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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO.34 OF 2022

Niranjan Alias Nilesh Balu Shinde ... Applicant

V/s.

The State of Maharashtra & Anr. ... Respondents

Mr. Shreyas P. Barsawade for the applicant.

Mrs. Veena Shinde, APP for respondent no.1/State.

Ms Megha Bajoria, Advocate appointed as Legal Aid
Counsel for the respondent no.2

CORAM : AMIT BORKAR, J.

DATED : JUNE 6, 2023

P.C.:

1. This application under section 439 of the Criminal Procedure Code in connection with C.R. No.83 of 2021 registered with respondent no.1/police station under Sections 363, 376(d), 307. 506(2) of the Indian Penal Code, 1860 Sections, 4, 5(G), 6, 16 of the Protection of Children from Sexual Offences Act, under Sections 3(25), 27 of the Indian Arms Act and Sections 37(1)(3) read with 135 of the Maharashtra Police Act, 1951 seeks pre-arrest bail.

2. The first information report bearing No.83 of 2021 was filed by respondent no.2/victim after 15 to 20 days after the alleged incident. According to the prosecution, on the date of the alleged incident, the victim and her friend went out for a walk in the vicinity of the local area, namely Janata VAsahat. At that time,

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accused no.5, at around 18.00 hours, approached the victim and her friend for the birthday party of accused no.1 organized at Warje SRA colony. The victim, along with her friend, joined the party. The applicant was already present there. After that, accused No. 1 asked the victim to proceed to the sixth floor with her friend. The victim's friend thereafter started feeling drowsy and, therefore, went to another room; however, the victim stayed back along with accused no.1. Around 20.00 hours, accused no.1 had sexual intercourse with the victim. Thereafter, the applicant and other co-accused established sexual intercourse with the victim.

3. Accused no.1 forced the victim to have sexual intercourse with another friend, but the victim wanted to leave the premises; therefore, applicant no.1 fired towards the victim by using a pistol owned by the co-accused. The bullet caused injury to the victim, but since the impact was on the mobile kept in her chest, she survived her life. Blood started coming from the injury. Her friend performed dressing on the injury. Accused no.1 threatened her with the firing of another bullet and forced her to stay with the accused persons till 12.00 noon on the next day.

4. The victim lodged the first information report on 28 March 2023. The applicant, therefore, applied to the learned Sessions Judge under Section 439 of the Criminal Procedure Code, 1973, which has been rejected. Aggrieved thereby, the applicant has filed a present bail application.

5. Learned advocate for the applicant submitted that the material on record shows that sexual intercourse with the victim

by the applicant and others was consensual in nature. She was in a relationship with accused No. 1. She did not resist sexual intercourse with the applicant. According to him, she had no source of income but was paying rent for her accommodation, reflecting her character. The statements of neighbours were not recorded. Though she is a minor, she was well aware of the acts performed by her. Therefore, the prima facie ingredients of the offence alleged against the applicant are not supported by the material on record. In support of his submissions, he relied on judgments of a learned Single Judge of the Rajasthan High Court in **Jogi Dan & Ors. v. State of Rajasthan** reported in 2004 Cri. L.J. 1726 and another judgment of a learned Single Judge of the Allahabad High Court in **Criminal Misc. Bail Application NO.32824 of 2020 (Chandran Kumar v. State of U.P.)** was decided on 16th February 2023.

6. Per contra, learned APP and learned Advocate for the victim submitted that the material on record indicates an active role played by the applicant. The offence alleged against the applicant is serious in nature. The medical certificate produced on record shows injury from the bullet. It also discloses vaginal penetration. There is no serious dispute about the age of the victim.

7. Before considering the gravity of the offence under Section 376(d), the purpose and intent of Section 376(d) introduced by the Criminal Second Amendment of 1983 must be considered. The minimum sentence is ten years, and the maximum is life imprisonment. Material on record prima facie establishes the firing of the pistol and resultant injury, which, along with the nature of

the act allegedly committed by the applicant and other co-accused, justifies delay in registration of the first information report. The material on record indicates that she was 14 years and 4 months on the date of the incident. Considering the trauma of such a minor girl, a delay in filing the first information report would not be fatal to the prosecution's case at this stage.

8. The applicant was arrested on 28 March 2021. The investigation is complete. Charge-sheet is filed. Though the investigation is complete, said factor by itself does not entitle the accused for release on bail as apart from custodial interrogation, the gravity of the offence and impact on the society are also relevant factors which the Court while considering an application under Section 439, was enjoined to be considered.

9. The material on record in the form of statements of the victim and her friend, a statement recorded by the Magistrate under Section 164 prima facie, indicates the active role of the applicant. The nature of the offence alleged against the applicant and others is gang rape, which is a heinous crime having an effect on society. The medical certificate prima facie supports the prosecution's case to the extent of injury by pistol and vaginal penetration.

10. Prima facie considering the material on record, at this stage, the applicant is not entitled to be released on bail based on the sole factor of delay in lodging the first information report. At this stage, it needs to be stated that the victim's age on the date of the incident was 14 years and 4 months. Non-recording of neighbours'

statements does not conclusively establish the victim's consent. Considering the victim's age, the victim's consent, if any, is insignificant.

11. In so far as the judgment relied upon by the applicant in the case of **Chetan Kumar v. State of U.P.** (supra) is concerned, no legal proposition of law has been laid down which constitutes a binding precedent. It is well settled that in bail matters unless a question on the principle of law arises for determination, specific submissions are advanced and adjudicated upon. A clear proposition of law is laid down; the general observations made in bail application do not constitute any binding precedent.

12. The nature of inquiry under Section 439 is generally summary in nature and, therefore, only if legal submissions are advanced and conclusively laid down by the Constitutional Courts, mere observations in the facts of the case, particularly in bail matters, do not constitute binding precedent.

13. The judgment in the case of **Jogi Dan v. State of Rajasthan** (supra) arises out of conviction which has less significance in adjudicating the bail application, essentially based on a prima facie view of the matter.

14. In the facts of the case, the material on record at this stage is sufficient to indicate the active role attributed to the applicant, which is supported by the medical certificate and the statement of the victim along with her friend. While deciding an application under Section 439, apart from the liberty of the accused, the victim's rights need to be balanced. The nature of allegations

against the applicant and others being heinous in nature, this Court declines to invoke the power under Section 439 of the Criminal Procedure Code, 1973.

15. The bail application stands rejected. No costs.

16. It is made clear that the observations made above are only for the purpose of adjudication of the present bail application, and the Trial Court shall not be influenced by the observations made and shall decide the trial uninfluenced by the observations made in this order.

17. Considering the fact that the applicant was arrested on 28 March 2021, the Trial Court shall endeavour to decide the trial as expeditiously as possible.

(AMIT BORKAR, J.)