

Shailaja

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

**CRIMINAL BAIL APPLICATION NO.1278 OF 2022**

|                                             |   |                    |
|---------------------------------------------|---|--------------------|
| <b>Ganesh Asaram Kale</b>                   | ] | <b>Applicant</b>   |
| <b>Vs.</b>                                  |   |                    |
| <b>The State of Maharashtra and another</b> | ] | <b>Respondents</b> |

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Mr. Milan Desai i/b Mr. T.R. Patel, for Applicant.

Ms. Anamika Malhotra, A.P.P, for Respondent No.1 – State.

Mr. Veerdhawal Deshmukh, for Respondent No.2.

Mr. S.L. Chakane, P.S.I, Dahisar Police Station, Mumbai.

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**CORAM : PRITHVIRAJ K. CHAVAN, J.**

**DATE : 23<sup>rd</sup> JANUARY, 2024.**

**P.C.**

1. By this application under Section 439 of the Code of Criminal Procedure, 1973, the applicant prays for his release on bail.

2. The applicant is being prosecuted for the offences punishable under section 376 of the Indian Penal Code and Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 by Dahisar Police Station in connection with C.R. No.456 of 2019.

3. Prosecution case, in brief, is as follows.
4. Mother of the victim had lodged an First Information Report. The victim was 13 years old girl. On 22<sup>nd</sup> September, 2021, around 11.00 p.m, she had been to answer call of the nature in a public toilet. As she did not return for an hour, first informant along with her relatives went for her search. At that time, one of the witnesses telephonically informed the first informant that the victim is about to elope with the applicant in an Auto Rickshaw which was parked in front of Madhuban Building, Ketki Pada, Dahisar (East), Mumbai.
5. When the first informant reached at the said place, she noticed the victim in an auto rickshaw. The applicant was not present at that time. The first informant was informed by the witness that the applicant had escaped from the spot, the moment he noticed this witness.
6. Upon being asked, the victim informed her mother that the applicant had forcibly dragged her into the Auto Rickshaw by pressing her mouth and committed forcible sexual intercourse with her.

7. A report came to be lodged against the applicant as above. After investigation, a charge-sheet came to be filed.
8. Special Judge under P.O.C.S.O Act, Borivali Division, Dindoshi has rejected the application for bail preferred by the applicant vide an order dated 19<sup>th</sup> June, 2020.
9. I heard Mr. Desai, learned Counsel for the applicant and the learned A.P.P for quite some time as well as Mr. Deshmukh, for respondent No.2 – victim.
10. Counsel for the applicant would argue that the applicant has been detained in the custody ever since his arrest without any hope of commencing the trial in near future. Apart from the said fact, material placed on record is quite insufficient to hold the applicant guilty of the offence with which he has been charged.
11. The Counsel would argue that identity of the applicant itself is in doubt in light of the history given by the victim at the time of her medical examination. A medical certificate of the Hospital of Municipal Corporation of Greater Mumbai dated 26<sup>th</sup> September,

2019 reveals that the victim had given a history of sexual assault by an unknown neighbourhood boy who was under intoxication, who grabbed her while she had been to the bathroom. History further reveals that he attempted to insert his penis in her genitalia but did not complete. The Counsel, therefore, submits that complicity of the applicant in the alleged offence itself is in question and, therefore, he needs to be granted bail as he has been falsely implicated in this case.

12. However, subsequently, the Counsel would submit that the applicant and the victim were in love and, therefore, relations were consensual. It is further stated that history of the victim at the time of her examination by a Medical Officer further indicates that not only she did not know the accused but even she could not recognize him when he kissed her lips and removed her lower clothes and also touched his penis against her genitalia. Medical report reveals that there is no history of penovaginal and penoanal or other form of intercourse or physical abuse. Victim also did not give history of ejaculation.

13. Section 3(a) and (b) of the POCSO Act defines what is a penetrative sexual assault. Sections 3 (a) and 3(b) read thus;

**3. Penetrative sexual assault.-** A person is said to commit “penetrative sexual assault” if -

(a) he penetrates his penis, **to any extent**, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, **to any extent**, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person;

which obviously means that even in case of penetrative sexual assault, it is not essential that there must be some injury to the hymen, labia majora, labia minora of the victim. Mere touching of the penis to the private part of the victim constitutes an offence under section 4 of the POCSO Act in view of the definition of “penetrative sexual assault” provided in sections 3 (a) and 3 (b) as above.

14. It is not the requirement of law that there should be complete penetration of penis into the genitalia. Be that as it may.

15. On the other hand, Mr. Deshmukh, learned Counsel appearing for respondent No.2 – victim invited my attention to the medical examination of the applicant wherein he had clearly admitted that on the date of the incident, there was a birthday party at the house of the victim where the applicant was invited at 8.45 p.m. After the party, the applicant left the house of the victim but she called him again at 9.30 p.m and asked him to meet her below the building where she asked him to run away with her, however, he refused as she was under age.

16. History given by the applicant falsifies argument of the learned Counsel for the applicant that the victim was subjected to sexual assault by one unknown person. History of the applicant further reveals that he had consensual sex in an auto rickshaw after which they were out till late night and thereafter her family members took her home and told her not to be in touch with the applicant. Even if it appears to be a love affair between the applicant and the victim pursuant to which they had consensual sex, yet it cannot be lost sight of the fact that the victim was of 13 years of age at the relevant time and, therefore, it would precisely attract sections 4 of the POCSO Act. The applicant, therefore, does not

deserve to be released on bail, for, looking to the nature of relation with the victim, chances of influencing or threatening the victim cannot be ruled out.

17. I am conscious of the fact that the applicant is behind bars without trial and, therefore, while rejecting the application, necessary directions will have to be issued to the Special Court. As such following order is passed.

: **ORDER** :

[a] The application is rejected.

[b] The Special Court under POCSO Act is directed to frame a charge against the applicant within three weeks of passing of this order and shall thereafter conduct the trial expeditiously and conclude it within four months thereafter without granting unnecessary adjournments either to the prosecution and the defence.

[c] If the trial is not concluded as above, liberty to the applicant to revive his prayer for bail.

18. Application stands disposed of in the aforesaid terms.

**[PRITHVIRAJ K. CHAVAN, J.]**