

(2021) 03 OHC CK 0023
In the Orissa High Court
Case No : Bail Application No. 6679 Of 2020

Gobinda Chandra Mallik

APPELLANT

Vs

State Of Odisha And Another

RESPONDENT

Date of Decision : 16-03-2021

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 439
Indian Penal Code, 1860 — Section 34, 294, 341, 354B, 375, 506
Evidence Act, 1872 — Section 114(b), 118
Protection Of Children From Sexual Offences Act, 2012 — Section 12

Citation : (2021) 03 OHC CK 0023

Hon'ble Judges : S. K. Panigrahi, J

Bench : Single Bench

Advocate : Dharanidhar Nayak, Bini Mishra, B. K. Das, S. S. Kanungo

Final Decision : Dismissed

Judgement

S.K. Panigrahi, J

1. The petitioner has filed the instant application under Section 439 of Cr.P.C. seeking bail in connection with Nikirai P.S. Case No.103 of 2020 corresponding to G.R. Case No.68 of 2020 pending before the learned Additional Sessions Judge-cum-Special Judge, Kendrapada. The petitioner herein is the accused in connection with alleged commission of offences punishable under Sections 341, 294, 506, 354-B read with Section 34 of I.P.C. and Section 12 of the POCSO Act, 2012.

2. The case of the prosecution is that on 18.08.2020 at about 7:00 P.M., the petitioner caught hold of the hand of the victim (aged about 11 years) while the latter was attending the call of nature. The petitioner dragged her to an under construction house where he inappropriately touched the private parts of the victim. The cousin of the victim witnessed the whole incident and she was threatened by the petitioner of committing a similar misconduct with her if she raises protest. Thereafter the matter was reported to local Sarpanch and on

advice of the said Sarpanch, the FIR was lodged by the mother of the victim before the IIC, Nikirai P.S.

3. Heard Mr. Dharanidhar Nayak, learned Senior Counsel appearing for the petitioner and Mr. S. S. Kanungo, learned Additional Government Advocate for the State and perused the case records.

4. Learned Senior Counsel for the petitioner, Mr. Nayak has submitted that the petitioner is an innocent person and has been falsely implicated in this case by the Police. The petitioner has never committed the alleged offences and has no role to play in it. Learned Court below has rejected the bail application of the petitioner without taking into consideration the materials available on record and without applying its judicial mind. Further, the medical examination has been conducted on the victim and the said report reflects no sign of forceful sexual misconduct and the wearing apparels do not suggest any sign of forceful sexual act. Hence, the petitioner should be granted bail.

5. Medical Officer, Dr. Nirmalya Mohapatra, who examined the victim has reported that on examination of genital organ and the clothing of the victim, there were no recent signs or symptoms or bodily injuries suggestive any kind of sexual intercourse. Further, the police official has reported the birth proof from her School stating that the victim was 11 years and 7 months old at the time of examination.

It is well settled that the victim of a sexual assault is not an accomplice. Nor is it an immutable rule of law that the testimony of a survivor cannot be acted without corroboration in material particulars. The injury suffered by the minor victim of a sexual abuse is deeply physical, psychological and emotional. In a given case, if the Court finds it difficult to accept the version of the victim, on its own, the Court would be justified in searching for evidence, direct or circumstantial, which lends assurance to her testimony. Such assurance, short of corroboration, is sufficient. The Bombay High Court in the case of Fazal Mehmud Jilani Dafedar vs State of Masharashtra Criminal Appeal No. 845 of 2017 Bombay HC. relied on the judgment of the Supreme Court in the case of Mohd. Imran Khan v. State Government (NCT of Delhi) (2011) 10 SCC 192 wherein the legal position was postulated as under:

"22. It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Evidence Act, 1872 (hereinafter called "the Evidence Act"), nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of the Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of

her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

23. The court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. Rape is not merely a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence."

24. Thus, the law that emerges on the issue is to the effect that statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

7. Further, it is also a well settled principle of law that the testimony of child witness can be relied upon along with other circumstances and corroborative evidence to convict the accused. Undoubtedly, the settled proposition of law that the evidence of a child witness is required to be scrutinised and appreciated with great caution. In this regard, reference can be made to the dicta of the Apex Court in the case of Yogesh Singh Vs. Mahabeer Singh AIR 2016 SC 5160 wherein the Apex Court has held that:

"22. It is well settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law.

23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring."

8. The Supreme Court in the case of Radhakrishna Nagesh vs. State of Andhra Pradesh (2013)11SCC688. has iterated that even if there is no penetration, it does not necessarily mean that there is no rape. It further stated that -

"29.The penetration itself proves the offence of rape, but the contrary is not true i.e. even if there is no penetration, it does not necessarily mean that there is no rape. The Explanation to Section 375 IPC has been worded by the legislature so as to presume that if there was penetration, it would be sufficient to constitute sexual intercourse necessary for the offence of rape. The penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstances of a given case. The Court must examine the evidence of the prosecution in its entirety and then see its cumulative effect to determine whether the offence of rape has been committed or it is a case of criminal sexual assault or criminal assault outraging the modesty of a girl."

The Delhi High Court while relying on Supreme Court cases, in the case of Lokesh vs State CRL.A. 487/2016 Delhi HC. has opined on the importance of the statement of the prosecutrix:

"54. The legal position, therefore, is, quite unambiguous, that the evidence of the prosecutrix, in a case of rape, is ordinarily to be believed, and may form the sole basis for conviction, unless cogent reasons, for the court to be hesitant in believing the statement at its face value, and to seek corroboration thereof, exist.

55. In Moti Lal v. State of M.P. (2008) 11 SCC 20., the Supreme Court held thus:

-It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. (Emphasis supplied)

56. In a similar vein, it was held, in B. C. Deva @ Dyava v. State of Karnataka (2007) 12 SCC 122, as under:

?The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted."

10. The Bombay High Court denied to grant bail to a person accused under the POCSO Act in the case of Amit Raoso Patil vs State of Maharashtra Bail Application No.1813 of 2020 Bombay HC stating that-

"12. "Rape" is just not a forcible intercourse, it means to inhabit and destroy everything. The applicant is seeking release on bail awaiting the trial. Considering the gravity of the accusation levelled against him and the testimony of the victim, which would be unfurled at the time of trial and in view of the

aforesaid position emerging from the submission of the learned counsel for the applicant based on the material on record, I am not inclined to release the applicant on bail. The observations made in the order are prima facie in nature, based on the material placed for consideration for a limited purpose of consideration of bail application and should not be considered as an expression/opinion on the merits of the matter at the time of trial."

11. In the instant case, the investigation is still in progress. From perusal of the FIR, it appears that offences under the Indian Penal Code, are definitely made out, though it needs to be further investigated as the investigation is still inconclusive. A perusal of the FIR and charge sheet filed in the present case shows that there are very specific allegations against the Petitioner who is arrayed as accused. It is not, as if, the allegations are casual and sweeping against the accused generally. The possibility of coercion of victim's family, repetition of similar type of offence and flee from justice cannot be ruled out and therefore, the petitioner should not be granted bail at least until the investigation is complete.

12. There are numerous other allegations as well in the charge sheet which are very detailed and need not be reproduced since the above extracts are sufficient to indicate that the allegations are specific and not of a general nature. Upon a reading of the FIR and the charge sheet as a whole, it is not possible to come to the conclusion that they do not make out even a prima facie case against the Petitioner for the offences in question. Moreover, the length of detention of the petitioner is not a ground for release him on bail in this kind of offence which shakes the social conscience. Therefore, I am not inclined to enlarge the petitioner on bail.

13. In view of the above, this Bail Application is accordingly dismissed.

However, the petitioner will be at liberty to raise all the points, already raised in this petition, at the time of framing of the charge, which will be considered by the trial court concerned by passing a reasoned order. It is further made clear that any of the observations made in this judgment shall not come in the way of a fair trial of the case, nor shall the trial Court be influenced by these observations.