

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO. 2083 OF 2024**

Bhiva Baban Kshirsagar	...	Applicant
vs.		
The State of Maharashtra and another	...	Respondents

Mr. Irfan A. Shaikh for applicant.

Mr. Prasanna P. Malshe, APP for respondent No.1-State.

**CORAM : MANISH PITALE, J.
DATE : 08th OCTOBER, 2024**

P.C. :

. Heard learned counsel for the applicant and the learned APP for the respondent No.1-State.

2. The applicant is seeking bail as he was arrested on 05.04.2021 in connection with FIR No.0110 of 2021 dated 30.03.2021, registered at Turbhe MIDC Police Station, Navi Mumbai, initially for offences under Section 354A and 363 read with Section 34 of the Indian Penal Code, 1860 (IPC). Subsequently, upon completion of investigation, when the chargesheet was filed, offence under Section 376(2)(1) of the IPC, pertaining to committing rape on a woman suffering from mental or physical disability, was added. The applicant is behind bars for the past about 3½ years.

3. The FIR in the present case, was registered on the statement given by the mother of the victim. It is stated that the victim is mentally challenged and the documents on record show that she suffers from disability upto 50%. It is also recorded by the concerned doctor that the applicant is suffering from mild intellectual disability. The informant stated that on 28.03.2021, which was the day of Holi festival, the victim had gone with the sister of the informant to a program in connection with the said festival. It is alleged that

the co-accused person took the victim away from the place of the aforesaid program and thereafter, the co-accused person and the applicant both sexually harassed the victim by touching her on various parts of her body, near a railway track. Thereafter, they dropped her back in the market from where she reached home. On the basis of the narration of the incident and the statement given to the police, the FIR came to be registered on 30.03.2021.

4. The learned counsel for the applicant submitted that the narration of the incident has changed at various stages during the course of investigation, which raises doubt about the actual manner in which the incident had taken place. It is alleged that the investigating authority did not investigate a specific angle that arose from the statement made by the applicant, during his medical examination. He had stated that he knew the victim for a number of years and that the victim was divorced. It was indicated that the applicant was in a relationship for some time with the victim but thereafter, he had withdrawn himself in the light of opposition of the family of the victim. According to the learned counsel for the applicant, this could be a case of false implication, which the investigating authority failed to investigate.

5. It is further submitted that in the history of medical examination, no names were taken by the victim. In the statement recorded before the Magistrate under Section 164 of the Criminal Procedure Code, 1973 (Cr.PC.) on 18.05.2021, the version of the victim underwent significant improvement and allegation of sexual intercourse surfaced for the first time. It is submitted that the medical examination report does not indicate any such recent activity of sexual intercourse and therefore, it can be claimed that the initial allegation pertaining to offence under Section 354A of the IPC, could be the

worst case scenario for the applicant.

6. The learned counsel for the applicant then referred to a document at Exhibit C pertaining to medical condition of the applicant himself. It is brought to the notice of this Court that the applicant suffered from stroke, due to which he has lost power in his left leg and there is significant weakness in his limbs. It is submitted that recently, the applicant had to be admitted in hospital through jail as his condition had worsened. It is further submitted that the applicant has already undergone incarceration for about 3½ years and if the offence under Section 376(2)(l) of the IPC is not made out, only the offences under Sections 354A and 363 of the IPC would remain, which carry punishment for a period of 3 years and 7 years respectively. It is submitted that the applicant having already suffered incarceration for about 3½ years, this Court may allow the bail application. The applicant undertakes to abide by the conditions that may be imposed by this Court.

7. On the other hand, the learned APP has vehemently opposed the present application. He submitted that the charges in the present case are already framed on 13.03.2024 and since the list of witnesses filed alongwith the chargesheet, shows only 21 witnesses, this Court may consider expediting the trial and the prayer for granting bail deserves to be rejected.

8. It is submitted that considering the fact that the report pertaining to the victim shows that she suffers only from mild intellectual disability, the statement recorded on oath before the Magistrate under Section 164 of Cr.P.C., assumes great significance. It is submitted that in the said statement, the victim has described in detail as to the manner in which the applicant forced himself on her and therefore, it cannot be claimed that at worst, offence under Section 354A of the IPC could be made out against the

applicant. It is submitted that the applicant appears to have taken advantage of the fact that the victim is mentally challenged and sexually exploited her and hence, no indulgence may be shown to the applicant in the facts and circumstances of the present case.

9. This Court has considered the rival submissions in the light of the material placed on record. The statement of the informant i.e. the mother of the victim, which led to registration of FIR, shows that according to her, the victim had narrated the incident by alleging that the applicant as well as the co-accused person had taken her near the railway track and both of them had touched her on various parts of her body. This is the reason why the offences only under Sections 354A and 363 were registered in the FIR. The statement of the victim recorded on 05.04.2021 i.e. the day on which the applicant was arrested also shows that according to her, the applicant had touched her on various parts of her body. In this statement also, there was no allegation of forced sexual intercourse. It is for the first time in the statement recorded before the Magistrate on 18.05.2021 under Section 164 of the Cr.P.C., that the victim gave graphic description of not only the manner in which the applicant allegedly touched her, but she also alleged that the applicant disrobed her and had forced sexual intercourse near the railway track. There is some substance in the contention raised on behalf of the applicant that there is clear improvement in the version of the victim, as recorded in her statement under Section 164 of Cr.P.C.

10. The medical examination report does show a minor injury near the vagina of the victim, but it does not show any signs of forced sexual intercourse, particularly when the incident is said to have taken place near the railway track, where the clothes of the victim were removed. There are no injuries to the body of the victim.

11. Apart from this, it is to be noted that documents have been placed on record to show the medical condition of the applicant himself. The discharge card at Exhibit C shows the fact that the applicant was suffering from non-hemorrhagic infarct of his right high parietal region, which led to complete loss of power in his left leg and considerable weakness in his lower limbs. The documents on record also show that the applicant had undergone treatment for the same, including bilateral intracranial internal carotid angioplasty. The aforesaid documents indicate that the applicant appears to be suffering from such ailment concerning his brain, which has affected his left leg completely. A statement is specifically made by the learned counsel for the applicant, on instructions, that due to worsening of condition of the applicant, he is admitted in hospital through jail. The aforesaid medical condition of the applicant is also being taken into consideration, while disposing of the present application.

12. It is also a matter of record that the applicant has suffered incarceration for almost 3½ years. If the allegation pertaining to offence under Section 376(2)(1) of the IPC is not made out, only the offence under Section 354A pertaining to sexual harassment and offence under Section 363 pertaining to punishment for kidnapping, would remain which prescribe punishment of imprisonment for a period of 3 years and 7 years respectively. The applicant already having undergone incarceration for a period of almost 3½ years, this Court is inclined to enlarge the applicant on bail, particularly considering his medical condition as on today. The apprehension expressed by the learned APP about the possibility of the applicant interfering with the smooth conduct of trial, can be addressed by imposing appropriate stringent conditions on the applicant.

13. In view of the above, the application is allowed in the following terms:
- (i) The applicant shall be released on bail in connection with FIR No.0110 of 2021 dated 30.03.2021, registered at Turbhe MIDC Police Station, Navi Mumbai, on furnishing PR Bond of ₹ 25,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.
 - (ii) The applicant, upon being released on bail, shall remain outside the jurisdiction of Turbhe MIDC Police Station, during the pendency of the trial.
 - (iii) Upon release, within one week, the applicant shall inform the Investigating Officer as well as the trial court about his contact number and residential address and update the same in case of any change.
 - (iv) The applicant shall co-operate with the trial Court in completing the proceedings expeditiously and attend the proceedings before the trial Court on each and every date, unless specifically exempted, for the reasons to be recorded in writing.
 - (v) The applicant shall not tamper with the evidence of the prosecution in any manner. He shall not undertake any action that may influence the informant, witnesses and other persons concerned with the case.
14. The applicant shall be liable to face proceedings for cancellation of bail, in the event any of the aforesaid conditions are violated.
15. It is also clarified that the observations made in this order are limited to the disposal of the present application and the trial court shall proceed further in the matter without being influenced by the observations made hereinabove.
16. The application is disposed of.

(MANISH PITALE, J)