

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
BAIL APPLICATION NO.3469 OF 2021**

Mahesh @ Sonu Shivaji Parse ... Applicant  
versus  
State of Maharashtra & Anr. ... Respondents

Mr. Anil S. Shitole, for Applicant.  
Mr. Y.Y.Dabake, APP, for State.  
Mr. Alibas Delhiwala, appointed Advocate for Respondent No.2.

**CORAM: N.J.JAMADAR, J.  
DATE : 24<sup>th</sup> JUNE, 2022**

**P.C.**

1. This is an Application to enlarge the Applicant on bail.
2. The Applicant is arraigned for the offences punishable under Section 376 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 ('the POCSO Act').
3. The indictment against the Applicant is that on 11<sup>th</sup> October, 2020, the Applicant had enticed away a 15 year old daughter of the first informant – Respondent No.2 on the promise of paying her a sum of Rs.100/- and made her to pillion ride his two wheeler, took her to the forest area in Wadgaon Sheri and had forcible sexual intercourse. Thereafter, the Applicant brought back the victim at Yerawada market area. The victim allegedly narrated the aforesaid incident to the first informant as, on the day of occurrence a neighbour of the first informant had informed the first informant that he had seen the victim proceeding towards the Agakhan Palace Road

along with a person on a motorcycle. Thus, the first informant inquired with the victim as to where she had been on that day. The victim was scared. She did not disclose anything. On the next day, the first informant tried to boost the morale of the victim and, thereupon, she narrated the aforesaid incident.

4. The first informant lodged FIR. The statement of the victim came to be recorded on 12<sup>th</sup> October, 2020. In the said statement, the victim named the Applicant as the person who had enticed her away. The victim stated that the Applicant took her to a shop at Wadgaon Sheri and had her carnal knowledge. The Applicant paid a sum of Rs.500/- and instructed her not to disclose the incident to anybody. On the following Sunday, the Applicant again took the victim to the said shop. Applicant's friend, the co-accused was present thereat. The co-accused had intercourse with her. The Applicant again paid Rs.500/- to the victim. She further claimed that as the first informant got enraged and scolded for being out of home, she did not disclose the true facts and stated that an unknown boy had taken her to Wadgaon Sheri and exploited her.

5. The medico legal examination of the victim revealed that the victim was subjected to sexual intercourse.

6. The learned Counsel for the Applicant submitted that the prosecution case bristles with inconsistencies. The victim had narrated different versions at different points of time. The inconsistencies in the version of the victim render the

prosecution version unworthy of credence. Though the victim was a minor, yet the fact remains that the victim had sufficient maturity of understanding to know the consequences of the act which was voluntarily indulging in.

7. The learned Counsel for the Applicant further submitted that these factors persuaded this Court in releasing the co-accused on bail in Bail Application No.51 of 2020. Laying emphasis on the fact that the victim had not disclosed the name of the Applicant either to her mother or to the medical officer when the victim was examined on 12<sup>th</sup> October, 2020, Mr. Shitole, learned Advocate for the Applicant, strenuously urged that there is no credible material to establish, prima facie, the identity of the Applicant as the person who had allegedly enticed away the victim. Thus, the Applicant also deserves to be enlarged on bail.

8. The learned APP, on the other hand, submitted that the submission on behalf of the Applicant that the victim had sufficient maturity of understanding and therefore, the act assumed consensual character, does not merit acceptance. Since the victim was barely 15 year old, the consent of the victim is wholly immaterial.

9. Mr. Delhiwala, the learned Advocate appointed to espouse the case of Respondent No.2, would urge that the allegations against the Applicant are required to be appreciated in the backdrop of two poignant factors. First, the strata of the society the victim comes from. Second, the conduct of the Applicant in inviting his friend to ravish the victim. The learned Advocate for the Respondent No.2 further submitted

that the failure to disclose the name of the Applicant, in the backdrop of the adverse social and financial situation in life, does not detract materially from the prosecution.

10. The version of the victim varies as regards the place where the victim was allegedly ravished in the first instance. In the FIR, the Respondent No.2 claimed that the victim was ravished in a forest area at Wadgaon Sheri. In her statement, the victim claimed that the Applicant took her to a shop at Wadgaon Sheri and deflowered her. Secondly, the first informant claimed that the victim told her that the Applicant promised to pay Rs.100/- and enticed her away. In contrast, in her statement, the victim claimed that the Applicant paid Rs.500/- to her. Thirdly, the victim reported to the first informant that she was exploited by an unknown person. In her statement, however, the victim named the Applicant as well as a friend of the Applicant as the persons who exploited her.

11. Indeed, there are inconsistencies in the version of the victim as narrated to the first informant and in her statement recorded on 12<sup>th</sup> October, 2021. However, the fact remains that the victim had a cellphone number of the Applicant and that provided a basis for the identification of the Applicant.

12. The learned Advocate for the Applicant banked upon the history narrated by the victim before the Medical Officer, wherein also the victim claimed that an unknown person had offered to pay Rs.200/- and took her to a flat in Wadgaon Sheri and they had protected penetrative sexual intercourse.

13. This version of the victim before the Medical Officer, in a sense, lends support to her claim that she was enticed away and sexually exploited. Once it is conceded that the victim was 15 years of age and she was sexually exploited and there is a prima facie material to establish the identity of the Applicant as the person who exploited her, at this stage, the submission sought to be canvassed on behalf of the Applicant based on the maturity of understanding of the victim, does not deserve countenance.

14. A useful reference in this context can be made to the judgment of the Supreme Court in the case of Satish Kumar Jayantilal Dabgar Vs. State of Gujarat<sup>1</sup>, wherein in the context of the unamended clause 'sixthly' of Section 375 of IPC, the Supreme Court has observed as under :

"15. The legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act

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1 (2015) 7 SCC 359

is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstances.

16. Once we put the things in right perspective in the manner stated above, we have to treat it as a case where the appellant has committed rape of a minor girl which is regarded as a heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as a mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when we keep in mind the letter and spirit behind the Protection of Children from Sexual Offences Act, 2012.”

15. While releasing the co-accused on bail on 8<sup>th</sup> April, 2022, this Court had, inter alia, observed as under :

“6. I have perused the chargesheet. The evidence shows, the victim had opportunity on three occasions to disclose the name of the applicant; in first point of time to the mother; second to police when report was lodged and third, when she was examined by the Doctor. However, she disclosed the name of the applicant three days after the incident. It may be stated that, prima facie, evidence is not definite to accept the presence of applicant at the shop where victim was sexually assaulted. Infact there is no evidence to ascertain as to how and at whose instance applicant came to the spot i.e. the shop where the victim was sexually assaulted. Investigation has not been carried out from this angle. Be that as it may, the evidence suggests, assault was not forced upon the victim. I am conscious of the fact that consent of the victim is immaterial, she being a minor. However, at the material time, victim was 15 year and few months old. Yet the conduct of the victim definitely suggest that she possessed mental capacity to actively understand the nature of circumstances and consequences of act, she suffered. Thus, in consideration of the facts and attendant circumstances,

in my view, a case is made out for releasing the applicant on bail. Applicant is a 19 year old student with no criminal antecedents. The application is granted and hence the following order.....”

16. The aforesaid observations, in my considered view, do not enure for the benefit of the Applicant. On the contrary, I find substance in the submission of the learned counsel for the Respondent No.2 that the Applicant allegedly not only exploited the victim but also made her to suffer exploitation by his friend. This factor, coupled with the allegations that the victim was paid some amount after each episode of exploitation, add gravity to the offence as the victim was sought to be used and exploited as a commodity.

17. I am, therefore, not persuaded to exercise the discretion in favour of the Applicant. Hence the following order :

#### ORDER

(i) The Application stands rejected.

(ii) By way abundant caution, it is clarified that the observations hereinabove are confined to the consideration of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant.

**( N.J.JAMADAR,J. )**