

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.134 OF 2024

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Mohd. Arish Mukhtar Ahmed Ansari ...Applicant

vs.

The State of Maharashtra and Another ...Respondents

Ms. Sana Shaikh, for the Applicant.

Mr. S.R. Agarkar, APP, for the Respondent/State.

Ms. Maya Updeshe, for Respondent No. 2.

Mr. S.D. Patil, PSI, Shivaji Nagar police station.

CORAM : N. J. JAMADAR, J.

DATE : APRIL 02, 2024

P.C.:

1. By this application under section 439 of the Code of Criminal Procedure, 1973 (the Code), the applicant who is arraigned in C.R. No. 471 of 2023 registered with Shivaji Nagar police station for the offences punishable under sections 376 and 376(2)(k) of Indian Penal Code, 1860 and sections 4, 6, 8, 10 and 12 of the Protection of Children from Sexual Offences Act, 2012 seeks to be enlarged on bail.

2. The victim is a 16 year old girl child. The applicant is the husband of her sister 'S'. The victim was residing with the applicant, his wife and their son near Kamla Nagar Dumping ground, Shivaji Nagar, Mumbai. On 3rd June, 2023 the victim's sister 'S' had gone to meet the ailing son of her sister. At about 10.30 am while the victim was taking rest in the room, the

applicant entered the room and bolted the door from inside. When the victim tried to raise alarm, the applicant gagged her mouth and had forcible sexual intercourse with her. After the victim's sister 'S' returned home, they approached the police station and lodged the report. The applicant came to be arrested on 4th June, 2023. Medico-legal examination of the victim was conducted. Post completion of investigation charge sheet came to be lodged.

3. Ms. Sana Shaikh, learned counsel for the applicant, submitted that there is no reliable material to show that the victim was a child at the time of the alleged occurrence. Birth certificate has not been placed on record. The entry in the school leaving certificate, indicating the date of the birth of the victim as 1st June, 2007, is not substantiated by a document of unimpeachable character. Secondly, in the statement of the victim recorded under section 164 of the Code, the victim had clearly stated that she has no grievance against anybody. As the victim has disowned the allegations in the FIR, the applicant deserves to be enlarged on bail.

4. Mr. Agarkar, learned APP, made an endeavour to urge that in the FIR the victim had made specific allegations against the applicant. The medico-legal examination report lends prima facie support to those allegations. Therefore, at this stage, the prosecution case cannot be thrown overboard on the premise that

the victim declined to subscribe to the prosecution version in her statement recorded under section 164 of the Code.

5. Ms. Updeshe, the learned counsel for respondent No. 2- victim submitted that the victim stands by her statement recorded before the learned Magistrate under section 164 of the Code.

6. Prima facie, in the FIR, there are allegations of penetrative sexual assault. The medico legal examination report indicates that the victim had narrated a history of forcible sexual intercourse. At this stage, the submissions sought to be canvassed on behalf of the applicant regarding the age of the victim is not required to be delved into, as it does not seem to be the case that there was a sort of relationship between the parties, in which case the element of consent may become relevant.

7. The material on record, prima facie, indicates that the victim was residing with the applicant and his wife/the sister of the victim, since 4-5 months prior to the alleged occurrence. The incident had allegedly occurred while 'S' the sister of the victim was away from home. The victim claimed before police that she had narrated the occurrence to her other sisters and 'S'. Their statements have been recorded.

8. In contrast, in her statement recorded before the learned Magistrate under section 164 of the Code, the victim declined to

subscribe to the prosecution version. In fact, she stated that she had no grievance against anybody. When her statement was recorded the victim claimed to be 19 years of age.

9. The situation which thus obtains is that, contrary to the allegations in the FIR, in the statement of the victim on oath, the victim refrains from making any allegation of sexual assault. It could be urged that an effort has been made to win over the victim. However, the Court cannot lose sight of the fact that the statement under section 164 of the Code commands precedence. In the face of such irreconcilable inconsistency, the statement under section 164 of the Code may have primacy.

10. In the case of **P. Yuvaprakash v. State Rep. By Inspector of Police**¹, the Supreme Court observed that, in the said case, the victim did not support the prosecution version in her statement under section 164 of the Code, and thus the trial Court could not have discarded the statement of the victim on the premise that such statement was not made by the victim voluntarily. At any rate, there are two versions of the victim. The last one, is on oath.

11. I am, therefore, impelled to lean in favour of securing the personal liberty of the applicant awaiting adjudication of the guilt of the applicant at the trial.

Hence, the following order.

1 2023 Live Law (SC) 538.

ORDER

- 1] The application stands allowed.
- 2] The applicant be released on bail in C.R. No. 471 of 2023 registered with Shivaji Nagar police station on furnishing a P.R. Bond of Rs. 30,000/- with one or more sureties in the like amount.
- 3] The applicant shall mark his presence at Shivaji Nagar police station on the first Monday of every month between 11 am to 1 pm for a period of three years or till conclusion of the trial, whichever is earlier.
- 4] The applicant shall not tamper with the prosecution evidence and give threat or inducement to first informant, any of the prosecution witnesses or any person acquainted with the facts of the case.
- 5] The applicant shall furnish his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.
- 6] The applicant shall regularly attend the proceedings before the jurisdictional Court.
- 7] By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not

be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N. J. JAMADAR, J.)