

Shailaja

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

CRIMINAL BAIL APPLICATION NO.722 OF 2022

Dipukumar Premshanker Pathak	]	Applicant
vs.		
The State of Maharashtra and another	]	Respondents

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Mr. Nimesh Mehta a/w Ms. Seema Chettri Rana, for Applicant.

Mr. Mayur S. Sonavane, A.P.P, for Respondent No.1 – State.

Mr. Mundhe, P.S.I, Ambernath Police Station a/w P.I. Gaikwad,
ACB, Mumbai.

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CORAM : PRITHVIRAJ K. CHAVAN, J.

RESERVED ON : 26th MARCH, 2024.

PRONOUNCED ON : 1ST APRIL, 2024.

ORDER:

1. The applicant is being prosecuted by *Ambernath* Police Station, District *Thane* in connection with C.R. No. 0518 of 2021 for the offences punishable under Sections 363, 366, 376, 370, 511, 506 (2) of the Indian Penal Code (for short “I.P.C”) and Sections 4, 6 and 10 of the Protection of Children from Sexual Offences Act, 2012 (“POCSO Act”).

2. The victim who was then 15 years old is resident of Village – *Dakshnichal*, Taluka – *Ajmal Golla*, District – *Patna*, State – *Bihar*. She used to reside at the above address with her parents, brother and other two siblings at the relevant time. She was studying in ninth standard. Her elder married sister had uploaded photographs of the victim on her Facebook. The applicant was her sister's friend. Two months before lodging the First Information Report, the applicant had asked her sister to marry the victim with him, however, her parents refused. The applicant had obtained the mobile number of victim's father and, thereafter, he started conversing with her father time and again. He was insisting upon to marry with the victim.

3. On 1st September, 2021, the victim had been to her School at Village *Dakshanichal (Bihar)* around 9.00 a.m. The applicant approached the victim and prevailed upon her to accompany with him, else he would kill her. He literally kidnapped and took her to *Nirjipur at Uttar Pradesh*. They had been to a temple of Lord *Hanuman* where the applicant put up vermilion on the forehead of the victim and garlanded her. On the same night, he took her to his home where his parents and other relatives were present. The

applicant informed his mother that he had performed marriage with the victim. The applicant's mother asked the applicant and the victim to spend the night in a room. The applicant had given some pills to the victim as the victim had pain in her leg. On the next day, the applicant took the victim with him at *Nirjipur* Railway Station and boarded a train for Mumbai (*Maharashtra*) under the pretext that he was taking her to his aunt who resides in the State of Maharashtra.

4. In the train, it is alleged that despite strong resistance, the applicant had raped her. When the train reached *Ambernath* on 3rd September, 2021, they alighted from the train. Later on, the applicant called a person on his phone and was talking about trafficking the victim. At that time, a person who was listening conversation of the applicant, caught him and was brought to *Ambernath* Police Station. The victim narrated the entire episode to the Police. The applicant was arrested. Investigation was conducted by the Investigating Officer. The victim was referred for medical examination. Her clothes were seized. The applicant was medically examined. Statements of the witnesses were recorded and a charge-sheet came to be filed.

5. The applicant was arrested on 9th September, 2021.
6. An application for bail was rejected by the trial Court on 24th December, 2021.
7. I heard Mr. Mehta, learned Counsel for the applicant and Mr. Sonavane, the learned A.P.P.
8. At the outset, Mr. Mehta would argue that the medical report of the victim depicts name of the applicant as “Deepu Pandey” who is not the applicant since he is “Dipukumar Premshanker Pathak”. Secondly, he submits that the victim was examined by the Doctor on 8th September, 2021, however, as per the history given by her, she was sexually assaulted on 2nd August, 2021 in the train. As per the First Information Report, victim and the applicant left for Maharashtra in train on 2nd September, 2021. That being so, how the victim was sexually assaulted on 2nd August, 2021?
9. The learned Counsel would further argue that the applicant and the victim married in a temple which was an inter caste marriage and since father of the victim was against the said inter

caste marriage, a false report came to be lodged against the applicant who is behind the bars ever since his arrest on 9th September, 2021. The Counsel, therefore, urged to release the applicant on bail.

10. Learned A.P.P took a strong exception to the arguments of the learned Counsel by contending that undisputedly the victim was minor at the time of the incident coupled with the fact that her statement under Section 164 of the Code of Criminal Procedure recorded by the Magistrate indicates a real story which falsifies the contention of the Counsel for the applicant that act of sexual exploitation, if any, was consensual.

11. There is no dispute that the victim was 15 years old at the time of the alleged incident. The First Information Report does indicate that the victim and the applicant left for *Maharashtra* on 2nd September, 2021 by train and during journey, the applicant committed forcible sexual intercourse with her. It seems that there is some error in the medical report of the victim wherein in column No. (vii), the Doctor had inadvertently stated about history of assault on 2nd August, 2021 which perhaps ought to have been 2nd

September, 2021. This is significant in the light of the fact that immediately after accosting the applicant and the victim on 3rd September, 2021 at *Ambernath*, the victim was examined by the Medical officer on 8th September, 2021. Since the applicant does not dispute his relations with the victim, his name depicted in the medical report as “Dipu Pandey” also could be an error in writing the name of the applicant.

12. In so far as age of the victim is concerned, the prosecution has tendered Radiological Age Report of the victim. An ossification test coupled with X-Ray of the wrist and elbow conjointly reveals that approximate radiological age of the victim is between 14 to 16 years.

13. The medical report indicates that hymen was torn with old tear at 2 o’ clock and 4 o’ clock position. *Prima facie*, there may not be an aggrieved penetrative sexual assault, nevertheless, there seems to be penetrative sexual assault in view of the medical report as well as in view of the fact that Section 3 (a) of POCSO Act contemplates that penetration of penis, to any extent, into the vagina, mouth, urethra or anus of a child amounts to penetrative sexual assault.

14. A bare look at the statement recorded under section 164 of the Cr. P.C by the Judicial Magistrate First Class, *Ulhasnagar* on 16th September, 2021 reaffirms the fact that the applicant had not only enticed the victim by repeatedly calling on the number of her father's cell phone, but also used to enquire about the victim. Statement also reveals that he was insisting upon to marry her despite knowing the fact that she was only 15 years of age. The report further reveals the fact that she was taken to *Hanuman* temple at *Nirjipur* and put vermilion on her forehead and performed a marriage by garlanding her. The statement under Section 164 of the Cr. P.C and the First Information Report are consistent. The victim reiterated before the Magistrate that while travelling in A.C Compartment from *Nirjipur* to *Maharashtra*, the applicant had committed forcible sexual intercourse on the point of knife and, therefore, she had to surrender.

15. As such, the material on record is sufficient to refuse bail to the applicant in light of the fact that in case of his release, he might abscond and would not attend the trial. Secondly, the victim was minor and, therefore, in case of release of the applicant, there is every likelihood of influencing or coercing her to give evidence in

his favour, more particularly, in view of the fact that the applicant had already put vermilion on her forehead and garlanded her to make a show that he had married her.

16. Mere incarceration for certain period would not *ipso facto* entitle the applicant to get bail. I am, therefore, not persuaded to accept the arguments of the Counsel appearing for the applicant.

17. Consequently, following order is passed.

: ORDER :

(a) Application is rejected.

(b) Trial Court is directed to frame a charge and expedite trial of the case without granting unnecessary adjournments either to the prosecution or to the defence.

18. Application is disposed of in the aforesaid terms.

[PRITHVIRAJ K. CHAVAN, J.]