

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 3294 OF 2023

SANTOSH
SUBHASH
KULKARNI

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Asgar Ali Haqeequlla Shaikh ...Applicant

Versus

The State of Maharashtra and anr. ...Respondents

Mr. Atul Kakade, a/w Ms. Deeapli Saudagar, for the
Applicant.

Mr. R. M. Pethe, APP for the State/Respondent No.1.

Ms. Tanvi Tapkire, for Respondent No.2.

CORAM: N. J. JAMADAR, J.

DATED: 3rd APRIL, 2024

ORDER:-

1. Heard the learned Counsel for the applicant, the learned APP for the State and the learned Counsel for respondent No.2.

2. The applicant, who is arraigned in CR No.112 of 2020 registered with Nijampura Police Station, Thane, for the offences punishable under Sections 376 and 354 of the Indian Penal Code, 1860 ("the Penal Code") and Sections 6, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 ("the POCSO"), has preferred this application to enlarge him on bail.

3. The first informant is the mother of a five year old girl child – victim. On 21st June, 2020, at about 5.00 pm. the victim left home to play. She returned at 5.45 pm. After a while, a lady residing in the vicinity, came to her home and cautioned her to be careful about the places the victim visits. She informed that the applicant had taken the victim to a room and shut the door from inside. She had peeped into the room and found the applicant touching the chest of the victim after pulling up her frock. She and other neighbours forced the applicant to open the door and rescued the victim. The first informant took the victim into confidence. Thereupon the victim narrated the sexual assault perpetrated by the applicant. The first informant lodged the report.

4. During the course of investigation, the statement of the victim came to be recorded. The lady, who had informed the first informant about the alleged occurrence and two more witnesses supported the version of the victim. In the supplementary statement, recorded on 11th August, 2020, the first informant stated that the victim had disclosed to her that the applicant had inserted his finger in the private part of the victim and made her to touch his private part. Thereupon, the offences punishable under Section 376 of the

Penal Code and Sections 4 and 6 of the POCSO Act, 2012 were added. The applicant came to be arrested on 29th August, 2022.

5. Mr. Kakade, the learned Counsel for the applicant, submitted that initially for almost two months the indictment against the applicant was that of the offence under Section 354 of the Penal Code only. Subsequently, the supplementary statement came to be recorded wherein allegations of penetrative sexual assault were falsely made. Mr. Kakade urged that in the FIR the name of the lady, who had allegedly informed the first informant about the occurrence, was not disclosed. Inviting the attention of the Court to the injury certificate of the victim, post her examination on 25th June, 2020, Mr. Kakade urged that there was no injury on the person of the victim. After the exaggerated allegations of penetrative sexual assault were made, on 2nd September, 2020, the victim was again examined and an attempt was made to show that there was redishness and swelling.

6. Mr. Kakade further submitted that the applicant has been in custody since 21st August, 2020. The trial has yet not commenced. Therefore, the applicant deserves to be enlarged on bail.

7. Mr. Pethe, the learned APP, countered the submissions on behalf of the applicant. It was urged that the applicant was found exploiting the child by the neighbours. There are three witnesses, who have given statement regarding the sexual assault perpetrated by the applicant. All of them can have no axe to grind against the applicant. Mr. Pethe submitted, the submission on behalf of the applicant that there was delay in reporting the incident of alleged penetrative sexual assault is required to be appreciated in the light of the age of the victim.

8. Ms. Tapkire, the learned Counsel for respondent No.2, also strongly opposed the prayer for bail. It was submitted that but for the intervention of the neighbours, the victim could have been subjected to aggravated penetrative sexual assault. In the event the applicant is released on bail, there is a strong possibility of tampering with evidence and threatening the first informant and the victim.

9. I have perused the allegations in the FIR. It is true initially FIR was registered for the offences punishable under Section 354 of the Penal Code and Sections 8 and 12 of the POCSO Act, 2012. However, the context in which the FIR came to be registered deserves to be properly appreciated.

Witness 'A' categorically states that the applicant had taken the victim to a room. She was suspicious, hence she peeped into the room from a gap in the door. The applicant had pulled up the clothes of the victim and was moving his hand over the chest of the victim. Thereupon, she raised alarm. Two more witnesses 'B' and 'C' joined her and noticed the said incident and forced the applicant to open the door. Thereupon witness 'A' went to the house of the first informant and narrated the incident to her.

10. In the backdrop of the aforesaid nature of the accusation, I find substance in the submission of Mr. Pethe that there is a very strong *prima facie* case to show that the applicant had taken the victim to a room and subjected her to sexual assault. In a sense, the applicant was apprehended in the act of sexual assault.

11. The submission of Mr. Kakade centered around the aspect of delay and absence of injury on the person of the victim deserves appreciation in the light of the age of the victim and the attendant circumstances. In the statement of the victim recorded on 24th June, 2020 itself, the victim stated that the applicant had touched her private part. The question as to whether the applicant subjected the victim to

aggravated penetrative sexual assault may be required to be adjudicated at the trial, keeping in view the aforesaid circumstances of delay and absence of injury sought to be pressed into service on behalf of the applicant. However, if the statement of the victim is considered in correct perspective, a *prima facie* case for aggravated sexual assault can be said to have been made out. In the circumstances, I am not inclined to exercise discretion in favour of the applicant. The apprehension on the part of the prosecution about tampering with evidence and threatening the witnesses as well as fleeing away from justice, cannot be said to be unfounded.

12. It is true the applicant has been in custody since August, 2020. The long period of incarceration without a real prospect of expeditious conclusion of the trial may furnish a ground for the release of the applicant on bail. Therefore, it would be expedient to direct the learned Special Judge to conclude the trial within a reasonable period. In the event the trial is not concluded within a reasonable period, the prayer of the applicant for bail on the count of prolonged period of incarceration can be legitimately considered.

13. Hence, the following order:

: O R D E R :

- (i) Application stands rejected.
- (ii) Having regard to the age of the victim and period of incarceration of the applicant, the learned Special Judge, seized with Special Case No.405 of 2020 arising out of CR No.112 of 2020 registered with Nijampura Police Station, Thane, is requested to make an endeavour to commence and conclude the trial as expeditiously as possible and, preferably, within a period of six months from the date of the communication of this order.
- (iii) The prosecution and the applicant shall cooperate in the expeditious conclusion of the trial and shall not seek adjournment.
- (iv) 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.

[N. J. JAMADAR, J.]