

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.4429 OF 2024

Azgar Ali Haqeequlla Shaikh	...Applicant
vs.	
The State of Maharashtra and Anr.	...Respondents

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Mr. Atul Kakade a/w. Ms. Deepali Saudagar, for the Applicant.
Ms. A.S. Shalgaonkar, APP, for the Respondent/State.
Ms. Tanvi Tapkire, for Respondent No. 2.
Mr. Pravin Koli, PSI, Nizampura police station.

CORAM : N. J. JAMADAR, J.
DATE : JANUARY 16, 2025

P.C.:

1. Heard the learned counsel for the parties.
2. The applicant, who is arraigned in C.R. No. 112 of 2020 registered with Nizampura police station, Dist. Thane for the offences punishable under sections 376 and 354 of the Indian Penal Code, 1860 (the Penal Code) and sections 4, 6, 8 and 12 of the Protection of Children From Sexual Offences Act, 2012 has preferred this application to enlarge him on bail.
3. The first informant is the mother of a five year old girl child – victim. On 21st June, 2020, at about 5.00 pm. the victim left home to play. She returned at 5.45 pm. After a while, a lady residing in the vicinity, came to her home and cautioned her to be careful about the places the victim visits. She informed that the applicant had taken the victim to a room and shut the door from inside. She had

peeped into the room and found the applicant touching the chest of the victim after pulling up her frock. She and other neighbours forced the applicant to open the door and rescued the victim. The first informant took the victim into confidence. Thereupon the victim narrated the sexual assault perpetrated by the applicant. The first informant lodged the report.

4. During the course of investigation, the statement of the victim came to be recorded. The lady, who had informed the first informant about the alleged occurrence and two more witnesses supported the version of the victim. In the supplementary statement, recorded on 11th August, 2020, the first informant stated that the victim had disclosed to her that the applicant had inserted his finger in the private part of the victim and made her to touch his private part. Thereupon, the offences punishable under Section 376 of the Penal Code and Sections 4 and 6 of the POCSO Act, 2012 were added. The applicant came to be arrested on 29th August, 2022.

5. In fact, this is the second application for bail. The first application being BA No. 3294 of 2023 was rejected by this Court by an order dated 3rd April, 2024. However, having regard to the period of incarceration of the applicant, the learned Special Judge seized with the Special Case No. 405 of 2020 arising out of C.R. No. 112 of 2020 was requested to make an endeavour to commence and

conclude the trial as expeditiously as possible and, preferably, within a period of six months from the date of the communication of this order.

6. Mr. Kakade, the learned counsel for the applicant submitted that even the charge could not be framed as the applicant was not produced before the Special Court, on successive dates. The applicant has been in custody since 29th August, 2020. It was submitted that a prima facie case for the offences punishable under section 4 and 6 of the POCSO Act, 2012 and section 376 of the Penal Code has not been made out. Initially, the FIR was registered only for the offence punishable under section 354 of the Penal Code and sections 8 and 12 of the POCSO Act, 2012. As the offence punishable under section 8 of the POCSO Act, 2012 entails punishment for five years and the applicant has already undergone almost four and half years of incarceration, the applicant deserves to be enlarged on bail.

7. Ms. Shalgaonkar, the learned APP, resisted the prayer for bail. It was submitted that on account of non-cooperation on the part of the applicant, the charge could not be framed. Therefore, the applicant cannot be permitted to take advantage of his own wrong.

8. I have perused the roznama of the learned Special Judge from 6th April, 2024. It does not appear that the applicant was ever produced before the Special Court, till 4th January, 2025. On that

date, the applicant, it appears, declined to plead guilty or otherwise to the charge as Discharge Application had been filed.

9. In the order dated 3rd April, 2024, on the first bail application this Court had considered the merits of the matter from the point of view of the prayer for bail. The observations in paragraph No. 11 of the said order read as under:-

11] The submission of Mr. Kakade centered around the aspect of delay and absence of injury on the person of the victim deserves appreciation in the light of the age of the victim and the attendant circumstances. In the statement of the victim recorded on 24th June, 2020 itself, the victim stated that the applicant had touched her private part. The question as to whether the applicant subjected the victim to aggravated penetrative sexual assault may be required to be adjudicated at the trial, keeping in view the aforesaid circumstances of delay and absence of injury sought to be pressed into service on behalf of the applicant. However, if the statement of the victim is considered in correct perspective, a prima facie case for aggravated sexual assault can be said to have been made out. In the circumstances, I am not inclined to exercise discretion in favour of the applicant. The apprehension on the part of the prosecution about tampering with evidence and threatening the witnesses as well as fleeing away from justice, cannot be said to be unfounded.

10. At this juncture, the element of delay in trial weighs with the Court from the perspective of the likelihood of the applicant not being eventually found guilty of the offences punishable under section 376 of the Penal Code and sections 4 and 6 of the POCSO Act, 2012. As noted above, the question as to whether the applicant committed aggravated penetrative sexual assault is required to be

adjudicated at the trial keeping in view the circumstances of delay, absence of injury, the delayed medical examination of the victim, the initial allegation being that of molestation and sexual assault only. If the acts of the applicant eventually fall within the tentacles of the offence punishable under section 354 of the Penal Code and section 8 of the POCSO Act, 2012, the maximum punishment which can be imposed thereunder would be five years. The applicant has been in custody for almost four years and six months.

11. Ms. Tapkire, the learned counsel for the respondent No. 2, fairly submitted that the question of applicability of the provision contained in sections 376 of the Penal Code and sections 4 and 6 of the POCSO Act, 2012 is debatable.

12. In the aforesaid view of the matter, I am persuaded to exercise the discretion in favour of the applicant subject to stringent conditions.

Hence, the following order.

ORDER

1] The application stands allowed.

2] The applicant Azgar Ali Hakeekulla Shaikh be released on bail in C.R. No. 112 of 2020 registered with Nijampura police station, on furnishing a P.R. Bond of Rs. 50,000/- with one or

more sureties in the like amount.

3] The applicant shall mark his presence at Kalyan police station on the first Monday of every alternate month between 11 am to 1 pm till conclusion of the trial.

4] The applicant shall not enter the limits of Bhiwandi city till the conclusion of trial except for the purpose of attending the proceedings before the Court.

5] The applicant shall not contact the victim, the first informant and any of the prosecution witnesses for any purpose whatsoever.

6] The applicant shall not tamper with the prosecution evidence and give threat or inducement to first informant, any of the prosecution witnesses or any person acquainted with the facts of the case, so as to dissuade him from disclosing the facts to Court or any police officer.

7] The applicant shall furnish his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.

8] The applicant shall regularly attend the proceedings before the jurisdictional Court.

9] By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose

of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

Application disposed.

(N. J. JAMADAR, J.)