

Ajay

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

CRIMINAL BAIL APPLICATION NO.2603 OF 2024

Aniket Santosh Gupta

Applicant

.. (Orig. Accused No.1)

Versus

State Of Maharashtra and Anr.

.. Respondents

WITH

CRIMINAL BAIL APPLICATION NO.1250 OF 2024

Nitesh Sanjay Dubey

Applicant

.. (Orig. Accused No. 2)

Versus

State Of Maharashtra and Anr.

.. Respondents

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- Ms. Tripti Shetty, Advocate for Applicant in Bail Application No.2603 of 2024.
- Ms. Stephanie Richards, Advocate for Applicant in Bail Application No.1250 of 2024.
- Ms. Shilpa K. Gajare-Dhumal, APP for Respondent No.1 - State.
- Ms. Kritika Mishra, Advocate for Respondent No.2 in both Applications.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 15, 2025.

P.C.:

1. Heard Ms. Shetty, learned Advocate for Applicant in Bail Application No.2603 of 2024; Ms. Richards, learned Advocate for Applicant in Bail Application No.1250 of 2024; Ms. Gajre-Dhumal, learned APP for Respondent No. 1 - State in both Applications and Ms. Mishra, learned Advocate for Respondent No.2 in both Applications.

2. This is a group of two Bail Applications decided by a common order wherein both Applicants are arraigned as accused in

the same crime. Applicant in Bail Application No. 2603 of 2024 is arraigned as accused No. 1 whereas Applicant in Bail Application No. 1250 of 2024 is arraigned as accused No. 2. Both the Applicants alongwith two other co-accused namely accused No. 3 and accused No.4 are charge-sheeted in C.R. No. 345 of 2023 for offences punishable under Sections 377 and 504, read with 34 of the Indian Penal Code, 1860 (for short 'IPC'), Sections 4, 6 and 12 of Prevention of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') and Sections 67, 67A and 67B of Information Technology Act, 2000 (for short 'IT' Act). Applicants are arrested on 07.05.2023 and are incarcerated for 1 year 11 months 8 days, pending trial.

3. All four accused persons are young offenders. Accused No. 1 is 18 years old and Accused No. 2 is 20 years old. Record shows that accused No. 3 and accused No. 4 are juveniles – children in conflict with law who are released on bail. First – Informant victim in the present case is a 14 year old boy who has alleged to have been molested by three (3) out of the four (4) accused persons, whereas role of accused No. 1 is that of filming on his mobile phone and sharing video of the alleged incident.

4. *Prima facie* case of prosecution is that on 07.05.2023 the victim boy lodged a complaint with Dindoshi Police Station stating that on 02.05.2023 some of the accused persons known to him

subjected him to carnal intercourse and one of the accused persons video-graphed the said incident. It is stated by First – Informant victim that accused No. 1 called him at about 12:00 - 12:30 in the noon and took him to a place behind their house where other co-accused joined them. Accused No. 2 gave him money and asked him to fetch some cigarettes and bidis from a nearby pan shop. The First – Informant victim obliged them and on returning back he was pestered with questions like whether he would like to take something in his mouth. It is further stated that accused No. 2 alongwith accused Nos. 3 and 4 started beating and abusing him. The four accused persons then asked the victim to accompany them behind the truck stand near the last bus stop of Santosh Nagar where accused Nos. 2, 3 and 4 thereafter forced him to take their male organ inside his mouth turn by turn and thereafter had carnal intercourse with him and the said act was video-graphed by accused No.1 on his mobile phone.

5. He has then stated that he was in tremendous pain, thereafter the four accused persons left the incident spot and at about 3:30 - 4:00 p.m. in the evening he returned back home and out of fear went to sleep and did not inform or disclose about the incident to any person. However four days later that is on 06.05.2023 it is alleged that accused No. 1 shared the video with one friend of First – Informant victim who in-turn shared the video with another friend whom First –

Informant victim treated and considered to be like his elder brother that friend showed the said video to victim's father after which the father of victim inquired with him resultantly leading to filing of the FIR. *Prima facie* record shows that accused Nos. 3 and 4 were juveniles in conflict with law who were apprehended, produced before the Juvenile Justice Board and have been released on bail. In so far as accused Nos. 1 and 2 are concerned, they at the time of the incident were 18 and 19 years old respectively. They are Applicants before me.

6. Ms. Shetty, learned advocate for the Applicant – Accused No. 1 would persuade the Court to consider the young age of the Applicant. She would submit that even according to First -Informant victim role of accused No. 1 is not of having done any overt act with the victim, however his indictment is solely due to the allegation levelled against him of having video-graphed the alleged incident. Rather learned Advocate would vehemently argue and submit that there is a *prima facie* apparent dichotomy and discrepancy in the veracity of the statement recorded by the First- Informant victim while recording his statement appended at page No. 43 of the Application at the time of filing of the FIR dated 07.05.2023 with his statement recorded under Section 164 on 20.04.2024 and his evidence recorded before the Trial Court on 04.12.2024 which is placed on record by her to contend that the First – Informant victim has approached the police

authorities with a *prima facie* false case.

6.1. She would submit that the statement of the First-Informant victim recorded on 08.05.2023 during his Medico-Legal Examination describing the alleged incident appended at page No. 75 of the Application filed by accused No. 1 would show that there is a clear discrepancy on the face of record as in that statement he has additionally stated that accused Nos. 2, 3 and 4 started abusing and physically assaulting him with their hands, sticks and plastic bottles and they forcefully made him smoke *ganja* after which he had a feeling of numbness and tingling in his body pursuant to which accused Nos. 3 and 4 made him perform unprotected peno - oral intercourse and accused No.4 performed carnal intercourse during which accused No. 2 was merely watching the same whereas accused No. 1 video-graphed the same. This *prima facie* dichotomy according to her is such that when the evidence of the First - Informant victim which is recorded by the Trial Court in trial is seen, there he has rather narrated a completely different version in his cross-examination, *inter alia*, insofar as the alleged incident is concerned as also with respect to the role of accused No. 1 and accused No. 2.

6.2. She has drawn my attention to another dichotomy and discrepancy of the First - Informant victim having informed the Doctor (Psychiatrist) during his Mental Status Examination dated 09.05.2023

appended at page No. 92 that he had an altercation with all four accused persons regarding the girlfriend of accused No. 1 with whom he was very friendly. Next, she would submit that in his Section 164 statement First - Informant victim has categorically stated that out of the four accused persons only accused No. 1 was known to him and he did not know who the other three accused persons were.

6.3. In view of the above *prima facie* discrepancies she would argue that the case of prosecution against Applicants being that of he having filmed the alleged incident cannot be believed in view of the FIR being silent about the alleged act *qua* the accused No.1. That apart there is an apparent delay in filing the FIR after the incident which according to First - Informant victim was traumatic despite which it is seen that he maintained a stoic silence for upto five days and most importantly accused No. 1 not having being involved in the alleged act or crime for which the FIR has been filed. Hence she would pray for releasing the accused No. 1 on bail.

7. Ms. Richards, learned Advocate for Applicant – Accused No. 2 would reiterate the aforementioned discrepancies pointed out by the learned Advocate for accused No. 1 from the record of the case and would contend that it was the accused No. 2 who initiated the beating and abusing of First - Informant victim, but it was accused Nos. 3 and 4 who had committed the overt acts with him as stated in his

statement before the Psychiatrist during his Mental Status Examination dated 09.05.2023 appended at page No. 92. She would submit that the entire Medical Examination Report appended at page No. 73 *prima facie* when read shows that First - Informant victim has not received any injuries, tear, bleeding, discharge, edema, or tenderness when it is his own case that he had suffered tremendous pain due to the overt act. She would submit that at the bail stage without evidence being led the case of First - Informant victim stands falsified by his own Medical Examination Report appended to Application which concludes that there is no injury observed to the private parts of First - Informant victim and also that there is no sign of use of force and his own deposition under Section 164 and in evidence in the trial .

7.1. She would submit that First - Informant victim's own statement given to the Medical Doctor at the time of his Medico-Legal Examination *prima facie* records that it was Accused Nos. 3 and 4, juvenile delinquents who had committed the overt acts on him and that charge of First - Informant victim has been consistent in all his statements. She would therefore submit that stand of First - Informant victim and various discrepancies observed therein as argued by the Advocate for accused No. 1 and delineated herein, the accused Nos. 3 and 4 having being released on bail, the present Applicant - accused

No. 2 deserves to be released on bail on the ground of his much lesser role according to the allegations levelled by First - Informant victim.

7.2. She would persuade the Court that statement of First - Informant victim in FIR and his subsequent statements which have been recorded under Section 164 are *prima facie* inconsistent where he has stated that except accused No. 1 he did not know who the other three persons were who committed the overt acts. Hence she would submit that accused No. 2 be also enlarged on bail.

8. Ms. Gajare-Dhumal, learned APP for Respondent No. 1 - State would submit that there are serious allegations against the Applicants and hence considering the gravity of offence this Court may be cautious in allowing the Bail Applications. She would submit that with regard to the Medical Report it has been stated that the probability of sexual assault cannot be ruled out. She would submit that the crime in question came to light, due to the video taken by accused No. 1 hence the occurrence of the said incident / crime cannot be denied. She would submit that both the Applicants and victim reside in the same vicinity, due to which the possibility of tampering with evidence and influencing the witnesses cannot be ruled out. She would submit that there is substantial material on record to corroborate the prosecution case and thereby prove the guilt of Applicants and hence she would urge the Court to reject both the Bail

Applications.

9. Ms. Mishra, learned Advocate for Respondent No. 2 would submit that insofar as the role of Applicant - Accused No. 1 is concerned the charge against him is rather consistent in FIR, Section 164 statement and as per the evidence at trial. She would submit that accused No. 1 though may not have participated in the overt acts but has video-graphed the incident in question and thereafter he has also shared the same with other friends. She would submit that because of his such acts as also he having abused and beaten First - Informant victim his role cannot be segregated from the alleged crime as argued by learned Advocate for accused No. 1. In so far as accused No. 4 is concerned, she would submit that his role is *prima facie* consistent in the FIR, Section 164 statement and evidence recorded that he alongwith accused Nos. 2 and 3 committed the overt acts with First - Informant victim. Hence she would submit that both Applicants namely accused Nos.1 and 2 should be kept behind bars due to the role attributed to them in the present crime and Applications be dismissed.

10. I have heard the learned Advocates for the respective parties, learned APP and with their able assistance perused the record of the case.

11. *Prima facie* if the case of First - Informant victim is to be believed then available material on record needs to be consistent. It is seen that in Section 164 statement recorded before the Magistrate, First - Informant victim has categorically stated that he only knew accused No. 1 and did not know who the other three accused persons were who committed the crime. The allegation emanating from the record according to the statement of First - Informant victim is that he was held captive for three hours from 12:00-12:30 noon to 3:00-3:00 p.m. after which he was asked to leave the incident spot. However it is *prima facie* seen that he reached home and did not disclose the incident to any person. In this regard his Medico- Legal Examination Report is *prima facie* crucial.

12. It is seen from the Medical evidence that First - Informant victim had complained of bleeding but the Medico-Legal Examination appended at page no. 73 and when read at page No. 81 which was done immediately within six days of the incident *prima facie* records that there is no evidence of bleeding, tear, discharge, edema or tenderness near the anus and rectum of the First - Informant victim. This is so because at the bail stage the medical evidence is the only *prima facie* source of corroborative evidence having being conducted immediately after the incident which can be relied upon by the Court for consideration. That apart considering the inconsistency in the

statements of First - Informant victim which is *prima facie* evident with his Section 164 statement as also the incarceration of the Applicants for more than 1 year 11 months 8 days the Applicants can be released on bail. Needless to state that complicity of Applicants can be proved by the prosecution in trial.

13. Considering Applicants' age and if they are enlarged on bail Court is hopeful that Applicants' family will undoubtedly do their duty to make every effort and attempt to reform and aid the Applicants in leading a reformed life while on bail rather than keeping them in prison and exposing them to criminal outlook and life in prison. However on the flip side, if a chance is given to the Applicants because of their young age by enlarging them on bail, there is a possibility that they will be remorseful and repent in retrospect. This is a chance required to be taken by the Court because punishment has to be believed to be inflicted for a reformatory result rather than being punitive in nature.

14. Undoubtedly the trial will determine the punishment for the offence. While considering Bail Applications in such facts, Court feels that reform and rehabilitation of the under trial accused persons needs to be considered especially when age of the accused is young so that the accused gets an opportunity / or is given an opportunity to reform, rehabilitate and earn his livelihood honorably from the perspective of

social integration. This is a chance which the Court must take considering the young age of both Applicants. By considering this Court is not stamping approval of any of the alleged actions of Applicants regarding the crime in question. Court is also equally conscious of the offence. The Applicants have just attained majority. They are young. If the Applicants are incarcerated in prison further, there is every possibility that they might loose faith in the institution and society at large and there is every likelihood that they may tread the path of criminality or would waste their life. Incarceration in prison statistically shows that it exposes many youth to abuse. Hence every opportunity or to that extent risk should be constructively taken by the Court in the case of young offenders – accused before committing such accused to further custody and give such accused an opportunity to become a good citizen in the Society. These observations are only in the view of the young age of the Applicants before me and it is only a means to explore an alternative to incarceration so that the Applicants can become good citizens.

15. Considering the aforementioned *prima facie* observations in the present case, absence of criminal antecedents and the other 2 juvenile delinquents being released on bail further persuades me to consider Applicants' case on the ground of parity also. Applicants' incarceration for more than two years in prison considering their

young age is likely to worsen their likelihood of success in every sphere of society and it will expose them to abuse if their incarceration is continued. Hence, I am of the opinion that both the Applicants can be released on bail.

16. In view of the above *prima facie* observations, both Bail Applications are allowed subject to the following terms and conditions:-

(i) Both Applicants are directed to be released on bail on furnishing P.R. Bond in the sum of Rs.15,000/- each with one or two sureties in the like amount;

(ii) Before their actual release from jail, Applicants shall furnish an undertaking giving their address and details of the persons where they propose to reside after their release from jail to the concerned Police Station and also to the trial Court;

(iii) After their release from jail, Applicants shall report to the Investigating Officer as and when called for;

(iv) Applicants shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 01.00 p.m. to mark their presence. If the first Tuesday of the said month falls on a holiday and / or non Court working day, the Applicants

shall mark presence on the next working day;

(v) Applicants shall co-operate with the conduct of trial and attend the trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if they do so, it will entitle the prosecution to apply for cancellation of this order;

(vi) Applicants shall not leave the State of Maharashtra without prior permission of the Trial Court;

(vii) Applicants shall not influence any of the witnesses or tamper with the evidence in any manner; and

(viii) In case of any infraction of the above conditions and / or two consecutive defaults in marking his attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.P.C. i.e. for cancellation of bail.

17. It is clarified that the observations made in this order are limited for the purpose of granting Bail only and I have not made any observations on merits of the case. The trial shall be adjudicated on the strength of the evidence led and strictly on its own merits being uninfluenced with any of the *prima facie* observations made herein above in this order.

18. Fees of the learned Advocate Ms. Mishra , learned Advocate

appointed through Legal Aid to represent and espouse the cause of Respondent No.2 shall be released by the Registry of this Court within a period of one week from the date of presentation of a server copy of this order on compliance.

19. Bail Application No.2603 of 2024 and Bail Application No.1250 of 2024 are allowed and disposed.

[MILIND N. JADHAV, J.]