

Ajay

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

BAIL APPLICATION NO. 1963 OF 2024

Mahesh Bindyachal Gupta

.. Applicant

Versus

The State of Maharashtra and Anr.

.. Respondents

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- Mr. Prabhanjay R. Dave, Advocate for Applicant.
 - Ms. Megha Bajoria, APP for Respondent No.1 - State.
 - Mr. Ritesh Thobde, appointed Advocate for Respondent No.2.
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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 03, 2025.

P.C.:

1. Heard Mr. Dave, learned Advocate for Applicant; Ms. Bajoria, learned APP for Respondent No.1- State and Mr. Thobde, learned appointed Advocate for Respondent No.2.

2. This is an Application under Section 439 of the Code of Criminal Procedure, 1973 seeking Regular Bail in connection with C.R. No. 992 of 2023 registered with Sakinaka Police Station for offences punishable under Sections 376, 376-AB and 506 of Indian Penal Code, 1860 readwith Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012. Applicant is incarcerated since 15.10.2023.

3. Briefly stated, First Informant is the mother of prosecutrix / victim aged 5 years. They reside alongwith First Informant's sister and her daughter who is of the same age as that of prosecutrix.

Prosecution case is that on 14.10.2023 at around 9:00/9:30 p.m. when prosecutrix was playing with her cousin and her friend i.e. Applicant's daughter who is also of the same age in Applicant's house in the room above Applicant who was lying in the said room and scrolling through his phone, touched her inappropriately in the presence of the other two minor girls. At that time, First Informant's sister was also present in the house talking to Applicant's wife in the room below. It is alleged that prosecutrix later in the night confided in her mother i.e. First Informant about the bad touch to her by the Applicant pursuant to which First Informant went to Applicant's house and confronted him and thereafter approached the Sakinaka Police Station and lodged the FIR.

4. Mr. Dave, learned Advocate for Applicant would at the outset deny occurrence of any such incident and would submit that he is falsely implicated in the present crime due to previous enmity between the two families who are neighbours and the husbands of both the First Informant and her sister working in the Gulf countries. He would submit that in statements of both the minor girls i.e. prosecutrix and her cousin, they have stated that after the alleged incident they all i.e. Applicant, his wife, his daughter, prosecutrix, her cousin sister and her aunt went for having juice and returned late. He would submit that there are material contradictions in the narration of the alleged incident by the prosecutrix and as also her cousin sister

which raises doubt about the prosecution story. He would submit that statement of Applicant's daughter who was also present at the time of happening of the alleged incident is not recorded by the Investigating Officer which is a material lapse. Hence the ground of framing Applicant be considered.

4.1. He has drawn my attention to the statement of the maternal aunt of prosecutrix recorded on 02.11.2023 which is appended at page No.35 of the Application and would submit that there is once again material contradiction in her narration of the alleged incident and that of the prosecutrix. Rather there is nothing incriminating in that statement.

4.2. He would submit that the First Informant and her sister have denied medical examination of the prosecutrix victim which is evident from the remark of the Doctor of Rajawadi Municipal Hospital signed by both First Informant and her sister and appended at page No.42 of the Application. He would submit that in such cases of alleged sexual abuse particularly wherein victim is a child, medical examination plays a vital role in corroboration of the prosecution case as in absence of the same it is difficult for prosecution to prove its case against Applicant. He would submit that in one of the statement it is alleged that due to the bad touch there was an nail injury, but it was not seen by the First Informant as stated in her statement.

4.3. Next he would submit that during investigation statement of Applicant's wife has not been recorded as also his daughter and this lapse is *prima facie* crucial in order to corroborate occurrence of the alleged incident. He would submit that in any event investigation of the matter is complete and charge-sheet has been filed; trial will take its own course to conclude and hence pre-trial incarceration of Applicant of more than 1 year 4 months be considered by this Court while deciding the Application on the basis of the above *prima facie* dichotomy. In addition to the above he would submit that Applicant is suffering from Tuberculosis and has been hospitalized on several occasions in the Jail Hospital itself as he requires constant medical care and support and that also may be taken into consideration by this Court. In view of his above submissions, he would submit that Applicant has made out a strong *prima facie* case on merits for his enlargement on bail and this Court be pleased to allow the present Application.

5. Ms. Bajoria, learned APP for Respondent No.1 – State would submit that there is sufficient material on record in the form of witness statements to prove guilt of the Accused as there is a serious allegation against him. She has placed on record the Section 164 statements of the prosecutrix and her cousin sister who is the eye-witness to the incident and would submit that the same corroborates with the statement recorded before the police officer which is *prima facie*

sufficient proof of the incident at this stage. She would submit that non-recording of statement of the other eye-witness i.e. Applicant's daughter and his wife who was also present in the house is not fatal to the prosecution case. She would submit that considering that Applicant resides in the same vicinity as that of prosecutrix, if released on bail there is every possibility of he tampering with evidence and influencing witnesses which would be damaging to the prosecution case.

5.1. She has referred to and relied upon the decisions of the Supreme Court in the case of *State of Jharkhand Vs. Anil Ganju*¹ and *X. Vs. State of Rajasthan and Anr.*² to contend that releasing the Applicant on bail in such a serious offence would not only jeopardise the trial but also be unsafe for the First Informant. She would submit that in the case of *State of Jharkhand* (*supra*), the Supreme Court while referring to its decision in the case of *Mahipal Vs. Rajesh Kumar @ Polia*³ has held that wherever serious crimes are involved against Society at large, Courts should maintain an appropriate balance between public interest in the administration of justice and the protection of individual liberty pending adjudication of the case. In view of her above submissions, she would urge the Court to reject the Bail Applications.

6. Mr. Thobde, learned Advocate practising at the bar has been

1 2024 SCC OnLine SC 3321

2 Order dated 27.11.2024 in SLP (Crl.) No.13378 of 2024

3 2019 INSC 1325

appointed by the High Court Legal Services Committee, Mumbai to represent and espouse the cause of Respondent No.2 – First Informant by order dated 19.07.2024. He would support and adopt the arguments of the learned APP and in addition thereto that would submit that mere absence of medical examination report or refusal to take medical examination is not fatal to prosecution case as in cases of sexual abuse sole testimony of the prosecutrix draws a sufficient presumption at the *prima facie* stage. He would submit that evidence of one eye-witness as in the present case is adequate to corroborate the prosecution case *prima facie*. He would urge the Court to reject the Bail Application.

7. With the able assistance of the learned Advocates at the bar. I have perused the record of the case and charge-sheet. Statement of the prosecutrix recorded before the police officer is at page No.26 of the Application. I have perused the same and the same corroborates with the statement of First Informant at page No.24 of the Application. Additionally, prosecutrix herself states that after the alleged incident, the Applicant took her, her cousin and his daughter for having juice, after which they all went to prosecutrix's house and Applicant's daughter had dinner with her in the First Informant's house. Prosecution has recorded statement of prosecutrix's cousin who was present at the time of the alleged incident which is at page No.37 of the Applicant. I have perused the same and the same is similar to that

of the prosecutrix except for a clear dichotomy with respect to a certain fact which is crucial at this stage for adjudication of the present Bail Application. In both her statements prosecutrix has stated that when the alleged incident occurred she started crying and the Applicant's daughter was also present alongwith Applicant's cousin at that time. Juxtaposed with this, her cousin in both her statements has stated that she asked the Applicant to let go the prosecutrix as she was crying and leave her, after which he let her go. Both the witnesses have remained completely silent about what happened next but have stated that they all climbed down to the room below, met the two mothers who were chatting and then accompanied the Applicant for having juice and returned late. These are the contradictions in the prosecution case which create a shadow of doubt especially since both the statements state that they all came down in the room below immediately after the incident where Applicant's wife and prosecution's aunt were talking and they went out. If the prosecutrix was crying she could have easily attracted the attention of Applicant's wife or her aunt or even Applicant's daughter. In all this statement of Applicant's daughter is not recorded.

8. Spot panchnama dated 15.10.2023 drawn in the presence of prosecutrix and her aunt is appended at page No.30 of the Application. Perusal of the same reveals that the alleged incident occurred in an attic like room on the top above the Applicant's house which

admeasures 6 x 10 feet having a wall of 3 feet height and ½ foot width on which the three girls were playing.

9. Ms. Bajoria, learned APP has placed reliance on the decision of the Division Bench of this Court in the case of ***Ex-LT Col PK Tiwari (SL-04526K) Vs. Union of India***⁴ which is on somewhat similar facts and circumstances, as that of the present case according to her. She would persuade me to consider the findings returned by the Division Bench in paragraph Nos.17 and 18 of the said decision and would submit that as opined by the Division Bench in paragraph Nos.17 and 18 of the aforesaid decision, the victim in the present case has clearly narrated the incident and therefore even if there is supposed discrepancy in the statement of the victim / prosecutrix herself it should not be held against her or it should not be fatal to prosecution case which is otherwise reliable. She would fairly submit that the testimony of the victim in such cases is vital unless there are compelling reasons which necessitate looking for corroboration of her statement. She would submit that in the present case victim's statement is more or less corroborated by the statement of her own cousin sister.

10. Mr. Thobde, learned Advocate for Respondent No.2 – prosecutrix – victim would submit that there is a presumption under the POCSO Act with respect to the testimony of the victim and in view

⁴ Criminal Writ Petition No.2919 of 2024 decided on 17.02.2025

of that presumption unless there is any *prima facie* material evidence placed on record to *prima facie* show that there was any other motive which in the present case is not, the case of the prosecution / prosecutrix needs to be believed for indictment.

11. I have considered the submissions of the learned Advocates at the bar in the facts of the present case and perused the record. It needs to be reiterated that is a Bail Application and not a trial.

12. Prosecution has not examined a key eye witness to the incident who is the daughter of the Applicant and friend of prosecutrix who according to her was also present at the time of occurrence of the alleged incident of bad touch in the present case.

13. In so far as Mr. Thobde's submission is concerned, there is no doubt that there has to be a presumption to be held at the outset but as stated and alluded to herein above this is a Bail Application. *Prima facie* material before the Court is in the form of the say of the prosecutrix, the medical evidence and witness statements in the present case. Medical evidence is not available due to refusal of the First Informant to undertake any medical examination despite there being a specific allegation of injury as stated in the FIR filed by her which *prima facie* is not evident from the prosecutrix's statement recorded subsequently or from any of the witness statement.

14. In the present case Applicant before me is himself the father of a 5 year old girl who is a crucial eye witness in the present case according to prosecutrix, however, her statement has not been recorded by the prosecution. As delineated herein above there are material contradictions in the statements of prosecution witness statements.

15. It is settled law that a court while deciding a Bail Application has to keep in mind the principal rule of bail which is to ascertain whether the Accused is likely to appear before the Court for Trial. There are broad parameters also like gravity of offence, likelihood of Accused repeating the offence while on bail, whether he would influence the witnesses and tamper with the evidence, his antecedents are required to be considered in such cases. I am informed by the Advocate of Applicant that the family of the prosecutrix have left the rental room which they were occupying after the above incident and complaint.

16. Considering the above *prima facie* observations, Applicant before me has made out a case for grant of bail due to the *prima facie* discrepancies in the prosecution case and the witness statements.

17. Bail Application is therefore allowed on the following terms and conditions:-

(i) Applicant – Mahesh Bindyachal Gupta is directed to be

released on bail on furnishing P.R. Bond of Rs.25,000/-
(Rupees Twenty Five Thousand only) with one or two
sureties in the like amount;

- (ii) Applicant shall report to the Investigating Officer at Sakinaka Police Station on the first Sunday of every month between 10:00 a.m. and 12:00 noon for the next 12 months and thereafter as and when called by the Investigating Officer;
- (iii) Applicant 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;
- (iv) Applicant shall not enter the jurisdiction of the place / Police Station where the prosecutrix – victim is presently residing until completion of the trial before the Trial court except for the purpose of marking his attendance before the Investigating Officer, if required and / or attending the hearing before the Trial Court, as the case may be;
- (v) Applicant shall not make any attempts to re-associate with the prosecutrix and/or First Informant in any

manner either through a device or in-person or through any other person;

(vi) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner;

(vii) Applicant shall keep the Investigating Officer informed of his current address and mobile contact number and / or change of residence or mobile details, if any, from time to time, as applicable; and

(viii) Any infraction of the conditions shall entail prosecution to apply for cancellation of bail granted to the Applicant.

18. It is also clarified that the observations made in this order are limited to the question of grant of bail to the Applicant in the present Application and the trial shall be adjudicated and determined on the basis of evidence without being influenced by the observations made in this order.

19. Fees be paid by the High Court Legal Aid Services Authority of this Court to the learned appointed Advocate for Respondent No.2 as per rules.

20. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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