

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

CRIMINAL BAIL APPLICATION NO. 3628 OF 2022

Azhar Hamidulha Khan ... Applicant
Versus
The State of Maharashtra and Anr. ... Respondents

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Mr. Anand Pandey a/w Prashant Jain, for the Applicant.
Mr.A. A. Palkar, APP, for Respondent No.1-State.
Ms. Komal G. Sinha, appointed Advocate, for Respondent No.2.
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CORAM : PRITHVIRAJ K. CHAVAN, J.

Reserved On : 10th April, 2024.

Pronounced on : 12th April, 2024.

P.C.

The applicant is being prosecuted in connection with C.R. No. I-486 of 2022 by Navghar Police Station for the offences punishable under Sections 376, 376(2)(j)(3) of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012.

2 Briefly stated, the facts are as follows;

The first informant is the mother of the victim, who works in a Steel Company at Bhayanadar. On 27th May, 2022 the first informant went for her work around 9:00 a.m. The victim was

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alone at home. The victim was 15 years at the relevant time. When the first informant returned home around 8:00 p.m., she found the victim was missing from the home. Since the victim used to visit the house of her uncle at Dahisar, the first informant made an enquiry. When she realized that the victim has not been to the house of her uncle, she tried to contact her on phone. It was informed that she was at her female friend's house. Thereafter on 23rd June, 2022 first informant received a call from one Anish Kumar Kashyap, who informed that the victim was found standing on a platform of Nalasopara Railway Station. At the instance of the victim the said Kashyap had called the first informant. Thereafter, the informant came to know about the alleged act by the applicant and, therefore, she immediately approached the police station and lodged a report.

3 It is the case of the prosecution that the applicant enticed and blackmailed the victim by showing certain photos from his mobile and threatened her to make it viral. It is further alleged by the prosecution that the victim was subjected to forcible sexual intercourse and assault by the applicant.

4 The applicant was arrested. The Investigating Officer

recorded the statements of the witnesses. The victim was referred for medical examination. Statement of the victim came to be recorded by the Judicial Magistrate First Class, Thane, under Section 164 of the Criminal Procedure Code (“Cr.P.C.” for short). After the investigation a charge-sheet was filed.

5 An application moved before the Additional Sessions Judge, Thane, for bail came to be rejected on 15th November, 2022 and, therefore, the applicant approached this Court.

6 Heard learned Counsel for the applicant, Ms. Komal Sinha, appointed through legal aid for the victim at a considerable time and the learned APP.

7 Undoubtedly, the victim was 15 years old at the time of the incident and the applicant was 24 years old. Learned Counsel would argue that the victim voluntarily eloped with the applicant which is evident from her statement recorded by the police under Section 161 of the Cr. P.C. and also in her statement recorded under Section 164 of the Cr.P.C. According to the Counsel, it is a love affair. Since the applicant is behind the bars from the date of his

arrest on 26th June, 2022, he is entitled for bail. Charge has not yet been framed. Learned Counsel would argue that if the victim was alleged to have wrongfully confined by the applicant then why the Investigating Officer did not invoke Section 344 and 346 of the Indian Penal Code?

8 On the other hand, learned Counsel appointed through legal aid, who represents the victim, strongly objected the application mainly for the reasons that it cannot be said to be a love affair as tried to be impressed upon this Court for the simple reason that the victim was a girl of just 14 to 15 years and the applicant is a grown up man of 24 years. The victim was of such a tender age that she was unable to comprehend the intention of the accused who wanted to exploit her sexually. The alleged threats given by the applicant to make video viral had definitely discouraged her to return to her mother immediately after she was enticed by him. The victim was under duress.

9 Learned APP also spoke in tune with learned Counsel for the victim. Learned APP would invite my attention to the medical report which confirmed the fact of sexual exploitation of the victim

by the applicant.

10 Statement of the victim under Section 164 of the Cr. P.C. recorded by the Judicial Magistrate First Class, Thane on 22nd July, 2022 reveals that after her acquaintance with the applicant they used to have talks frequently. When her mother realized about their conversation, she asked the victim not to talk with him. After about one and half months thereafter the applicant had been to her house and threatened her that if she did not accompany him, he would make her photographs viral and would show it to her mother also. The victim thought that if she would accompany him, perhaps he would immediately leave her alone. However, it appears that she was wrongfully confined by him and repeatedly committed penetrative sexual assault upon her despite knowing that she was below 18 years of age. The statement further indicates that on one day when the applicant was in the bathroom, she could escape from his clutches. She thereafter called her mother on phone. Thereafter, a report came to be lodged. It is apparent from her statement that the applicant not only enticed but threatened her to accompany him by giving threats that he will show the photographs to her mother. Considering the tender age of the victim, *prima facie*, what has been

argued by learned Counsel for the victim appears to be quite probable.

11 The medical report of the victim, who appears to have been examined by the doctor on 27th June, 2022 depicts that there were multiple hymenal tears and sexual assault could not be ruled out. The report does not say that there was no sexual assault or that the hymen was intact. This further substantiates the statement of the victim recorded by the Magistrate that she was repeatedly subjected to rape and sexual assault by the applicant. Even if for the sake of argument it is taken to be a voluntary act on the part of the victim, since she was a child within the definition “child” as per Section 2(1)(d) of the POCSO Act, the provisions under Sections 3 and 4 would be precisely attracted. Consent of the victim is immaterial.

12 Learned Counsel for the applicant is at pains to argue that the mother of the victim had, earlier occasion also lodged similar kind of report with the police by adopting similar *modus operandi* to implicate one more accused Vishal Raju Chauhan against whom crime has been registered bearing No.898 of 2022 for the offences punishable under Sections 363, 376(2)(i), 376(2)(n) of the IPC and

Sections 4, 5(l), 6, 8, 12 of the POCSO Act. It appears that the victim was impregnated and DNA samples were sent for analysis. However, that itself would not be a ground to grant bail to the applicant as that would be a distinct offence *qua* another accused.

13 To grant bail to the applicant in light of the material on record would frustrate the very object of the POCSO Act. Moreover, in case of his release, there is every likelihood of influencing and coercing the victim who is still of tender age. It would not be safe to release the applicant on bail, especially in light of the fact that the first informant is a widow and there is no other male member in the family.

14 For the reasons stated herein-above, the application is devoid of any of substance and hence, stands rejected.

15 The trial Court shall frame a charge and proceed to continue with the trial.

16 Application is disposed of in the aforesaid terms.

[PRITHVIRAJ K. CHAVAN, J.]