



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

923 BAIL APPLICATION NO. 2151 OF 2023

Ashfak s/o Jafar Shaikh
Age 23 years, Occ. Labour
R/o. Sonari, Tq. Himayatnagar
District Nanded

...Applicant

versus

1. The State of Maharashtra
Through its Investigating Officer
Himayatnagar Police Station
Nanded, district Nanded

2. XYZ
(address given in closed envelope)

...Respondents

...
Advocate for Applicant : Mr. Manpreet Ajeet Singh Granthi
APP for Respondent No.1: Mr. Mukesh K. Goyanka
Advocate for Respondent No.2 : Mr. Anand Dale

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CORAM : SANJAY A. DESHMUKH, J.
DATED : 22nd FEBRUARY, 2024.

ORAL JUDGMENT:-

1. This is an application for granting bail under Section 439 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."). The applicant is arrested in connection with crime No. 179 of 2023 registered with Himayatnagar police station, district Nanded for the offences punishable under Sections 376(2) (j), 452, 342, 506 of the Indian Penal Code (for short I.P.C.), under Section 4 of Protection of Children From Sexual Offences Act, 2012 (for short "POCSO Act")

and under Section 3(1)(w)(i), 3(1)(w) (ii) and 3(2)(va) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (for short "Atrocities Act").

2. It is averred in the report by the victim girl child, who was 15 years old at the relevant time that on 24.8.2023, she was at her house. At about 11.00 a.m. her sister went to the school. At that time, the applicant entered into her house. She questioned him as to how he had come there. At that time, the applicant said her that he like her. He threatened her that if she makes hue and cry, he will eliminate her. He took out a razor and put it on her neck. She was frightened. He again threatened her that if she makes hue and cry, he will eliminate her. The applicant latched the door of front room. Then he latched the door of internal room and committed sexual intercourse with her, by using condom. At that time, sister of the victim girl came there and pushed the door forcefully. She succeeded in opening the door, as the door was not properly latched. She entered into the first room. The victim girl opened the door of internal room. At that time, the applicant again caught hold of her hands and threatened her that if she tells that incident to anybody he will see her. She was frightened but she did not disclose that fact to Sagar Mama, Anil Kaka, Raju Mama etc. who were outside of the house. Thereafter, she went to attend the examination in the school. Thereafter, her father came to the house, went to her school to fetch her to the house, she told that incident to him. She came to know that

the applicant was caught hold by the people gathered there and called the police. He was handed over to the police. The report was lodged on the same day.

3. Learned advocate for the applicant submitted that it is a case of love affair between the applicant and the victim girl. Though it is alleged that the applicant was caught hold by the neighbors immediately after the incident, a razor and a contraceptive used were seized from another place which falsifies the prosecution's story. He further submitted that the applicant has not committed alleged aggravated sexual assault but it was consensual sex. He therefore, prayed for granting bail.

4. Learned advocate for the applicant is relying upon the following authorities:-

1) ***Imran Iqbal Shaikh vs The State of Maharashtra and another*** (bail application No. 997 of 2022, decided on 26.4.2023), in para 4, it is observed as under:-

"4. It is true that the victim is a child within the meaning of Section 2(d) of the POCSO Act. The Applicant was also a young boy of 22 years of age at the time of the incident. The statement of the first informant prima facie indicates that the relationship was consensual. It needs to be noted that the POCSO Act has been enacted to protect children from offences of sexual assault, sexual harassment etc., and contains stringent penal provisions as to safeguard the interest and the well being of the children. The object is

certainly not to punish minors in romantic or consensual relationship and brand them as criminals."

ii) ***Amansingh @ Devendrasingh s/o Rajendrasingh Sapure vs. State of Maharashtra*** (criminal application No. 4802 of 2017, decided on 27.9.2017) in which in para 5, this court has observed as under:-

"5. It appears that charge sheet is submitted on 10.7.2017. Though the victim is below the age of 15 years, it appears from her statement, recorded before the Magistrate, that she had joined the company of applicant on her own and travelled with him at various places voluntarily. It further appears from her statement that love affair was going on between the victim and applicant two years prior to the alleged incident. Antecedents of the applicant are clear. He is in the employment of Gurudwara, Nanded as Class IV employee."

5. Learned A.P.P. for the State and learned advocate for respondent No.2 have pointed out that the applicant is prosecuted for the serious offence of commission of aggrieved sexual assault on the girl child of 15 years old. Consent of the child is not the consent in the eyes of law. Section 2 (d) of POCSO Act, defines 'any person below the age of 18 years is a child'. The victim girl was 15 years old at the time of incident and thus she is child. Considering serious nature of crime and object of POCSO Act, they both submitted to reject the application.

6. Learned A.P.P. for the State and learned advocate for respondent No.2 are relying upon the following two authorities:-

- i) ***X (minor) vs The State of Jharkhand and another***, reported in (2022) 2 Cri CC 248, in which in para 6, the Hon'ble Supreme court has observed as under:-

"6. The High Court was manifestly in error in allowing the application for bail. The reason that from the statement under Section 164 and the averments in the FIR, it appears that "there was a love affair" between the appellant and the second respondent and that the case was instituted on the refusal of the second respondent to marry the appellant, is specious. Once, prima facie, it appears from the material before the Court that the appellant was barely thirteen years of age on the date when the alleged offence took place, both the grounds, namely that "there was a love affair" between the appellant and the second respondent as well as the alleged refusal to marry, are circumstances which will have no bearing on the grant of bail. Having regard to the age of the prosecutrix and the nature and gravity of the crime, no case for the grant of bail was established. The order of the High Court granting bail has to be interfered with since the circumstances which prevailed with the High Court are extraneous in view of the age of the prosecutrix, having regard to the provisions of Section 376 of IPC and Section 6 of POCSO."

- ii) ***Sagar Dattu Pardeshi vs. The State of Maharashtra*** (bail application No. 1844 of 2022, decided on 14.11.2022), in which this Court in para 5 has observed as under:-

"5. Two incidents of sexual assault have been narrated by the victim. It appears from the record that the applicant used to go to the house of the victim even in the absence of her mother. He and her mother had extra marital relations for a long period. The victim is of growing age. There appears substance in the argument of learned counsel for the victim and the learned APP that since the mother of

the victim has to go for the labour work, she used to live alone in the home. The applicant was going to her in the absence of her mother. Therefore, there may be danger to the life of the victim, who is a minor girl. In addition thereto, there are antecedents to the discredit of the applicant. Though the offences registered against the applicant were not similar, but that shows his conduct. The victim was 15 years and 9 months old girl. Her safety is important than the liberty of the applicant. For these reasons, the application stands dismissed”.

7. Nobody can dispute the ratio laid down in these authorities. However, it is well settled that facts of each case are always decisive.

8. Perused the charge sheet, particularly the report and statements of witnesses. It is not disputed that the informant is 15 years old child. The allegation made by the victim girl in the report, prima facie, shows that the applicant committed sexual intercourse with her to which she did not resist or it was with her consent. She is a child and even though there was consent, her consent is not a legal consent as contemplated under Section 90 of the I.P.C.

9. Learned advocate for applicant pointed out that the condom and razor used by the applicant were seized from the side of the road, which were allegedly thrown by him. The seizure panchanama of those articles under Section 27 of the Indian Evidence Act cannot be considered meticulously at this stage. The informant cooked false story of razor and condom. Those articles would have seized by the Investigating Officer from the accused at the time of arrest. It is

because as per prosecution's story he was caught hold there immediately. The fact showing false seizure of condom and razor against the truth which is a backbone of justice. He prayed for bail on the ground of false evidence of seizure of those two articles.

10. There are catena of judgments of this Court and the Hon'ble Supreme Court that the truth must prevail and the Court has to find out the truth. The "*Satyamev Jayate*" is the title of the emblem of our country. However, as per the definition of words "proved" and "disproved", as defined in the Indian Evidence Act, 1872, importance is not given to the word "truth" but importance is given to the proof of "existence" or "non existence" of the fact. The Indian Evidence Act is most rational law and it takes cognizance of human psychology and particularly conducts showing immoralities and morality etc., of human beings. It is because proved facts must be considered in the context of background facts and circumstances of each case. Some times the bitter truth causes heavy loss and it defeats justice. Therefore, the consequences intended by law are to give justice and care must be taken that no injustice should be caused by giving justice to the other side.

11. The morality and faithfulness of people of our Indian psychology can be seen from their conducts that they are not adhering to the truth except the exceptions. Our country is not developed but it is developing. There is no such special educational

policy and facility to develop dedication, truthfulness, faithfulness, morality etc. in the minds of people. The general moralities and values in our country are to be considered while expecting truth from them as per their backgrounds i.e. status, strata, education, social and economic conditions etc.. The truthfulness and faithfulness are best virtues. But those do not come by birth. Those can be developed through the surrounding atmosphere, specially by teaching, compelling circumstances etc. Now a days decreasing value and morality is serious question for our society. It increases various mischiefs. Therefore, crime rate is increasing. It is possible by effective education policy and methods of teaching and strict laws etc. Therefore, truthfulness, moral value etc. are to be taught as well as get implemented from new generation continuously.

12. In India, the principle that "*falsus in uno, falsus in omnibus*" is not considered as a sound law of appreciation of evidence. It is because psychology of truthfulness, faithfulness, dedication, values and morality of Indians are different than that of European and American society. Thus, if a part of evidence is found reliable and its existence is proved or its existence is so probable, then the unreliable, exaggerated or false evidence mixed with truth shall be ignored and part of evidence which is reliable and truthful can be relied upon. Therefore, in the definition of "proved" and "disproved", no such importance is given to the "truth" but the importance is given to the proving of existence and non existence of disputed fact i.e. fact

in issue and relevant fact even on probability standard. Thus the court is not expected to search or reveal the truth of that particular case. The duty of the Court is to decide rights, liabilities etc., and give justice to the legal mischief affected persons. Thus, truth is not always decisive for giving justice. Justice is more important than truth. It does not mean that truth has no importance at all. It has importance if total false evidence is given certainly it can not be relied upon. Therefore, in such fact situation truth has importance, but not in each and every case strictly.

13. The object of the law is to give justice and no importance is given to the revealing of truth. In case of conflict between truth and justice, certainly justice will prevail. If the Court insists for the truth and if consequences of it are causing injustice, it is bitter truth which is not intended by Statutes. It may cause injustice. It does not mean that falsity is always justifiable. But for reaching to the object of justice, some falsity mixed with truth must be considered in the peculiar set of fact situation i.e. context of each case. However only in civil cases if equitable relief is claimed it is expected that, the person who seeks equity, should come before Court with clean hands (with truth) and not in case of statutory reliefs. Thus telling lies is not punishable. But giving false evidence and fabricating false evidence is punishable. One cannot tell truth if others are not telling truth. It is natural human tendency and selfishness. In cases like this case in hand full truth and sterling quality evidence can not be expected

because victim is child and she hails from rural area.

14. In the case of ***Deepak Yadav Vs. State of Uttar Pradesh and another, (2022) 8 SCC 559***, the Hon'ble supreme Court in para 22 has laid down eight guidelines. Para 22 is reproduced as under:-

“22. As reiterated by the two-Judge Bench of this Court in Prasanta Kumar Sarkar v. Ashis Chatterjee, (2010) 14 SCC 496 : (2011) 3 SCC (Cri) 765, it is well-settled that the factors to be borne in mind while considering an application for bail are:

- (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;*
- (ii) nature and gravity of the accusation;*
- (iii) severity of the punishment in the event of conviction;*
- (iv) danger of the accused absconding or fleeing, if released on bail;*
- (v) character, behaviour, means, position and standing of the accused;*
- (vi) likelihood of the offence being repeated;*
- (vii) reasonable apprehension of the witnesses being influenced; and*
- (viii) danger, of course, of justice being thwarted by grant of bail.*

15. In the case of ***Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and another, (1987) 2 SCC 684***, para 6

“6. We are constrained to observe that Justice D. S. Bajpai refused to grant the prayer and proceeded to grant bail simply on the ground that the liberty of a citizen was involved which is the case in every criminal case more particularly in a murder case where a citizen who let alone losing liberty has lost his very life. Another ground for granting bail was that trial was delayed, therefore the accused was entitled to bail. This also cannot be helped if a litigant is encouraged to make half a dozen applications on the same point without any new factor having arisen after the first was rejected. Had the learned Judge granted time to the complainant for filing counter-affidavit, correct facts would have been placed before the court and it could have been pointed out that apart from the inherent danger of tampering with or intimidating witnesses and aborting the case, there was also the danger to the life of the main witnesses or to the life of the accused being endangered as experience of life has shown to the members of the profession and the judiciary, and in that event, the learned Judge would have been in a better position to ascertain facts to act judiciously. No doubt liberty of a citizen must be zealously safeguarded by court, nonetheless when a person is accused of a serious offence like murder and his successive bail applications are rejected on merit there being prima facie material, the prosecution is entitled to place correct facts before the court. Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution. Learned Judge was unduly influenced by the concept of liberty, disregarding the facts of the case.”

16. As discussed above, though there is consensual sexual intercourse between the victim child and the applicant, the prosecutrix stated in her report that the applicant put a razor on her neck and thus she has concealed the truth, the applicant is not entitled for benefit of such falsity for granting bail. Therefore, The authorities of ***Imran Iqbal Shaikh vs The State of Maharashtra and***

another (supra) and ***Amansingh @ Devendrasingh s/o Rajendrasingh Sapure vs. State of Maharashtra (supra)*** cited on behalf of the applicant are not relied upon in view of the different facts of this case and as per the law laid down by the Hon'ble Supreme Court in the case of ***X (minor) vs The State of Jharkhand and another (supra)***, in which the Hon'ble Supreme Court has held that merely because there was love affairs between the informant and applicant bail cannot be granted considering the nature and gravity of the crime.

17. The applicant is not entitled for bail only because there is prima facie, unreliable and doubtful seizure of the articles. Thus, keeping in the mind that meticulous consideration of evidence is not expected at this stage as well as considering the serious nature of crime of aggravated sexual assault committed against the girl child of 15 years old, the object of POCSO Act, the ratio and guidelines laid down in the above authorities and the reasons given above, the applicant cannot be released on bail. Therefore, the argument of learned advocate for the applicant that it is truth that prosecutrix has called this applicant to have sexual intercourse with her and it is case of consensual sex is not acceptable. In view of the above reasons, the application deserves to be rejected. The application is rejected.

18. The legal fees of learned advocate Mr. Anand Dale, appointed to represent the cause of respondent No.2, shall be paid

by the High Court Legal Services Sub committee, Aurangabad, as per Rules and schedule.

(SANJAY A. DESHMUKH, J.)

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