

(2024) 04 BOM CK 0037

In the Bombay High Court

Case No : Criminal Bail Application No.2424 Of 2023

Ajay Kisan Shelke

APPELLANT

Vs

State Of Maharashtra & Anr

RESPONDENT

Date of Decision : 10-04-2024

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164, 439

Protection Of Children From Sexual Offences Act, 2012 — Section 4(2), 5(m), 15

Citation : (2024) 04 BOM CK 0037

Hon'ble Judges : Madhav J. Jamdar, J

Bench : Single Bench

Advocate : Nitin Sejpal, Amicus Curiae, Jayant Bardeskar, P. H. Gaikwad, Vilasini Balasubramanian, Sudhir Kadam

Judgement

Madhav J. Jamdar, J

1. Heard Mr. Sejpal, learned Amicus Curiae, Mr. Bardeskar, learned Counsel for the Applicant, Mr. Gaikwad, learned APP, for the Respondent No.1-State and Ms. Balasubramanian, learned Counsel appointed to represent the interests of Respondent No.2.

2. This regular Bail Application is preferred under Section 439 of the Code of Criminal Procedure, 1973 ("CrPC"). The relevant details are as follows:-

1

C. R. No.

184 of 2021

2

Date of registration of F.I.R.

26/07/2021

3

Name of Police Station

Paud, Pune

4

Section/s invoked

376-AB, 376(2)(n), 354-A and 506 of the Indian Penal Code, 1860; 4, 8, 12, of the Protection of Children from Sexual Offences Act, 2012.

5

Date of incident

17/07/2021

6

Date of arrest

27/07/2021

7

Date of filing of Charge-sheet

21/09/2021

3. The Applicant and the victim are cousins and also neighbours. As per the prosecution case, at the relevant time, when the incident in question occurred, the Applicant was aged 26 years and the victim was aged about 9 years and 9 months enrolled in the 5th Standard [Date of Birth of the Victim- 01/10/2011]. As per the prosecution case, for past about 6 months the Applicant was sexually assaulting the victim and he also threatened her. On 17th July 2021, the victim informed her mother about the trauma which she was undergoing as she started experiencing severe pain. Thereafter, the Informant i.e. the mother of the victim questioned the Applicant about the said incident. However, the Applicant denied having done anything. Thereafter, as the Applicant's mother started abusing the victim's mother, neighbours gathered there and the victim's mother informed them about the sexual assault suffered by the victim. Thereafter, many women gathered there went to the house of the victim and the victim informed them about the sexual assault. Thereafter, the victim called her brother and other relatives and after discussion, an F.I.R. was lodged on 26th July 2021. The Applicant was apprehended on 27th July 2021.

4. Mr. Bardeskar, learned Counsel for the Applicant submitted that there was a delay in lodging the F.I.R.. Apart from that, he submitted that although the Applicant is incarcerated since more than 2 years and 9 months, there is no progress in the trial and even the charge is also not framed yet. He submitted

that the Applicant is a young person and therefore, bail be granted or at least the trial be expedited.

5. On the other hand, Mr. Gaikwad, learned APP submitted that statement of the victim and that of the mother of the victim i.e. the Informant, recorded under Section 164 of the CrPC, supports the prosecution case. He submitted that even the medical evidence supports the prosecution case. He submitted that as per his instructions, the victim is suffering from trauma and even till date, the victim is in a distressed condition.

6. Mr. Sejpal, learned Amicus Curiae submitted that, this is not a case of a romantic relationship. He submitted that in this case, the Applicant who is aged 26 years, has sexually assaulted the victim aged 9 years and 9 months. He submitted that the offence in question is heinous and serious and the victim is a child aged less than 10 years. He submitted that the medical evidence supports the prosecution case. He submitted that the allegations of sexual assault made against the Applicant, have also been supported by the medical evidence. He submitted that the delay is not fatal. He pointed out Section 4(2) of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act") and submitted that whoever commits penetrative sexual assault on a child below 16 years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine. He also submitted that in fact, Section 5(m) of the POCSO Act is also applicable to the present case and therefore, the sexual assault is aggravated penetrative sexual assault.

7. Ms. Balasubramanian, learned Counsel appointed to represent the Respondent No.-2, also adopted the submissions of Mr. Sejpal, learned Amicus as well as Mr. Gaikwad, learned APP. In addition to that, she pointed out that in fact Section 15 of the POCSO Act should also be invoked. She pointed out the decision of the Supreme Court of India in the case of Bhagwan Singh vs. Dilip Kumar[(2023) SCC OnLine SC 1059]. She pointed out paragraph Nos.12, 13, 20, 27, and 28 of the said decision.

8. Perusal of the record shows that the allegations as contained in the statement of the Informant i.e. the mother of the victim on the basis of which, the F.I.R. was lodged as well as the statement of the victim recorded under Sections 161 and 164 of the CrPC clearly show that the offence is very heinous and grievous. This is a case where, when the incident in question occurred, the Applicant aged 26 years and who is the cousin of the victim aged 9 years and 9 months, has sexually assaulted her. In fact, when the sexual assault started the victim was only 9 years and 3 months. The F.I.R. and the statements recorded under Sections 161 and 164 of the CrPC show that not only has the Applicant inflicted penetrative sexual assault, but the same is also aggravated penetrative sexual assault. This is a case where the medical evidence supports the prosecution case. The minimum punishment is imprisonment for 20 years.

9. Ms. Balasubramanian, learned Counsel appointed to represent interests of the Respondent No.2 relied on paragraph Nos. 12, 13, 20, 27 and 29 of the decision of the Supreme Court in Bhagwan Singh (supra). The same are reproduced herein below for ready reference:-

"12. The grant of bail is a discretionary relief which necessarily means that such discretion would have to be exercised in a judicious manner and not as a matter of course. The grant of bail is dependant upon contextual facts of the matter being dealt with by the Court and may vary from case to case. There cannot be any exhaustive parameters set out for considering the application for grant of bail. However, it can be noted that;

(a) While granting bail the court has to keep in mind factors such as the nature of accusations, severity of the punishment, if the accusations entails a conviction and the nature of evidence in support of the accusations;

(b) reasonable apprehensions of the witnesses being tempered with or the apprehension of there being a threat for the complainant should also weight with the Court in the matter of grant of bail.

(c) While it is not accepted to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought to be always a prima facie satisfaction of the Court in support of the charge.

(d) Frivility of prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to have an order of bail.

13. We may also profitably refer to a decision of this Court in Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and another (2004) 7 SCC 528 where the parameters to be taken into consideration for grant of bail by the Courts has been explained in the following words:

"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of

threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh [(2002) 3 SCC 598 : 2002 SCC (Cri) 688] and Puran v. Rambilas [(2001) 6 SCC 338 : 2001 SCC (Cri) 1124].)”

20. Similar is the opinion of this Court in Prashanta Kumar Sarkar v. Ashish Chatterjee and another (2010) 14 SCC 496 has held as under:

“9. We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the 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.”

27. The Courts have placed the liberty of an individual at a high pedestal and extended the protection to such rights whenever and wherever required. In the same breadth, it requires to be noticed that emphasis has also been laid on furnishing reasons for granting while balancing it with the requirement of a fair trial bail even though such reasoning may be brief.

28. In the aforesaid circumstances, we notice that the impugned order granting bail is not only bereft of material particulars which would justify grant of bail, but it seems that the High Court has got swayed on the ground of delay and the video having not been recovered during the course of investigation and has given a complete go by to the allegation made in the FIR and statement recorded under Section 161 and 164 of the Cr.P.C. as also the testimony of the prosecutrix before the jurisdictional court.”

(Emphasis added)

10. If the principles laid down by the Supreme Court of India for granting bail are

applied to the present case, in view of the nature of the crime, it is very clear that the Applicant is not entitled to be released on bail. The material on record including statement of the victim recorded under Sections 161 and 164 of the CrPC as well as the medical evidence are sufficient at the stage of bail to record prima facie satisfaction in support of the charge.

11. Apart from that, this Court, in earlier Orders dated 13th March 2024, 18th March 2024, 2nd April 2024, and 8th April 2024 has recorded that the relatives of the Applicant are exerting tremendous pressure on the parents of the victim and in fact, the same is being done in connivance with the Police machinery. Thus, there is reasonable apprehension of the witnesses being tampered with and threats have also been made to the victim's parents. The factual position with respect to the same is already set out in the earlier orders.

12. This is a very serious case where a 9 years 9 months old child has suffered aggravated penetrative sexual assault from her cousin i.e. the Applicant who is aged 26 years. The allegations are supported by the medical evidence. Accordingly, no case is made out for granting bail. Apart from that, there is a reasonable apprehension of the witnesses being tampered with and the victim's parents being threatened.

13. Accordingly, the bail Application is rejected.

14. However, it is to be noted that the victim who is presently about 12 years and 6 months is, even till today, severely traumatised. Mr. Gaikwad, learned APP submitted that as per letter dated 25th March 2024 of the Deputy Superintendent of Police addressed to the Child Welfare Committee-1, Pune the victim has not been able to recover from the extreme trauma caused by the incident in question and that she is suffering from emotional and psychological distress which is causing her withdrawal from social interaction and is adversely affecting her sleep, physical and mental health.

15. Although, a serious offence has been committed in the year 2021, till date, there is no progress in the trial.

16. In the facts and circumstances of this case, as the victim and witnesses are being pressurised, as recorded in earlier orders, and in fact, the parents of the victim were forced to leave their village due to pressure from villagers as they are presently residing at some other village and as the victim is suffering tremendous mental trauma, it is absolutely essential to conduct the trial on a day-to-day basis.

17. Accordingly, the learned Trial Court is requested to conclude the trial expeditiously by conducting the same on day-to-day basis.

18. In the facts and circumstances of this case, the Secretary, Maharashtra State Legal Services Authority, Mumbai/the Secretary, High Court Legal Services Committee, Mumbai is requested to take effective steps as per the provisions of law, to rehabilitate the victim and also to appoint two senior Para-Legal

Volunteers to visit her. The Secretary, Maharashtra State Legal Services Authority, Mumbai/the Secretary, High Court Legal Services Committee, Mumbai is also requested to take steps to provide psychological assistance to the victim by a senior psychologist/psychiatrist/counsellor, if necessary. Steps be taken in coordination with the Child Welfare Committee-1, Pune.

19. Although the Bail Application is rejected, in the facts and circumstances of this case, as noted earlier, as there is tremendous pressure on the parents of the victim to consent for Applicant's bail and the same has been actively supported by the Police machinery, it is necessary that the learned Trial Court should file periodical reports in this Court for ensuring the conduct of the trial in a just and fair manner.

20. Mr. Sejpal, learned Amicus Curiae states that the Police also be directed to keep the Applicant present in the Trial Court on every date, to prevent delay in the trial. Mr. Sejpal, learned Amicus Curiae suggested that the learned District Government Pleader be requested to monitor the progress of the trial and to ensure that the trial is concluded effectively.

21. Mr. Gaikwad, learned APP states that the prosecution will take effective steps to conclude the trial as early as possible and steps will be taken to ensure that the trial will be conducted on a day-to-day basis. Mr. Gaikwad, learned APP states that the Applicant will be kept present in the Court on every date and the learned District Government Pleader will monitor the progress of the trial.

22. In the facts and circumstances of this case, the learned Trial Court is also requested to conclude the trial as early as possible and preferably by conducting the trial on day-to-day basis.

23. This Court places on record its appreciation for the assistance rendered by Mr. Sejpal, learned Amicus Curiae and Ms. Balasubramanian, learned Counsel appointed to represent the interests of the Respondent No.2.

24. Stand over to 3rd May 2024 for reporting compliance.