



IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION (APPLN) NO.79/2023

XYZ in Crime No.255/2022 Registered at Police Station Gittikhadan,
Nagpur – through her Natural Guardian

..vs..

State of Mah., thr.PSO PS Gittikhadan, Nagpur and anr

.....
Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders
.....

Court's or Judge's Order

Shri R.M.Daga, Counsel for the Applicant.
Shri P.K.Sathianathan, Counsel for Non-applicant No.2.
Shri M.J.Khan, Additional Public Prosecutor for the State.

CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 28/03/2024

PRONOUNCED ON : 03/04/2024

1. Heard learned counsel Shri R.M.Daga for the applicant/victim, learned counsel Shri P.K.Sathianathan for non-applicant No.2/accused, and learned Additional Public Prosecutor for the State.

2. The present application by the applicant/victim is for cancellation of bail granted to non-applicant No.2 in connection with Crime No.255/2022 registered with the non-applicant/police station for offences punishable under Sections 376 and 506 with Sections 4, 6, and 8 of the Protection

of Children from Sexual Offences Act, 2012 (the POCSO Act).

3. As per allegations, the victim and non-applicant No.2 are neighbours. On 9.5.2022, at about 2:00 pm, the victim went on terrace of her house for bringing dry clothes. Non-applicant No.2 came there and hold her from back side and committed forcible sexual intercourse. She immediately narrated the incident to her mother and lodged a report promptly. On the basis of the said report, the crime was registered.

4. Learned counsel for the applicant/victim submitted that non-applicant No.2 was arrested on 9.5.2022. After his arrest, he filed an application bearing No.1210/2022 which was withdrawn and subsequently he again filed an application vide Exhibit-4 in Special Case No.313/2022. Learned Session Judge released non-applicant No.2 on bail by observing that there was no injury on the person of the victim as well as there is a distance of seven feet between two buildings and, therefore, story of the victim appears to be improbable. It is his contention that these observations are contrary to record collected during investigation. Thus, learned Judge of the trial court ignored material evidence and released non-applicant No.2 on bail. He further submitted that the Protection of Children from Sexual

Offences Act is enacted with an object to provide a statutory shield to protect children from offences of sexual assault, sexual harassment, and to provide establishment of special court for trial of such offences. The victim in the present case is aged about fifteen-year-girl and by finding her alone on the terrace, she was subjected for forceful sexual assault. The medical report shows that during medical examination, hymenal tear at 10.00 O'clock; 1.00 O'clock, and 7.00 O'clock was observed by the medical officer. The supplementary investigation was carried out as in initial panchanama, distance between two buildings was not shown. The spot panchanama shows that distance between two buildings is around three feet and three inches and, therefore observations of learned Judge of the trial court that distance between two buildings is approximately seven to eight feet and a jump of a person from a distance of seven feet is improbable and non-applicant No.2 is released on bail, which is contrary to the record. As such, the bail granted to non-applicant No.2 deserves to be cancelled.

5. In support of his submissions, learned counsel for the victim placed reliance on the decisions of the Honourable Apex Court in the cases of **B.C.Deva alias Dyava vs. State of**

Karnataka, reported in (2007)12 SCC 122 and Deepak Yadav vs. State of U.P. and anr, reported in 2022 ALL SCR (Cri) 1109 wherein it is held that bail granted, without considering role of accused, is liable to be cancelled.

He also placed reliance on the decision of the Honourable Apex Court in the case of **State of Kerala vs. Mahesh, reported in (2021)14 SCC 86** wherein it is held : determining factors and distinction with cancellation of bail - exercise of appellate jurisdiction to adjudge correctness of a bail order held not restricted by the principles for cancellation of bail.

6. Learned counsel for non-applicant No.2 strongly opposed the application on the ground that the story narrated by the victim is not probable. Learned Judge of the trial court rightly considered aspect that investigation is completed and chargesheet is filed. Further incarceration is not required. Chemical Analyzer's Reports as well as spot panchanama do not support the prosecution case and, therefore, non-applicant No.2 is released on bail. Now, charge is framed and the case is fixed for recording of evidence. He submitted that supplementary statement of the victim is not in consonance with the First Information Report. Learned Judge of the trial court considered

principles for grant of bail and non-applicant No.2 has not violated any conditions. Non-applicant No.2 is working in Indian Air Force and abiding conditions imposed by the trial court. Now, investigation is completed, chargesheet is filed, and the matter is already fixed for hearing. As such, the application deserves to be rejected.

7. In support of his contentions, learned counsel for non-applicant No.2 placed reliance on the decision of the Honourable Apex Court in the case of **Himanshu Sharma vs. State of Madhya Pradesh**, reported in AIR OnLine 2024 SC 110 wherein it is held that bail can only be cancelled if accused misuses liberty, flouts bail conditions or if bail is granted in ignorance of statutory provisions or by misrepresentation, none of situation warranting cancellation of bail existed and order cancelling the bail was set aside.

8. Learned Additional Public Prosecutor for the State supported the application and submissions made by learned counsel for the victim and prays for cancellation of bail. He submitted that learned Judge of the trial court ignored statement of the victim as well as medical report and provisions of the POCSO Act. He submitted that the full bench of this court in the

case of **Arjun Kishanrao Malge vs. State of Mah., Director General of Police, Maharashtra State Commission for Protection of Child Rights**, reported in 2021(2) BCR (cri) 677 wherein it is observed that Section 40 confers a right upon a child to take assistance of a legal practitioner. It provides that the family or the guardian of the child shall be entitled to the assistance of a legal counsel "of their choice" for any offence under this Act, and as per the proviso, if the family or the guardian of the child are unable to afford a legal counsel "the Legal Services Authority" shall provide a lawyer to them.

He submitted that in the present case, though notice was to the victim, she could not appear and contest the application for one or other reasons. Learned Judge of the trial court should have considered that her representation is required and under obligation to appoint somebody to represent her which was not done. He submitted that moreover, material evidence is ignored by learned Judge of the trial court. In this view of the matter, the application deserves to be allowed.

He also placed reliance on the decision of the Honourable Apex Court in the case of **Ms.X vs. The State of Maharashtra and anr**, reported in 2023 LiveLaw (SC) 205

wherein also it is observed victim has right to be heard in bail application and the right of the prosecutrix could not have been whittled down. In a crime of this nature where originally there is no other witness except the prosecutrix, it was all the more incumbent for the High Court to have lent its ear to the appellant.

He also placed reliance on the decision of the Honourable Apex Court in the case of **Imran vs. Mohammed Bhava and anr, reported in (2022)13 SCC 70** wherein it is held that where bail is granted in mechanical manner, the order granting bail is liable to be set aside.

9. Heard learned counsel appearing for parties and perused the record.

10. It is well established principle that once bail has been granted, it would require overwhelming circumstances for its cancellation. The Honourable Apex Court in the case of **Vipan Kumar Dhir vs. State of Punjab and another, reported in (2021)15 SCC 518** wherein also the said principle is reiterated and while considering the same, it is observed that certain supervening circumstances impeding fair trial must develop after

granting bail to an accused, for its cancellation by a superior court, bail, can also be revoked by a superior court, when the previous court granting bail has ignored relevant material available on record, gravity of the offence or its societal impact.

11. Thus, it is well settled that factors to be borne in mind while considering an application for bail are: (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the accusation; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being influenced; and (viii) danger, of course, of justice being thwarted by grant of bail.”

12. Thus, while considering cancellation of bail already granted by a lower court, would indeed require significant scrutiny at the instance of superior court, however, bail when granted can always be revoked if the relevant material on record, gravity of the offence or its societal impact have not been considered by the lower court. In such instances, where bail is

granted in a mechanical manner, the order granting bail is liable to be set aside. Certain basic principles must be borne in mind while deciding application for cancellation of bail.

13. The law is settled by catena of judgments rendered by the Honourable Apex Court that consideration for grant of bail and cancellation thereof are entirely different. Bail granted to an accused can only be cancelled if the court is satisfied that after being released on bail (1) the accused has misused liberty granted to him; (2) flouted conditions of bail order, and (3) that the bail was granted in ignorance restricting powers of the court to grant bail or that the bail was procured by misrepresentation or fraud.

14. Reverting back to facts of the present case, allegedly, fifteen-year-girl was subjected for sexual assault by non-applicant No.2 when she had been on terrace alone. Immediately, she disclosed the incident to her mother and approached the police station and lodged the report. After lodging of the report, she was referred for medical examination and her medical examination was carried out at 9:30 pm. The alleged incident took place at 2:00 pm. The victim narrated history before the Medical Officer. During her medical

examination, though external injuries are not found on her person, the Medical Officer observed fresh hymenal tear at 10.00 O'clock; 1.00 O'clock, and 7.00 O'clock position. The diagram also shows the said hymenal tear. The Investigating Officer drawn the spot panchanama, however, initially, he has not shown distance between two buildings and, therefore, panchanama was drawn. During further investigation, distance of two building was shown as three feet and 3 inches. The statement of the victim was also recorded under Section 364 of the Code of Criminal Procedure wherein also she reiterated the same facts. This incident is also witnessed by her brother whose statement is also recorded.

15. Admittedly, Chemical Analyzer's Reports show neither blood nor semen is detected on undergarments of the victim and non-applicant No.2. The reason assigned by learned Judge of the trial court, while considering the bail application, is that there was no injury on the person of the victim.

16. The contention of learned counsel for non-applicant No.2 is that the story stated by the victim is not possible as there was seven to eight feet distance between two buildings and the applicant ran away by jumping on another building. To clarify

the said position, the Investigating Officer was called who admitted that distance between two buildings is approximately seven to eight feet. It is further observed that the medical examination does not show any injury on her person. Non-applicant No.2 has no criminal antecedents and considering the same, he is released on bail.

17. *Prima facie*, thus, it appears that learned Judge of the trial court ignored that fifteen-year-girl was subjected for sexual assault by non-applicant No.2 and also ignored the evidence collected by the Investigating Officer.

18. It is no doubt true that cancellation of bail cannot be limited to occurrence of supervening circumstances. The bail can be cancelled when serious discrepancies are found in the order of granting bail thereby causing prejudice to justice. There is certainly no *straight jacket* formula which exists for courts to assess an application for grant or rejection of bail, but determination factors is whether the trial court has considered gravity of offence and *prima facie* view of the involvement while releasing him on bail. The discretion is to be exercised judiciously and cautiously.

19. In the light of the above principles, admittedly, learned Judge of the trial court ignored the material collected during the investigation showing *prima facie* case against non-applicant No.2. As such, the application deserves to be allowed, as per order below:

ORDER

(1) The criminal application is **allowed**.

(2) The order dated 8.9.2022, granting bail to non-applicant No.2, passed below Exhibit-4 by learned Additional Sessions Judge, Nagpur in Special Criminal Case No.313/2022 is hereby quashed and set aside.

(3) Non-applicant No.2 is at liberty to file an appropriate application before the trial court and the trial court shall decide the application on its own merits.

(URMILA JOSHI-PHALKE, J.)

(1) **At this stage**, learned counsel for non-applicant No.2 prays for grant of two weeks' time to surrender non-applicant No.2 before the trial court.

(2) Learned counsel for the applicant/victim and learned Additional Public Prosecutor for the State strongly object the prayer made by learned counsel for non-applicant No.2.

(3) Considering reasons mentioned by learned counsel for non-applicant No.2, two weeks' time is granted to surrender before the trial court.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!