

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

BAIL APPLICATION NO. 1531 OF 2024

Nitin Vitthal Khandare	...	Applicant
Versus		
The State of Maharashtra & Anr.	...	Respondents

Mr. Aditya Salve for the Applicant.
Ms. Rutuja A. Ambekar, (through V.C.) APP for Respondent No.1-
State.
Mr. Rutvij Solanki, through Legal-Aid, for Respondent No.2.
Mr. Amit Tad, P.I., Andheri Police Station, Mumbai.

**CORAM: MANISH PITALE, J.
DATE : 18th OCTOBER 2024**

P.C. :

. Heard learned counsel for the applicant, learned APP for the respondent-State and learned counsel appointed to appear on behalf of the respondent No.2.

2. The applicant is seeking bail as he was arrested on 27th May 2023 in connection with FIR No. 0284 of 2023 dated 27th May 2023 registered at Andheri Police Station, Mumbai, for offences under Sections 376(2)(l) and 376(2)(j) of the Indian Penal Code, 1860 (IPC) and Sections 4, 6, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act).

3. The informant in the present case is the mother of the victim. She gave her statement to the effect that on 27th May 2023,

her daughter came home from the playground, where she was playing, and started crying after narrating the incident in question.

4. The informant i.e. the mother of the victim, immediately went to the playground, where she found that the alleged eye-witness to the incident was present along with the applicant/accused. The eye-witness narrated the manner in which the incident had occurred and how he accosted the applicant, as also the manner in which the Police was called from the mobile phone of an employee of the BEST, who was passing by the said area. Upon the Police reaching the place of the incident, the applicant was taken into custody and investigation was undertaken. The investigation was completed and charge-sheet was filed. The applicant has remained behind bars since 27th May 2023.

5. The learned counsel for the applicant referred to the statement of the informant, as well as the statement of the alleged eye-witness and also the statement of the victim herself, recorded during the course of investigation. He then invited attention of this Court to the medical examination report, to contend that the allegation of penetrative sexual assault is farfetched and the very description of the incident as given by the alleged eye-witness appears to be seriously doubtful, if this Court peruses the spot *panchanama* filed along with the charge-sheet. It was submitted that the incident, as described by the alleged eye-witness, which forms the basis for registration of the FIR, appears to be doubtful since there is no material to indicate the distance from which the

alleged eye-witness noticed the incident. The playground in which the incident allegedly took place had a number of other persons, none of whom came forward to support the description of the incident as given in the FIR.

6. It was submitted that the applicant is ready to abide by any condition that may be imposed by this Court, including staying away from the place where the witnesses are residing. On this basis, it was submitted that relief may be granted in the present bail application.

7. On the other hand, the learned APP and the learned counsel appointed to appear on behalf of the respondent No.2, have opposed the present application. They referred to the serious offences registered against the applicant and the fact that the victim was only 6 years old girl child at the time of the incident. By relying upon the statement of the eye-witness as well as the informant and the person, whose mobile phone was used to call the Police, it was submitted that the description of the incident was given in sufficient detail. This was clearly supported by the statement of the victim herself, wherein she describes as to the manner in which she was sexually harassed by the applicant. It is submitted that infact the medical examination report would be a matter for trial. It was further submitted that an affidavit of the informant was filed before the Sessions Court, when the bail application was taken up for consideration, wherein she expressed her no objection for bail being granted to the applicant. It is

submitted that this indicates as to the manner in which the applicant is seeking to influence the witnesses and therefore, the application deserves to be dismissed.

8. This Court has considered the rival submissions in the light of the material available on record. There is no doubt about the fact that the applicant is facing prosecution for serious offences, including offences under the POCSO Act, in the context of the victim, who at the relevant time was only 6 years old. But, seriousness of the offences registered against the applicant/accused in itself cannot be a ground for rejecting the prayer for bail. In that light, this Court has considered the documents filed along with the charge-sheet.

9. The statement of the eye-witness, which is essentially the basis for registration of the FIR, describes in detail, as to the acts attributed to the applicant. The statement of the informant is nothing but a reflection of what is stated by the alleged eye-witness. The statement of the victim herself indeed describes the manner in which the applicant allegedly sexually assaulted her.

10. But, a perusal of the medical examination report in the present case, *prima facie*, does not appear to support the allegation of the penetrative sexual assault. The allegation in the present case is that the applicant used his fingers to penetrate the private part of the victim. It is also stated that the victim was resisting such an act on the part of the applicant. Yet, the medical examination

report, at the relevant places, specifically records that there was no evidence of any bleeding, tear or even tenderness on the private parts of the victim. No external injuries were found on the private part, which was allegedly penetrated by the applicant by using his fingers. There were no external injuries found on any part of the body of the victim. In fact, at the conclusion, the medical examination report specifically records that there was no evidence of any fresh injury.

11. It is also to be noted that the alleged eye-witness stated that on the date and time of the incident, while he was in his house, from a window in the kitchen of his house overlooking the playground, he saw some activity happening in the playground near a Christian cross located in the playground. The alleged eye-witness claims that he jump over the security wall of the house and rushed towards the playground when he saw the applicant with the victim and thereupon, the act allegedly being undertaken by the applicant was described. It is significant to note that one of the details stated by the said alleged eye-witness does not find mention in the statement of the victim or the statement of the mother of the victim, who is the informant. In this context, when the spot *panchanama* is perused, while the place of the incident has been marked, there is nothing to show as to the location of the house of the alleged eye-witness. There is nothing to show as to the distance between the window of the kitchen of the house of the alleged eye-witness and the actual spot of the incident. Apart from

this, in the playground, it can be safely assumed that there would be other persons also, particularly when the statements on record show that children were playing in playground. There was not a single person in the playground, who either noticed the said activity or came forward to corroborate the allegations made by the alleged eye-witness against the accused. These factors cannot be ignored, merely because the allegations made against the applicant are serious.

12. A perusal of Section 3 of the POCSO Act shows as to the manner in which penetrative sexual assault is defined. *Prima facie*, the material on record, particularly the medical examination report, does not appear to support the allegation of penetrative sexual assault against the applicant. At worst, the allegation could fit into the definition of sexual assault under Section 7 of the POCSO Act, punishable under Section 8 thereof by imprisonment for a period not less than 3 years, but which could be extended to 5 years. For the same reasons, the allegation of rape against the applicant, *prima facie*, do not appear to be supported by the material on record.

13. In such circumstances, when the applicant has already suffered incarceration for a period of about 1 year and 5 months, this Court is inclined to allow the present application.

14. The apprehension expressed by the learned APP and the learned counsel for the respondent No.2 about the possibility of

witnesses being influenced, can be dealt with by issuing appropriate directions.

15. 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.0284 of 2023 dated 27th May 2023 registered at Andheri Police Station, Mumbai, on furnishing P.R. Bond of Rs. 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 Andheri Police Station, Mumbai, during the pendency of the trial.
- (c) The applicant shall report to the Naigaon Police Station, Mira-Bhayandar, Vasai-Virar, on first Monday of each month between 10:00 a.m. and 12:00 noon.
- (d) The applicant shall cooperate with the trial Court and he shall attend each and every date, unless exempted by the trial Court, for reasons to be recorded in writing.
- (e) The applicant shall not tamper with the evidence of the prosecution and he shall not influence the informant, witnesses or any other person concerned with the case.
- (f) The applicant, upon being released on bail, shall place

on record of the trial Court the details of his Contact Number and residential address with updates in case of any change.

16. 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. It is also clarified that the observations made in this order are limited to the disposal of the present bail application. The concerned Court shall proceed further in the matter without being influenced by the observations made hereinabove.

17. The application is disposed of.

MANISH PITALE, J.