

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (BA) NO.262 OF 2023

Akshay s/o Chanduji Thool

Vs.

State of Maharashtra

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.

Court's or Judge's orders.

Shri S.V. Sirpurkar, Advocate for applicant.
Shri M.J. Khan, APP for non-applicant no.1/State.
Ms Sonali Saware-Gadhawe, Advocate appointed for non-
applicant no.2.

CORAM : ANIL L. PANSARE, J.

DATE : MAY 3, 2023.

This is an application under Section 439 of the Code of Criminal Procedure (Code).

2. The applicant has been arrested on 26.10.2022 in Crime No.1091/2022 registered with Police Station, Hinganghat, District Wardha for the offence punishable under Section 376(1), 376C and 354D of the Indian Penal Code (for short, 'IPC') and under Sections 4 and 6 of the Protection of Children from Sexual Offences Act.

3. The case of the prosecution, in short, is that on 21.10.2022 the victim, who is 17 years old, left the house to celebrate her birthday. The parents of the victim had gone to attend their work. When they returned back at 6 pm, they did not find the victim at home and therefore the mother of the victim took search of the victim but she could not find her. The

mother of the victim then heard voice of the victim and therefore she came out of the house. She saw her daughter with a boy and a girl with a motorcycle. She enquired with the victim as to where she had been, to which victim stated the name of girl as Ritu Raut and name of boy as Mayur. Thereafter, Ritu and Mayur left the place. The mother and the victim came in the house. On enquiry by the mother, the victim stated that she had been to celebrate her birthday. Ritu, Mayur and Akash cut the cake and thereafter Akash took her on moped to kaccha room and committed forcible intercourse. Akash left her at Nandgaon square, from there Ritu and Mayur brought her back. Thereupon, the mother lodged FIR.

4. Learned counsel for the applicant submits that the victim has subsequently modified this story and has implicated two more persons, which is unbelievable. He has invited my attention to the statement of victim recorded on 22.10.2022 i.e. immediately after next day. She states that on 21.10.2022, it was her birthday, she received phone call from her friend Ritu. Ritu asked her to come near Jobanputra Hospital. The victim reached the spot, however, no one was there. She was waiting for Ritu, at that time two persons namely Akash Verma and Sujit Gawande of the same locality came there on moped. Akash was riding the moped and Sujit was pillion rider. They forcibly make her sit on the moped in between Akash and Sujit. They took her to Mahakali Nagari. The third accused Akshay Thool was present there. He had brought liquor. Sujit and Akash have administered beer to the victim though she

opposed. The victim states that she consumed three to four sips but was conscious. They stayed at Mahakali Nagari till 3.00 pm. Thereafter, Akash and Sujit took her to kachha room at Nandgaon. Sujit waited outside to ensure that no one would come there. Akash committed forcible sexual intercourse. Thereafter, Akash and Sujit dropped her at Nandgaon. From there, Ritu Raut and Mayur brought the victim to her house. The victim told her mother about the incident.

5. This statement has been further modified on 25.10.2022 by the victim. She now states that on 21.10.2022 she left her house for celebrating her birthday. Ritu asked her to come near Jobanputra Hospital for purchasing cake. The victim reached the spot but Ritu was not there. She states that after sometime three persons came there one was her old boyfriend Akshay, his friend Sujit Gawande and Akash Verma. Akash Verma asked Akshay to get beer. Sujit made her to sit on the scooter between Sujit and Akash. They took her to Mahakali Nagari. Akshay brought beer. Akash administered the same to the victim. Sujit Gawande caught hold her hand. She felt drowsy because of consumption of liquor. She was then brought to kaccha room at slum areas of Nandgaon. All the three accused have committed forcibly sexual intercourse with her. Akshay Thool has recorded a video of the same. Thereafter, Ritu and Akash dropped her at Chatrapati Shivaji Market. She then explains that on 22.10.2022 when police enquired with her, she was not in proper state of mind and therefore did not narrate the entire incident. She felt better and stable and therefore informed the entire incident on

25.10.2022.

6. Learned counsel for the applicant has vehemently argued that there being serious discrepancies in the FIR, the first statement of the victim and her second statement, her version cannot be believed. He has further relied upon the statement of victim's paternal uncle Umesh Murar. His statement has been recorded on 05.11.2022. He states that on 21.10.2022 he saw the victim sitting in between two persons on the motorcycle. He asked her to stop but they did not. He followed them and intercepted them. He asked victim as to where is she going with those two persons. He found that the victim was intoxicated. At that time, the victim informed him about the sexual assault. The uncle thereafter brought victim to her house on his motorcycle.

7. Thus, according to learned counsel for the applicant, the victim has stated that she has been brought by Ritu and Mayur as against her uncle states that he himself has brought her at her house. This discrepancy coupled with the improvement in the statement by the victim makes her version doubtful and on that count, he submits that the applicant is entitled for the relief.

8. As against, learned APP and learned counsel for the non-applicant no.2 submit that though there is discrepancy on the point as to who has brought victim at her house, so far as the incident is concerned, the victim has narrated the entire

incident in detail in her statement dated 25.10.2022. She has given justification as to why did not she narrate the incident in her earlier statement and therefore there is no reason why her version should not be believed. Learned APP further submits that the Hon'ble Apex Court in its judgment in the case of *Sumit Subhashchandra Gangwal and another Vs. State of Maharashtra and another* [2023 LiveLaw (SC) 373] has held that while entertaining the application under Section 439 of the Code the courts cannot meticulously deal with the evidence. This position is well settled. The discrepancies pointed by the learned counsel for the applicant, however, are apparent and would have been considered to the advantage of the applicant, had the victim not given explanation in her later statement.

9. Be that as it may, in the present set of facts there should not be any doubt that the accusation against the applicant is serious. In the first statement she accused Akash for committing rape. In her second statement, she has blamed three persons for committing rape. She has given justification for not disclosing the same on earlier occasion. Therefore, at this stage, her version of gang rape cannot be said to be doubtful.

10. Considering the aforesaid allegations coupled with the medical evidence, which indicates that there was/is small laceration present at fourchette with the hymen ruptured and further that she was under the influence of liquor, the story

putforth by the victim in her statement dated 25.10.2022 appears to be of sufferance of the victim. The victim is a child as defined under Section2(1)(d) of the POCSO Act. The applicant and co-accused, appears to have taken advantage of the tender age of the victim and have exploited her. The applicant is, therefore, not entitled for the relief. Hence, the application is rejected.

11. Professional fees of the learned counsel appointed for the non-applicant no.2 be quantified and paid as per Rules.

(Anil L. Pansare, J.)

Wagh