

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 274 OF 2024

Mohd. Rashid Abdul Shabbir Siddhiki

...Applicant

Versus

The State of Maharashtra & Anr.

...Respondents

- Mr. Tohid Shaikh i/b Ms. Anjali Patil, for Applicant.
- Mr. Sagar R. Agarkar, APP for Respondent.
- Mr. Marmik Shah, for Respondent No.2 (Appointed)

CORAM : MANISH PITALE, J.

DATE : 03rd OCTOBER, 2024.

P. C. :

1. Heard, Mr. Shaikh, learned counsel for the applicant, Mr. Agarkar, learned APP for respondent – State and Mr. Shah, learned counsel appointed to appear on behalf of victim in terms of order dated 19.09.2024.

2. The applicant in the present case is seeking bail, as he was arrested on 23.06.2023, in connection with First Information Report No.0947 of 2023, dated 23.06.2023, registered at Police Station Bandra, Mumbai, for offences under Sections 324, 354, 354-A, 376(2)(j) and (l) and 376(3) of the Indian Penal Code, 1860 (IPC) and Sections 4, 8, 10 and 12 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act).

3. The informant in the present case is the sister of a minor victim girl. It is stated that at the time of the incident the victim was aged about 15

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years and the allegation is that the applicant, is being a worker in the factory of the victim's uncle, sexually assaulted her, resulting in registration of the aforesaid offences.

4. The learned counsel for the applicant submits that although, amongst other allegations, the victim is alleged to have stated that the applicant had penetrated her private part by means of his finger, the medical examination report does not support such an assertion at all. In fact, the history recorded in the medical examination report also does not support such a version. Since the copy of the medical examination report, placed on record with the application, was not legible, on an earlier occasion the learned APP was requested to furnish a legible copy thereof. The learned APP tendered a legible copy of the same. He also tendered a copy of the statement of the victim recorded under Section 164 of the Code of Criminal Procedure, 1973 (CrPC).

5. The contents of the statement of the victim recorded under Section 164 of the CrPC describes the incident in the manner in which it was stated in the history recorded in the medical examination report. In the light of the aforesaid material, it was submitted on behalf of the applicant that the worst case scenario against the applicant could be the offence pertaining to sexual assault as defined under Section 7 of the POCSO Act, which is

punishable under Section 8 thereof with a minimum term of imprisonment of 3 years and maximum of 5 years. It is submitted that since there is no material on record to support the registration of the offence under Section 4 of the POCSO Act, which pertains to penetrative sexual assault, the applicant having undergone incarceration for about 1 year and 3 months, this Court may consider enlarging him on bail. It is submitted that the applicant undertakes to abide by conditions that may be imposed by this Court.

6. The learned APP submitted that the statement of the informant recorded under Section 164 of the CrPC read with medical examination report does not appear to support the allegation of penetration with finger made in the report, leading to registration of the FIR. It is submitted that this Court may pass appropriate order in the present case.

7. The learned counsel appointed to appear on behalf of the victim, submitted that the question as to whether the material on record sufficiently supports the allegation of penetration or not would be a matter for trial. This Court ought to consider the fact that the victim in the present case is a blind girl and the applicant appears to have taken advantage of her physical disability, while inflicting sexual assault on her. It is further submitted that since the prosecution would be examining only limited number of witnesses, the trial may be expedited rather than enlarging the applicant on bail,

particularly because the applicant is originally a resident of Uttar Pradesh.

8. This Court has considered the rival submissions in the light of the material available on record. The question as to whether Section 4 of the POCSO Act, can *prima facie*, be invoked becomes crucial in the facts and circumstances of the present case. A perusal of the statement, leading to registration of the FIR, shows that there is indeed an allegation, amongst other allegations, against the applicant of having penetrated the private part of the victim by means of his finger. It is to be noted that the FIR is registered at the behest of the elder sister of the victim and she has given the statement on the basis of what was allegedly told by the victim.

9. But, a perusal of the statement of the victim, recorded under Section 164 of the CrPC shows that there is no such allegation of the applicant having penetrated the private part of the victim in any manner. In fact, the allegation is about manner in which the applicant allegedly molested the victim.

10. The description of the incident, as recorded in the statement under Section 164 of the CrPC, is more akin to the manner in which the history of the incident is recorded during the medical examination, which was conducted immediately after registration of the FIR. In the said history also the description of the incident appears to be more in the nature of molestation

rather than penetrative sexual assault on the victim. Apart from this, the contents of the medical report indicate that there was no penetration in the present case. A contusion was found on the right upper breast of the victim, which is corresponding to the allegation of bite made against the applicant. The medical examination report does not record any injury to the genitalia, including the hymen and it is also specifically recorded that there was no history of penovaginal sexual or penetrative sexual intercourse given by the informant during the course of medical examination. The report further goes on to record that it appears to be a case of sexual violence associated with molestation.

11. The aforesaid material does make out a *prima facie* case in favour of the applicant, at least to the extent of indicating that the offences of penetrative sexual assault as defined under Section 3 of the POCSO Act, punishable under Section 4 thereof may not be made out in the present case. The description of the incident fits more into the definition of sexual assault as defined under Section 7 of the POCSO Act and punishable under Section 8 thereof. Perusal of Section 8 of the POCSO Act shows that the punishment for sexual assault is imprisonment for minimum term of 3 years, which may extend to 5 years. The other Sections of the IPC in the present case include Sections 376(2)(j) and (l) thereof. But, the said offences would necessarily relate to the offence of rape as defined under Section 375 of the IPC, which

again involves the act of penetration. In such circumstances, the applicant having already undergone incarceration for a period of 1 year and 3 months, this Court is inclined to allow the application. The apprehension expressed on behalf of the victim that the applicant may abscond during the course of trial, can be addressed by imposing appropriate conditions. In any case, there is a specific statement made on behalf of the applicant that his entire family, including his sons are residing in Mumbai and it has to be noted that the applicant is a senior citizen aged about 60 years.

12. In view of the above, the application is allowed in the following terms :

- (A) The applicant shall be released on bail in connection with FIR No.0947 of 2023, dated 23.06.2023, registered at Police Station Bandra, Mumbai, on furnishing PR bond of ₹ 25,000/- and one or two sureties in the like amount to the satisfaction of the Trial Court.
- (B) The applicant shall not enter the jurisdiction of police station Bandra, Mumbai, during the course of the trial.
- (C) The applicant shall attend the police station Khar, Mumbai, on the First Monday of every month between 10.00 a.m. to 12.00 noon, during the pendency of the trial.
- (D) The applicant shall attend the proceedings before the Trial

Court on every date, except when exempted, for reasons to be recorded in writing.

(E) The applicant shall not tamper with the evidence in any manner. He shall not influence the informant, witnesses or any other persons concerned with the case.

(F) The applicant shall upon being released immediately inform the Investigating Officer of his Contact number and residential address and update the same in case of any change.

13. Needless to say, in case of violation of any of the aforesaid conditions, the bail granted to the applicant shall be liable to be cancelled.

14. It is made clear that the observations made in this order are limited to the question of grant of bail to the applicant and that the Trial Court shall proceed further in the matter without being influenced by the observations made hereinabove.

15. The application is disposed of.

(MANISH PITALE, J.)