

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.1604 OF 2024

Lavakush Singh s/o. Ram Fakeer

...Applicant

Versus

Union of India & Anr.

...Respondents

Mr. Veerdhawal Deshmukh, for Applicant.

Mr. Hiten Venegaonkar, Public Prosecutor a/w. Ms. Savita Yadav,
APP and Mr. Harsh Dedhia, for Respondent No.1-Union of India.
Ms. Sabiha Ansari, Amicus Curiae a/w. Ms. Aisha Shaikh and Ms.
Tanvi Rane for Respondent No.2.

CORAM: MADHAV J. JAMDAR, J.
DATED: 29th APRIL 2024

P. C.:

1. Heard Mr. Veerdhawal Deshmukh, learned Counsel for the Applicant, Mr. Venegaonkar, learned Public Prosecutor a/w. Ms. Yadav, learned APP for the Respondent No.1-Union of India and Ms. Ansari, learned Amicus, for the Respondent No.2.

2. This regular Bail Application is preferred under Section 439 of the *Code of Criminal Procedure, 1973* ("CrPC"). The relevant details are as follows:

1.	C. R. No.	26 of 2022
2.	Date of registration of F.I.R.	12/08/2022
3.	Name of Police Station	Coastal, Moti Daman, Gujarat
4.	Sections invoked	302, 376, 376-A, 376-AB of IPC, 1860; 6 of the POCSO Act, 2012
5.	Date of incident	12/08/2022
6.	Date of arrest	06/09/2022
7.	Date of filing Charge-sheet	07/10/2022
8.	Date of filing Supplementary Charge-sheet	28/11/2022

3. The prosecution case in brief is as follows:

- (i) The mortal remains of a girl aged 4 years and 2 months were brought by her parents at the P.H.C.-Kachigam situated within the jurisdiction of Coastal Police Station Moti Daman on 12th August 2022. The provisional cause of death in the post-mortem examination report of the panel of medical officers at Government Hospital, Marwad, Nani Daman is recorded as follows:

“local injury suggestive of forceful vaginal wall penetration, provisional cause of death suggestive of hemorrhagic shock and final confirm report after FSL report”

- (ii) During investigation, it was found that the Applicant who was residing as tenant on the 4th floor in Room No.411 of the building in which the offence in question was committed, had gone away with his family, without informing anyone including the care taker of the said building. As per his cell phone location, he was found to be present at Balitha, Vapi, District-Valsad, Gujarat.
- (iii) The Applicant was arrested on 6th September 2022. The Charge-sheet applying Sections 302, 376, 376-A, and 376-AB of the IPC and Section 6 of the POCSO Act against the Applicant, was filed on 7th October 2022.
- (iv) Thereafter, a Supplementary Charge-sheet was filed on 28th November 2022 after the receipt of the Biological and Serological Examination Report and D.N.A. Report both dated 14th October 2022 wherein it has been *inter alia* determined that the forensic examination of the sample of victim's blood and Applicant's semen found on the undergarments of the deceased and the sample of semen found on the floor-mat

(*Chattai*) and from the cotton threads collected from the scene of the offence is that of the Applicant.

4. It is the contention of Mr. Deshmukh, learned Counsel for the Applicant that as per the prosecution case, the incident in question took place at a time when the mother, father, and uncle of the deceased were present in and asleep in the very house where the incident in question had occurred. He therefore submitted that it was impossible to commit the offence in question at the relevant time. As far as the D.N.A. report is concerned, he submitted that the D.N.A. evidence is only a corroborative piece of evidence to support the prosecution case. He submitted that the Applicant was arrested on 6th September 2022 merely on suspicion. There was a delay of 8 days in sending the samples to the concerned forensic science laboratory and therefore a possibility of tampering with the evidence cannot be ruled out. He relied on the decision of the Supreme Court of India in *Rahul v. State (NCT of Delhi)*,¹ where, as there was a 12 days delay in sending the sample from the Police station to the Forensic Science Laboratory, the Supreme Court held that it will not be possible to rely on the said D.N.A. report. He also

1 (2023) 1 SCC 83

relied on the decision of the Supreme Court in *Manoj v. State of M.P.*² and more particularly on paragraph No.152 therein.

5. On the other hand, Mr. Venegaonkar, learned Public Prosecutor a/w. Ms. Yadav, learned APP, for the Respondent No.1-UoI and Ms. Ansari, learned Amicus for the Respondent No.2 strongly opposed the Bail Application. Ms. Ansari, learned Amicus submitted that the deceased was 4 years and 2 months old at the time of the incident in question. On the basis of the statements of the mother, father, and uncle of the deceased, it is submitted that the incident in question took place when the father and uncle had gone out and the mother was waiting for them on the stairs. It is also submitted that the Applicant got time to commit the offence in question when the mother, father, and uncle of the deceased were not present in the house. Reliance is also placed on the disclosure statement of the Applicant. It is submitted that the Applicant along with his the family left the building on 20th August 2022 without informing anyone. Reliance is also placed on the D.N.A. Report and it is submitted that the Bail Application be rejected. Ms. Ansari, learned Amicus also relied on the decision of a learned Single

2 (2023) 2 SCC 353

Judge of the Delhi High Court in *Rajkumar Gupta v. State (NCT of Delhi)* ³ and the decision of the Supreme Court in *Alakh Alok Srivastava v. Union of India* ⁴ wherein directions were issued for cases under the POCSO Act.

6. As per the settled law, the Supreme Court of India in *Prasanta Kumar Sarkar v. Ashis Chatterjee* ⁵ has held that the following parameters are required to be taken into consideration while considering the Application for bail:

“9. We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, 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;

3 (2023) SCC OnLine Del 4032

4 (2018) 17 SCC 291

5 (2010) 14 SCC 496

(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.*

[See State of U.P. v. Amarmani Tripathi [(2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] (SCC p. 31, para 18), Prahlad Singh Bhati v. NCT of Delhi [(2001) 4 SCC 280 : 2001 SCC (Cri) 674] , and Ram Govind Upadhyay v. Sudarshan Singh [(2002) 3 SCC 598 : 2002 SCC (Cri) 688] .]”

7. The Supreme Court in *Y v. State of Rajasthan*⁶ has held that the grant of bail requires the consideration of various factors which ultimately depends upon the specific facts and circumstances of the case before the Court. There is no straitjacket formula which can ever be prescribed as to what the relevant factors could be. However, certain important factors that are always considered, *inter alia*, relate to *prima facie* involvement of the Accused, nature

6 (2022) 9 SCC 269

and gravity of the charge, severity of the punishment, and the character, position and standing of the Accused etc.

8. It is also settled law that at the stage of granting bail, the Court is not required to enter into a detailed analysis of the evidence in the case. Such an exercise may be undertaken at the stage of trial. However, the Court is required to see the evidence only for the purpose of ascertaining the *prima facie* involvement of the Accused in the commission of the offence.

9. *Prima facie*, the incriminating circumstances against the Applicant are as follows:

- (a) The deceased was a 4 years and 2 months old child.
- (b) The Applicant was residing on the same floor as that of the deceased;
- (c) The incident in question took place on the intervening night of 12th August 2022 and 13th August 2022 and the victim was found dead with bleeding from her private parts;
- (d) The provisional cause of death in the post-mortem examination report of the panel of medical officers at Government Hospital, Marwad, Nani Daman is recorded as follows:
“local injury suggestive of forceful vaginal wall penetration, provisional cause of death suggestive of hemorrhagic shock and final confirm report after FSL report”
- (e) On 20th August 2022, the Applicant and his family consisting of his wife and their two children left the said building where the Applicant was residing on a

- rental basis, without informing anybody including the care-taker of the building; and
- (f) The sample of semen found on the undergarments of the deceased, on the floor-mat at the site of the incident, and on certain cotton threads recovered from the crime scene, all matches with the D.N.A. of the Applicant.

10. Thus, this is not a case where, at this stage, it can be said that the Applicant is falsely implicated in the offence in question. *Prima facie*, there is sufficient material against the Applicant.

11. The offence is extremely grievous and heinous. The deceased victim was a 4 years and 2 months old child. The Applicant is from Uttar Pradesh and the incident in question occurred at Daman. If the Applicant is granted bail, then there is a likelihood of the Applicant fleeing from justice.

12. Reliance of Mr. Deshmukh, on *Rahul* (supra) is of no use. He relied on paragraph Nos.36, 38, 39, 40 and 41 of the said decision, which read as under:

“36. The learned Amicus Curiae has also assailed the forensic evidence i.e. the report regarding the DNA profiling dated 18-4-2012 (Ext. P-23/1) giving incriminating findings. She vehemently submitted that apart from the fact that the collection of the samples sent for examination itself was very doubtful, the said forensic evidence was neither

scientifically nor legally proved and could not have been used as a circumstance against the appellant-accused. The Court finds substance in the said submissions made by the Amicus Curiae. The DNA evidence is in the nature of opinion evidence as envisaged under Section 45 and like any other opinion evidence, its probative value varies from case to case.

...

38. It is true that PW 23 Dr B.K. Mohapatra, Senior Scientific Officer (Biology) of CFSL, New Delhi had stepped into the witness box and his report regarding DNA profiling was exhibited as Ext. PW 23/A, however mere exhibiting a document, would not prove its contents. The record shows that all the samples relating to the accused and relating to the deceased were seized by the investigating officer on 14-2-2012 and 16-2-2012; and they were sent to CFSL for examination on 27-2-2012. During this period, they remained in the malkhana of the police station. Under the circumstances, the possibility of tampering with the samples collected also could not be ruled out. Neither the trial court nor the High Court has examined the underlying basis of the findings in the DNA reports nor have they examined the fact whether the techniques were reliably applied by the expert. In the absence of such evidence on record, all the reports with regard to the DNA profiling become highly vulnerable, more particularly when the collection and sealing of the samples sent for examination were also not free from suspicion.

39. Thus, having regard to the totality of circumstances and the evidence on record, it is difficult to hold that the prosecution had proved the

guilt of the accused by adducing cogent and clinching evidence.

40. As per the settled legal position, in order to sustain conviction, the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused only and none else. The circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

41. As demonstrated earlier, the evidence with regard to the arrest of the appellant-accused, their identification, discoveries and recoveries of the incriminating articles, identity of the Indica car, the seizures and sealing of the articles and collection of samples, the medical and scientific evidence, the report of DNA profiling, the evidence with regard to the CDRs, etc. were not proved by the prosecution by leading cogent, clinching and clear evidence much less unerringly pointing to the guilt of the accused. The prosecution has to bring home the charges levelled against them beyond reasonable doubt, which the prosecution has failed to do in the instant case, resultantly, the Court is left with no alternative but to acquit the accused, though involved in a very heinous crime.”

13. It is important to note that the said decision is in the context of a trial where the convict was sentenced to death. In the said decision, *inter alia* it has been held that the prosecution failed to prove the circumstances by leading cogent evidence and that

having regard to the totality of circumstances and evidence on record in that case chain is not complete as the case is of circumstantial evidence. As far as the D.N.A. report is concerned, it has been observed that the same is not proved in accordance with law. Accordingly, the said decision has no application for consideration of the Bail Application in the facts and circumstances of the present case.

14. Mr. Deshmukh also relied on *Manoj* (supra) and more particularly on paragraph No.152 thereof, which reads as under:

“152. In an earlier judgment, R v. Dohoney & Adams the UK Court of Appeal laid down the following guidelines concerning the procedure for introducing DNA evidence in trials: (1) the scientist should adduce the evidence of the DNA comparisons together with his calculations of the random occurrence ratio; (2) whenever such evidence is to be adduced, the Crown (prosecution) should serve upon the defence details as to how the calculations have been carried out, which are sufficient for the defence to scrutinise the basis of the calculations; (3) the Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.”

Thus, what has been held in *Manoj* (supra) is the manner in which the D.N.A. evidence is required to be proved. The appreciation of the evidence concerning proof of D.N.A. report is to

be done at the stage of trial and therefore the said decision is also of no use.

15. Mr. Deshmukh also relied on the decision of a Division Bench of this Court [Aurangabad Bench] in Criminal Appeal No.306 of 2016 and more particularly on paragraph No.6. In paragraph No.6 the Court has considered the manner in which the D.N.A. report is to be proved. However, the said decision is also concerning appreciation of the case after trial. Thus, said decision is also not relevant to the Bail Application and in the facts and circumstances of this case.

16. Ms. Ansari, learned Amicus relied on *Rajkumar* (supra) wherein while dismissing the Bail Application, it has been observed that the D.N.A. report was matched. However, Mr. Deshmukh is right in contending that in the said case, there are several factors taken into consideration namely the Section 164 CrPC statement, Test Identification Parade. The Accused in the said case has been identified. Therefore, the said decision will not have any bearing while deciding the present Bail Application.

17. Ms. Ansari, learned Amicus also relied on *Alakh Alok Srivastava* (supra) and more particularly on paragraph No.25 setting out the directions to be followed with respect to criminal cases arising out of POCSO Act. Said paragraph No.25 reads as under:

“25. It is submitted by Mr Srivastava that in both the States, the cases are pending at the evidence stage beyond one year. We are absolutely conscious that Section 35(2) of the Act says “as far as possible”. Be that as it may, regard being had to the spirit of the Act, we think it appropriate to issue the following directions:

25.1. The High Courts shall ensure that the cases registered under the POCSO Act are tried and disposed of by the Special Courts and the Presiding Officers of the said courts are sensitised in the matters of child protection and psychological response.

25.2. The Special Courts, as conceived, be established, if not already done, and be assigned the responsibility to deal with the cases under the POCSO Act.

25.3. The instructions should be issued to the Special Courts to fast track the cases by not granting unnecessary adjournments and following the procedure laid down in the POCSO Act and thus complete the trial in a time-bound manner or within a specific time-frame under the Act.

25.4. The Chief Justices of the High Courts are requested to constitute a Committee of three Judges to regulate and monitor the progress of the trials under the POCSO Act. The High Courts where three Judges are not available the Chief Justices of the said courts shall constitute one Judge Committee.

25.5. The Director General of Police or the officer of equivalent rank of the States shall constitute a Special Task Force which shall ensure that the investigation is properly conducted and witnesses are produced on the dates fixed before the trial courts.

25.6. Adequate steps shall be taken by the High Courts to provide child-friendly atmosphere in the Special Courts keeping in view the provisions of the POCSO Act so that the spirit of the Act is observed.”

18. Mr. Venegaonkar, learned Public Prosecutor submitted that in the facts and circumstances of this case, the State will take all efforts to conclude the trial within a period of six months.

19. In the facts and circumstances of this case, as the victim was 4 years and 2 months old at the time of the incident and in view of the guidelines issued by the Supreme Court, the learned Trial Court is requested to conclude the trial within a period of six months.

20. For the reasons recorded earlier, the Bail Application is rejected.

21. It is clarified that the Trial Court shall decide the case on its merits, uninfluenced by the *prima facie* observations made in this order.

[MADHAV J. JAMDAR, J.]

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