee, Jalna to hold inquiry on expeditious basis in respect of the girl and to find out whether she is a fit person to be declared as a child in need of care and protection. At the cost of repetition, it can be said that in view of the actions taken by the father of the girl in executing “*Danpatra*”, this Court is required to interfere. This is in view of the future of the girl and she should not be driven to do any illegal activities. With these observations, following order is passed :-

ORDER

I) Bail Applications stand allowed.

II) The applicant – Shankeshwar @ Shambhu s/o Bhausahab Dhakne in Bail Application No.1366 of 2021, applicant – Sopan Sarjerao Dhakne in Bail Application No.1345 of 2021, who have been arrested in connection with Crime No.281 of 2021 registered with Badnapur Police Station, Dist. Jalna for the offences punishable under Sections 376, 376(D), 341, 323 of Indian Penal

Code and under Sections 4, 6, 8 and 12 of the POCSO Act, be released on P. R. Bond of Rs.50,000/- with two solvent sureties of Rs.25,000/- each.

III) The applicants shall not tamper with the evidence of the prosecution.

IV) They shall not indulge in any criminal Activity

V) Bail before the Trial Court.

VI) The Child Welfare Committee, Jalna is directed to hold an inquiry on expeditious basis in respect of the girl i.e. victim/informant and to consider whether the girl/child is fit to be declared as child in need of care and protection. The investigating officer is directed to make available the copy of the charge-sheet to the Child Welfare Committee. Further, the Registrar (Judicial) is directed to supply copy of the impugned "*Danpatra*" and also the affidavit filed on 21.10.2021 to Child Welfare Committee. Entire act be done within a period of one week.

VII) The Child Welfare Committee to hold the inquiry and give report to this Court on or before 20.01.2022.

VIII) Place the matters for further consideration along with the report on 21.01.2022.

[SMT. VIBHA KANKANWADI, J.]

scm