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

CRIMINAL BAIL APPLICATION NO. 511 OF 2025

Niraj Uttam Kate

.. Applicant

Versus

The State of Maharashtra and Anr.

.. Respondents

-
- Ms. Sana Shaikh, Advocate for Applicant.
 - Mr. Hitendra J. Dedhia, APP for Respondent No.1 – State.
 - Ms. Ashwini Achari, Advocate for Respondent No.2 appointed through Legal Aid.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 08, 2025.

P.C.:

1. Heard Ms. Shaikh, learned Advocate for Applicant; Mr. Dedhia, learned APP for Respondent No.1 – State and Ms. Achari, learned Advocate for Respondent No.2 appointed through Legal Aid.

2. This is an Application under Section 439 of the Code of Criminal Procedure, 1973 (for short ‘**Cr.P.C.**’) seeking Regular Bail in connection with C.R. No.343 of 2020 registered with Jogeshwari Police Station for the offences punishable under Section 376 of the Indian Penal Code, 1860 (for short ‘**IPC**’) and Sections 4, 8 and 12 of the Protection of Children From Sexual Offences Act, 2012 (for short ‘**POCSO**’).

3. In the present case, Applicant was 19 – 20 years old at the time of incident. Respondent No.2 prosecutrix was 16 and ½ year old. First Information Report (for short '**FIR**') was filed on 11.09.2020. Applicant was arrested on 12.09.2020. Prosecutrix has recorded her statement on 11.09.2020 which is appended at page No.27 of the Application.

4. Ms. Shaikh, learned Advocate for Applicant has persuaded the Court to consider three submissions and elaborately argued on the same, namely (i) that Applicant is in long incarceration since 12.09.2020 for the past 4 years and 6 months pending trial and therefore he deserves to be enlarged on bail since the trial has not commenced and certainty of the trial being completed in the near foreseeable future is a distinct in possibility; (ii) that relationship between Applicant and prosecutrix was consensual in nature which is evident from the statement of the prosecutrix herself as also other recorded statements of the witnesses and the prosecutrix during her Medico Legal Examination which corroborate the same and (iii) reliance of the prosecution on the positive Deoxyribonucleic Acid (for short '**DNA**') report at the stage of grant of bail would be fatal since the said report has not been proved in accordance with the principles of law of evidence by the author of the same and as such it would be the subject matter of trial.

5. *PER-CONTRA*, Mr. Dedhia, learned APP for Respondent No.1 – State and Ms. Achari, learned Advocate for Respondent No.2 appointed through Legal Aid appearing in the Application would persuade me to consider to the contrary and reject the Bail Application. Fairly speaking on the ground of long incarceration, both the learned Advocates have not submitted anything and let it to the Court. According to them, trial has not commenced. Next they would submit that at the *prima facie* stage when there is clinching evidence in the form of DNA report which concludes that Applicant and the prosecutrix were the biological parents of the male child which was given birth by prosecutrix in the present case and as such once *prima facie* paternity of the Applicant is established, the Applicant cannot refute the same. Further they both vehemently submit that considering the age of the prosecutrix below 18 years age even if it is the case of the Applicant that their relationship was consensual still consent of the prosecutrix would be immaterial for such an act.

6. They would argue that the statement recorded of the prosecutrix *prima facie* states that Applicant induced her forcibly and against her wishes and therefore such statement needs to be presumed to be true. Both the learned Advocates would persuade the Court to consider the effect of Section 29 of the POCSO Act which entails a presumption of what prosecutrix has stated to be true unless *prima facie* at this stage it can be shown to be otherwise which is not the

case. They would therefore persuade the Court to reject the Application for bail.

7. I have heard Ms. Shaikh, learned Advocate for Applicant; Mr. Dedhia, learned APP for Respondent No.1 – State and Ms. Achari, learned Advocate for Respondent No.2 appointed through Legal Aid and with their able assistance perused the entire record of the case.

8. It is true that the trial has not commenced and even otherwise if it is considered, then trial will take a long time to conclude and complete. Applicant is already incarcerated for the past 4 years and 6 months which is indeed a long period of incarceration considering the facts in the present case. Applicant as can be seen from the record was about 20 years old at the time of his arrest.

9. According to prosecution case which is supported by the recorded statement of the prosecutrix appended at page No.27 of the Application, it is seen that she has categorically stated in her statement that she was in a love relationship with the Applicant for the past 2 years prior to the lodging of the FIR. It is seen that prosecutrix herself states that she befriended the Applicant on Facebook in the year 2018 when he was 18 years old and in that year itself they both had confessed their liking and love for each other. Further it is seen that Applicant was residing in the same locality rather immediately behind the residence of the prosecutrix alongwith his family and he was well

acquainted with the mother of the prosecutrix also.

10. Further the prosecutrix has stated that she used to regularly visit the house of the Applicant when there used to be no other person in his house on his request and used to spend a lot of time with him as also eat meals alongwith the Applicant at his house. She has stated that on some occasions Applicant used to become intimate with her during these incidents at his house. In so far as the present offence is concerned, she has stated that in January 2020, Applicant as usual called her to his house at about 11:00 a.m. when no other family member was present at his house. Thereafter they both became intimate and there itself had an encounter. Thereafter the prosecutrix has stated that she missed her periods during February and March and informed her mother who alongwith prosecutrix undertook a pregnancy test wherein it was confirmed that the prosecutrix was pregnant at that time. In March 2020, the prosecutrix informed her mother about her relationship with Applicant. Thereafter it is seen that from March 2020 to September 2020 the said fact was suppressed by the prosecutrix and her mother from the prosecutrix's father. At one point of time father of the prosecutrix asked the mother about the change in physical appearance and increase of weight of the prosecutrix sometime in July 2020 to which the mother evaded giving the correct answer and did not disclose the fact to the father of prosecutrix. This has been confessed by her mother in his statement

appended at page No.39 of the Application. Thereafter on 11.09.2020 the prosecutrix had pain in her stomach in the night and early morning she was taken to her grand-mother's place nearby her parents in a rickshaw at about 05:00 a.m. in the morning. There the prosecutrix delivered a baby boy who expired on the same day, resultantly leading to filing of the FIR on 11.09.2020 and Applicant was arrested on 12.09.2020.

11. Statement of the mother of the prosecutrix is appended at page No.39 of the Application and on reading the same, it is *prima facie* seen that mother of prosecutrix was aware about the relationship between the Applicant and prosecutrix since February – March 2020 itself but she did not disclose the same to any person. *Prima facie* reading of the statement of the mother also shows that she was well acquainted with the Applicant and his family members who were their immediate neighbours.

12. Statement of the prosecutrix in her Medico Legal Examination Report is appended at page No.47 of the Application and when description of the incident as narrated by her appended at page No.53 of the Application is seen, it is seen that she has categorically stated therein that she consensually had intercourse with the Applicant.

13. That apart, medical report is *prima facie* inconclusive since the prosecution is relying upon the DNA report appended at page No.84 of the Application. It is seen that DNA was extracted from the blood of the Applicant and matched with the blood of the prosecutrix and blood of the male child delivered by the prosecutrix. DNA report states that the analysis was started on 08.04.2021 and completed on 30.06.2021 and after examination the opinion records that Applicant and prosecutrix are concluded to be the biological parents of the male child delivered by the prosecutrix.

14. *Prima facie* it is seen that the samples of the blood for conducting the DNA analysis report were collected on 11.09.2020. The date of the DNA report is 25.10.2021. It is seen that blood samples were sent on 15.09.2020 and the report was received after more than one year. The report *prima facie* states that analysis started on 08.04.2021 and it was completed on 30.06.2021. The aforesaid dates *prima facie* speak for themselves. DNA test has been conducted by employing the PCR amplification technique wherein 15 different genetic alleles are analyzed and the loci are matched with the maternal alleles present in the male child with the obligate paternal alleles on 15 counts. The PCR amplification technique is a powerful tool used in forensic science and other fields wherein the DNA strands are amplified for the purpose of effecting a match between various samples which are analyzed.

15. *Prima facie* it is seen that if DNA is not properly collected, packaged and preserved, it will not meet the legal and scientific requirements for admissibility in a Court of law. This is because extremely small samples of DNA can be used as evidence but whenever PCR test is done, greater attention to contamination issues is necessary while locating, collecting and preserving which can be contaminated when the DNA from another source gets mixed with DNA relevant to the case.

16. In an earlier judgment, *R Vs. Dohoney & Adams*¹ the UK Court of Appeal laid down the following guidelines concerning the procedure for introducing DNA evidence in trials: (1) the scientist should adduce the evidence of the comparisons together with his calculations of the random occurrence ratio; (2) whenever such evidence is to be adduced, the crown (prosecution) should serve upon the defence details as to how the calculations have been carried out, which are sufficient for the defence to scrutinise the basis of the calculations; (3) the Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.

17. In the case of *Dharam Deo Yadav Vs. State of UP*² this Court

¹ 1997 (1) Cri. App Rep. 369

² (2015) 5 SCC 509

discussed the reliability of DNA evidence in a criminal trial and held as follows:-

“The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines.....DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory.”

18. Thereafter several decisions of the Supreme Court, namely in the case of *Pantangi Balarama Venkata Ganesh Vs. State of Andhra Pradesh*³; *Santosh Kumar Singh Vs. State through CBI*⁴; *Inspector of Police, Tamil Nadu Vs. John David*⁵; *Krishnan Kumar Malik Vs. State of Haryana*⁶; *Surendra Koli Vs. State of Uttar Pradesh and Ors.*⁷; *Sandip Vs. State of Uttar Pradesh*⁸; *Rajkumar Vs. State of Madhya Pradesh*⁹; and *Mukesh and Ors. Vs. State of NCT and Delhi and Ors.*¹⁰

have dealt with the increasing importance of DNA evidence. The Supreme Court has also emphasized the need for assuring quality

3 (2009) 14 SCC 607

4 (2010) 9 SCC 747

5 (2011) 5 SCC 506

6 (2011) 7 SCC 130

7 (2011) 4 SCC 80

8 (2012) 6 SCC 107

9 (2014) 5 SCC 353

10 (2017) 6 SCC 1

control, about the samples, as well as the technique for test in **Anil Anthony Arikswamy Joseph Vs. State of Maharashtra**¹¹. The relevant paragraph No.17 is reproduced below for reference:-

“17. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory.”

19. Thereafter Supreme Court in one recent decision in the case of **Pattu Rajan Vs. The State of Tamil Nadu**¹², considered the value and weight to be attached to a DNA report:-

“33. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party.”

20. Thereafter the Supreme Court in the case of **Manoj and Ors. Vs. State of Madhya Pradesh**¹³ in paragraph No.41 after considering the aforesaid observations regarding reliance to be placed on DNA

¹¹ (2014) 4 SCC 69

¹² (2019) 4 SCC 771

¹³ 2022 LiveLaw (SC) 510

reports, in the past, where the guilt of an accused was sought to be established has held that notably the reliance DNA test result was to corroborate. The Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case.

21. Though the learned Prosecutor in the present case would persuade the Court to consider some of the decisions of this Court passed in Bail Applications wherein this Court has rejected the bail, the said decisions are orders passed in Bail Applications. I have perused the said decisions in the case of *Sanjay Tulsidas Waghat Vs. State of Maharashtra*¹⁴, *Bashir Dilawar Shiakh Vs. State of Maharashtra*¹⁵, *Samadhan Kashinath Borkar Vs. State of Maharashtra*¹⁶ and *Santosh Dhondiram Kende Vs. State of Maharashtra*¹⁷. However *prima facie* it is seen that none of the said decisions discuss reliance to be placed and relying upon DNA report at the bail stage and state that DNA report cannot be ignored apart from the statement of the victim implicating the accused person and hence bail was rejected in the said cases.

22. There is another decision of the learned Single Judge of this Court in Bail Application in the case of *Parmeshwar Manik Golhar Vs.*

14 2020 SCC OnLine Bom 11530

15 2017 SCC OnLine Bom 8097

16 2019 SCC OnLine Bom 4519

17 2019 SCC OnLine Bom 7319

*State of Maharashtra*¹⁸ which *prima facie* states that in a case where there a possibility of consensual sexual relations even though the DNA report is positive and the age of the Applicant being very young (20 years old) having no criminal history, the case of the Applicant can be considered for grant of bail. This decision incidentally is in favour the Applicant.

23. Next, I would like to draw attention to the decision of the Supreme Court in the case of *Prakash Nishad @ Kewat Zinak Nishad Vs. State of Maharashtra*¹⁹. The Supreme Court held that even though the accuracy of the DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Next, Supreme Court held that it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party. The Supreme Court has therefore relied upon DNA report, in the past where the guilt of an accused was sought to be established. However, notably the reliance was to corroborate. The Supreme Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence. It also held that being an opinion the probative value of such evidence has to vary from case to

¹⁸ 2020 SCC OnLine Bom 11132

¹⁹ (2023) 16 SCC 357

case. The Supreme Court in this case held that the DNA evidence by way of a report was present, its reliability is not infallible, especially not so in light of the fact that the uncompromised nature of such evidence cannot be established and other that cogent evidence as can be seen is absent almost in its entirety. Paragraph Nos.64 and 65 of the said decision are relevant and reproduced as under:-

“64. Even otherwise, on the value of DNA evidence, we may refer to an observation made by this Court, in Pattu Rajan v. State of T.N., as under:

“52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on the facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party.”

(Emphasis supplied)

65. Referring to the above case, a three-Judge bench in Manoj V. State of M.P. , through S. Ravindra Bhat J., observed:

“158. This Court, therefore, has relied on DNA reports, in the past, where the guilt of an accused was sought to be established. Notably, the reliance was to corroborate. This Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case.”

(emphasis in original)

24. I would like to draw attention to the Division Bench of Calcutta High Court in the case of **In the matter of: *Muskan Tamang***²⁰. That case where the FIR was lodged 7 and ½ months after the alleged

²⁰ 2024 SCC OnLine Cal 10345

date of occurrence, DNA sample of the Appellant was collected and sent for chemical examination 37 days after the date of its collection and it was examined 1 and ½ months thereafter. The division Bench of the Calcutta High Court referred to the judgment of the Supreme Court in the case of ***Rahul Vs. State of Delhi Ministry of Home Affairs***²¹ wherein the Supreme Court had held, *inter alia*, as follows:-

“Collection and Preservation of Evidence

If DNA evidence is not properly documented, collected, packaged, and preserved, It will not meet the legal and scientific requirements for admissibility in a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be Identified, preserved, packed and sent for DNA Profiling.”

24.1. The Division Bench of the Calcutta High Court held that the delay was unexplained. It further held the Scientific Officer who authored the report and conducted the examination was never produced as witness. As such, not only such DNA report was not properly proved, the Appellant was deprived of the opportunity to cross-examine such Scientific Officer in order to elucidate certain facts which are in favour of the Appellant. In that view of the matter, the Division Bench of the Calcutta High Court granted bail to the Appellant

²¹ [2022] 9 S.C.R. 1129

and suspended his sentence by imposing conditions. The facts of the case before the learned Division Bench of the Calcutta High Court are more or less identical to the present case.

25. Attention is also drawn to another decision of the Division Bench of this Court (Aurangabad Bench) in the case of *Nivrutti S/o. Nagorao Hange Vs. The State of Maharashtra and Anr.*²². In that case the Court analysed the DNA report chart and also commented upon the long delay in respect of the result of the DNA having not been explained.

26. In the present case, we are at the bail stage which is pre-trial stage. It is seen that samples were collected in September 2020 when they were sent on 15.09.2020 for analysis to the Forensic Laboratory. In the Forensic Laboratory, samples were taken up for analysis only in the month of April, 2021. The analysis was completed on 30.06.2021 and report was thereafter made available on 25.10.2021.

27. The aforesaid delay is *prima facie* unexplained. Be that as it may, since we are at the interim stage of bail considering the aforesaid citations of the Supreme Court and various High Courts, I am of the opinion that reliance on DNA report by the prosecution at this stage would be fatal to the Applicant's case unless proved in evidence. *Prima facie* relations between the parties as observed appear to be consensual, an opportunity needs to be given to Applicant to defend

²² Criminal Appeal No.889 of 2023 – decided on 25.09.2024

the said report at the time of trial.

28. In view of the above *prima facie* observations and findings, I am of the *prima facie* opinion that Applicant can be enlarged on bail. In that view of the matter as also the age of the Applicant and long incarceration of the Applicant for more than 4 and ½ years pending trial, Applicant can be released on bail.

29. Hence, Bail Application is allowed subject to the following terms and conditions:-

- (i) Applicant is directed to be released on bail on furnishing P.R. Bond in the sum of Rs.25,000/- with one or two sureties in the like amount;
- (ii) Before his actual release from jail, Applicant shall furnish his address where he proposes to reside after his release from jail to the concerned Police Station and also to the trial Court;
- (iv) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (v) Applicant shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Tuesday of the said month falls on a holiday and/or non Court working day, the Applicant shall mark presence on the next working day;

- (vi) 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 he does so, it will entitle the prosecution to apply for cancellation of this order;
- (vii) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (viii) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner;
- (ix) Applicant shall not make any attempts to re-associate with the victim girl in any manner either through a device or in-person; and
- (x) 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.

30. 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.

31. Ms. Achari's efforts and assistance to the Court in the present case are appreciated by the Court. Fees of Ms. Achari, 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 due compliance.

32. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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