

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

BAIL APPLICATION NO. 1249 OF 2023

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Nijam Murshad Ali Hashim Khan @ Nizam
Alil

...Applicant

Versus

The State of Maharashtra and anr.

...Respondents

Mr. Hrishikesh Mundargi, i/b Shraddha Sawant, for the
Applicant.

Ms. Supriya Kak, APP for the State/Respondent No.1.

Mr. Kalam Shaikh, a/w S. Shaikh, for Respondent No.2.

PI Jadhavar a/w PSI Khillare, Oshiwara Police Station,
present.

CORAM: N. J. JAMADAR, J.

DATED: 9th MAY, 2024

ORDER:-

1. Heard the learned Counsel for the parties.
2. The applicant, who is arraigned in Special Case (POCSO) No.309 of 2022, arising out of CR No.412 of 2022 for the offences punishable under Sections 376, 376(2)(n), 377, 341, 354, 498A, 406, 323, 324, 504, 506 and 509 read with Section 34 of the Indian Penal Code, 1860 ("the Penal Code") and Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act"), has preferred this application to enlarge him on bail.

3. The first informant is the mother of the victim, who was born on 21st February, 2004. In the month of December, 2021 when the victim had been to her maternal uncle's house at Rampur, Uttar Pradesh, she became acquainted with the applicant and they exchanged phone numbers. Thereafter, romantic relations developed.

4. On 17th February, 2022, the applicant came to Mumbai. The applicant called the victim to meet him at the Golden Hotel, Jogeshwari (W), Mumbai. As the victim had yet not completed 18 years of age, she used the AADHAR Card of her friend and went to the said hotel alongwith the applicant. After a while, the victim alleged, the applicant started to become intimate with her. Despite her resistance, the applicant had forcible sexual intercourse without the consent of the victim.

5. On 3rd March, 2022, the applicant asked the victim to marry him. When she refused, the applicant reacted in a crude manner and stated that since they had sexual relations she cannot marry any other person. The applicant allegedly threatened her that if she does not marry him he will kill her parents.

6. On account of the said threat, the victim claimed that she went to Delhi by flight on a ticket forwarded by the applicant

alongwith gold ornaments worth of Rs.7,00,000/-. The applicant came from Rampur and took her to hotels, where the applicant again allegedly had sexual intercourse without the consent of the victim. On 5th March, 2022, the applicant and the victim reached the house of the applicant at Rampur.

7. On 6th March, 2022, the parents of the victim came at Rampur and lodged a report with Kotwali Police Station. The victim alleged on account of the threats given by the applicant, she stated before the police that she intended to marry the applicant. Thereupon on the same day at 10.30 p.m. her marriage was solemnized with the applicant.

8. Post marriage, the victim alleged the applicant had forcible sexual intercourse with her, without regard to her consent, physical condition and wishes. The applicant allegedly subjected her to sexual assault against the order of nature. The applicant harassed her with a view to coerce her to demand her share in the property of her father and bring a 'Fortuner' car for him.

9. On 5th April, 2022, the first informant went to Rampur. The first informant invited the applicant to come to Mumbai alongwith the victim to celebrate Eid. The applicant declined. However, the victim was sent with the first informant. On 9th April, 2022, the first informant and victim returned to Mumbai.

She was taken in confidence. Thereupon the victim narrated her woes. The victim was taken to Cooper Hospital. Medico-legal Examination was conducted. The Medical Officer found peri-hymenal inflammation and pigmented lesions in her perineum. The Medical Officer reported the matter to police. Thereupon, the first informant lodged the report on 11th April, 2022.

10. In the statement the victim allegedly made allegations against her in-laws as well as cousins of the applicant.

11. The applicant came to be arrested on 3rd May, 2022. The learned Special Judge was persuaded to grant pre-arrest bail to the parents, brother and cousin of the applicant.

12. I have noted the prosecution case in a little detail as the incidents, especially in the context the age of the victim, bear upon the entitlement of the applicant for bail.

13. Mr. Mundargi, the learned Counsel for the applicant, submitted that the allegations in the FIR clearly indicate that the victim was in love with the applicant, and had voluntarily gone to the hotel a couple of days before she attained majority, and after a fortnight, the victim went to Delhi on her own. This conduct of the victim unmistakably indicates that the relationship was consensual. On 6th March, 2022, in the

presence of her parents, the victim, who was then a major, expressed her desire to marry the applicant. Emphasis was laid on the fact that no grievance was made by the victim till she returned to Mumbai alongwith her mother, in cordial circumstances. It was submitted that in this backdrop, the applicant, who has been in custody for two years, deserves to be enlarged on bail.

14. Ms. Kak, the learned APP, resisted the prayer for bail. It was submitted that the initial consent of the victim cannot said to be free as the victim has specifically stated that she was subjected to aggravated penetrative sexual assault. On 17th February, 2022, when the victim was sexually exploited for the first time, she was still a child. Therefore, the applicant cannot urge the ground of consensual relationship.

15. Mr. Shaikh, the learned Counsel for respondent No.2, stoutly resisted the prayer for bail. Taking the Court through the Medico-Legal Examination Report especially the injuries noted by the Medial Officer on her private parts, Mr. Shaikh would submit the victim was mercilessly exploited by the applicant. There are serious allegations against the brother and cousins of the applicant of subjecting the victim to sexual harassment. Mr. Shaikh would further urge that what

exacerbates the situation is the threat given by the applicant to eliminate the parents of the deceased, the day he is released on bail. The applicant had the audacity to send threatening messages to the victim even after he was arrested and produced before the Court. Therefore, the release of the applicant on bail is fraught with imminent risk to the lives and safety of the victim and her parents.

16. Evidently, in the FIR the victim states that she was in love with the applicant. The first alleged act of penetrative sexual assault occurred three days prior to the victim attaining majority. The victim states that she had gone to the hotel by using the identity of her friend as she was still a minor.

17. The act and conduct of the victim on 3rd March, 2022 assumes significance, even at the stage of considering prayer for bail. The applicant allegedly threatened the victim by making a telephone call. The said call was allegedly received at about 5.00 p.m. on 3rd March, 2022. The victim claimed to have boarded the flight at about 10.30 p.m., all by herself. The applicant was then at Rampur. The applicant joined the victim at Delhi Airport on 5.00 a.m. on 4th March, 2022.

18. In the backdrop of these facts, I find it *prima facie* difficult to accede to the submissions that the victim did not know the

nature and consequences of her acts. The element of threat is required to be appreciated in the light of the fact that within hours of the call by the applicant, the victim allegedly left her home alongwith ornaments. It is not the case that the applicant took away the victim. He appeared to be far away at Rampur.

19. The subsequent conduct of the victim on 6th March, 2022 when the matter was reported to police, also deserves consideration. In the presence of her parents, the victim stated that she intended to marry the applicant. Whether the consent of the victim to marry the applicant was vitiated on account of coercion or duress would be a matter for evidence.

20. It is true the Medico-Legal Examination Report indicates that there were peri-hymenal inflammation and pigmented lesions in her perineum. *Prima facie*, it appears that the applicant was extremely crude and unkind to the victim. However, the fact that the victim left her matrimonial home in a cordial atmosphere, when she accompanied her mother to Mumbai, cannot be lost sight of.

21. Indeed there are allegations against the applicant of subjecting the victim to sexual exploitation. What also deserves consideration is the allegations made against the parents, brother and the cousins of the applicant. Those allegations

prima facie betray an attempt to rope in the family members of the husband.

22. In the totality of the circumstances, especially having regard to the fact that at the time of the alleged first sexual exploitation the victim was days away from attaining majority, and the subsequent conduct of the victim, an inference becomes *prima facie* justifiable that the relationship was consensual.

23. The allegations that the applicant had threatened the victim with dire consequences once he is released on bail, however, puts the Court on guard. The applicant had allegedly sent an audio message on Instagram on 1st May, 2022 and threatened to kill the parents of the victim. In a second audio message, the applicant allegedly reiterated the threat. On 6th May, 2022, the applicant had sent text messages by using the cellphone of an Advocate and requested the victim to reach Rampur.

24. On the previous date, the Court directed the Investigating Officer to collect the mobile phone handset of the victim. Thereupon, it seems, the mobile phone handset has been seized under a panchnama dated 26th April, 2022. The Investigating Officer has forwarded the mobile phone handset for forensic analysis.

25. At this stage, the alleged threats are required to be seen in a proper prospective. The applicant came to be arrested on 3rd May, 2022. The text message of 6th May, 2022 indicates the desperation. The applicant virtually implored the victim to return to Rampur as he was arraigned in an offence punishable with 20 years imprisonment.

26. Two year period has elapsed. The apprehension on the part of the victim and the parents of the victim, in the circumstances of the case, though cannot be said to be unfounded, yet it can be taken care of by imposing stringent conditions.

27. Hence, the following order:

: O R D E R :

- (i) Application stands allowed.
- (ii) The applicant be released on bail in CR No.412 of 2022, registered with Oshiwara Police Station, Mumbai, on furnishing a P.R. Bond in the sum of Rs.50,000/- with one or two sureties in the like amount.
- (iii) The applicant shall not contact the victim, first informant and her family members in any manner and whatsoever mode.
- (iv) The applicant shall not tamper with the prosecution

evidence and directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police officer.

- (v) The applicant shall mark his presence at Azad Maidan Police Station, Mumbai, on Monday every week between 10.00 a.m. to 12.00 noon till further orders.
- (vi) The applicant shall not enter the limits of Jogeshwari and Oshiwara Police Station for any purpose whatsoever.
- (vii) The applicant shall regularly attend the proceedings before the jurisdictional Court.
- (viii) On being released on bail, the applicant shall furnish their contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.
- (ix) The applicant shall file an undertaking before the Special Court that he will abide by the aforesaid conditions within a period of three days of his release from prison.
- (x) After a period of six months, the Police Inspector, Azad Maidan Police Station, shall file a report before the Special Court about the attendance as well as the conduct of the applicant.
- (xi) The applicant shall be at liberty to apply before the

Special Court for modification of the conditions after six months and the learned Special Judge shall impose appropriate conditions after providing an opportunity of hearing to the prosecution as well as the victim.

(xii) In the event of breach of any of the aforesaid conditions the bail granted to the applicant shall be liable to be cancelled.

(xiii) 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.]