

(2012) 07 BOM CK 0200

In the Bombay High Court

Case No : Criminal Application (Bail) No. 139 Of 2012

Mr. Desmond Andrade (Presently lodged in Judicial Custody at Sada, Vasco da Gama, Goa) APPELLANT

Vs

State RESPONDENT

Date of Decision : 10-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439
Penal Code, 1860 (IPC) — Section 376, 376(g)

Citation : (2012) 07 BOM CK 0200

Hon'ble Judges : F. M. Reis, J

Bench : Single Bench

Advocate : Menino Teles, for the Appellant; Milena Gomes e Pinto, Assistant Public Prosecutor, for the Respondent

Judgement

F. M. Reis, J

1. Heard Shri Menino Teles, learned Counsel appearing for the Applicant and Mrs. Pinto, learned Addl. Public Prosecutor appearing for the State- Respondents. The above application is filed by the Applicant for bail u/s CRMAB-139-12 439 of the Cr. P. C., on the ground that he is of 22 years of age and that he is mentally retarded since from his childhood and his present IQ is 66 percent and he has been studying in a school known as St. Xavier's School, Centre for Handicapped Shanti Niketan at Old Goa, since the last four years. He has further stated that there are 240 students presently studying at the said Institution and that in view of the disability, he has a slow learning skill. It is further his case that the Director of the said Institution lodged a complaint with the Respondents, attached to the Old Goa Police Station on 18.12.2011 on the basis of the information of one of the Sisters by name Fatima Cardozo alleging that the Applicant took the victim, who was studying in the same Institute, to the toilet of the Institute and sexually abused her. It is further his contention that acting on the said complaint, the Respondent no. 1 registered an FIR being Crime no. 152/11 for offences punishable u/s 376 of the Indian Penal Code and Section 8 of

The Goa Children's Act. It is further his contention that immediately after the said complaint was lodged, the police arrested the Applicant on 19.12.2011 for the said accusations. It is further the contention of the Applicant that he is totally innocent and that he has been falsely implicated in the said crime. He has further stated that the Applicant as well as the victim are mentally retarded and the medical report discloses that the IQ of the Applicant is 66 percent and that of the Victim is 60 percent which is much less than 80 percent. The Applicant filed an application for bail before the learned Sessions Judge, which came to be rejected by Order dated 04.01.2012. Thereafter, the police have filed a chargesheet against the Applicant on 17.02.2012 and another bail application came to be filed before the Children's Court, which came to be dismissed by Order dated 19.03.2012. Thereafter, the CRMAB-139-12 Applicant filed the above bail application.

2. The Respondents have filed their reply disputing the contentions raised by the Applicant but, however, did not dispute the fact that the Applicant was mentally retarded. The main objection of the Respondents is that the Applicant may interfere with the prosecution witnesses and tamper with the evidence and that the Applicant may not be available at the time of the trial.

3. Shri Menino Teles, learned Counsel appearing for the Applicant, pointed out that the Applicant is totally innocent and in any event the Applicant is a mentally challenged person. Learned Counsel further pointed out that on going through the statement of the Victim, nothing incriminating as far as the alleged offences are concerned have been mentioned by the Victim in her statement. Learned Counsel has further taken me through the statement and pointed out that there is nothing disclosed in the said statement which would directly implicate the Applicant with the alleged offence of sexual abuse apart from the fact that the only statement made therein was that the Victim was called to the toilet. Learned Counsel further pointed out that apart from the said statement, there is no evidence on record to show any nexus between the alleged offence and the Applicant. Learned Counsel has further taken me through the recovery panchanama of the clothes of the Applicant and pointed out that nothing incriminating was noticed at the time of such recovery though the clothes of the Applicant have been referred to the Chemical Analyser for necessary investigations. Learned Counsel has further pointed out that the Applicant being mentally challenged person would be further affected in case he continues to be in custody and, according to the Applicant, he would abide with any conditions imposed by this Court in case he is released on bail. The learned Counsel further pointed out that the Applicant may be kept in the custody of his parents who would take care of him at their residential house at Ribandar. Learned Counsel has further taken me through the Judgment passed by the learned Sessions Judge and pointed out that the application for bail has been rejected only on the ground that the Applicant is involved in a serious offence. Learned Counsel as such submits that the application for bail be granted.

4. On the other hand, Mrs. Pinto, learned Addl. Public Prosecutor appearing for the Respondents, has pointed out that the Applicant has been involved in a serious offence and, as such, the question of granting any bail to the Applicant would not arise. Learned Addl. Public Prosecutor further submitted that merely because the Victim has not disclosed any incriminating fact to implicate the Applicant in the act of sexual abuse, nevertheless, the Victim being of 16 years of age, cannot be accepted to state anything on that count to the concerned Police Officers. The learned Addl. Public Prosecutor further pointed out that in any event, there is other material on record which would conclusively establish that the Applicant is involved in the charges levelled against the Applicant. Learned Addl. Public Prosecutor further pointed out that in case the Applicant is released on bail, he would tamper with the evidence and further intermediate the witnesses of the prosecution and, as such, the question of granting any bail at this stage, would not arise.

5. I have duly considered the arguments advanced by the learned Counsel. I have also gone through the statements and the records. On perusal of the statement of the Victim, prima facie, the same does not disclose anything incriminating about the alleged act of sexual abuse. But, however, taking note of the contention of the learned Addl. Public Prosecutor, to the effect that the Victim is a special child and as such is not expected to disclose such statement freely, I find that this aspect in any event will have to be considered by the learned Judge at the time of trial.

6. Be that as it may, it is well settled in the Judgment reported in Sanjay Chandra Vs. CBI, , has held at paras 21, 22 and 23 thus :

21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, `necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

The Apex Court in the said Judgment has clearly held that a punishment begins after conviction and every person is deemed to be innocent until duly tried and duly found guilty.

7. In the light of the said Judgment of the Apex Court, I find it proper to consider the above application filed by the Applicant. In the present case, it is not in dispute that the Applicant is a mentally retarded person. Apart from that, there is no material on record to suggest that the Applicant would tamper with the evidence of the prosecution. Admittedly, the Victim is presently in a Boarding School and, as such, the Applicant coming in contact at this stage would not arise, as conditions could be imposed that the Applicant would not tamper with the evidence of the prosecution or contact the victim. The apprehension of the Respondents that the Applicant may not be available for trial have not been supported by any material on record. There are no eye witnesses to the case and, prima facie, material produced appears to be insufficient. The Applicant is 22 years of age and continues in custody is likely to further affect his mental condition. The investigation is complete and charge sheet has already been filed.

8. This Court, in another Judgment of the learned Single Judge, relied upon by the learned Counsel appearing for the Applicant, in an Order dated 17.12.2004 in Criminal Misc. Application No. 240 of 2004, has held at para 9 thus :

9. On this aspect, Mr. Menino Teles, learned Counsel for the applicant has placed reliance on the case of Menino Lopes v. State of Goa (II(1995) CCR 795) wherein a Division Bench of this Court, after having referred to a decision of a Division Bench of the Calcutta High Court reported in AIR 1949 Calcutta 582 observed with approval that it was common knowledge that in every bail case the police allege that there is a danger of tampering with witnesses, and if witnesses can be tampered with in this way, it does not speak very highly of the efficiency of the police". These observations, in my humble opinion, might have been relevant at the times when they were made and could not be taken as relevant at all times including the times we are living in. However, I must hasten to add that as far as the apprehension of the prosecution that the accused will tamper with the witnesses, as far as the facts of this case are concerned, appears to be more imaginary than real. Admittedly, after the alleged commission of offences, the victim is presently detained in Apnagar/Children's Home and the chances that the accused will tamper with her are extremely remote.

10. It is well settled by a catena of decisions of the Supreme Court that power to grant bail is not to be exercised as if imposing punishment before trial. The Court

was also required to take note of the age of the accused who was only about 19 years of age and his continued incarceration in jail might have been more harmful to him than beneficial to anyone or for that matter to the Society at large. The accused has been in custody from 22-8-2004."

9. The learned Single Judge of this Court in the case of Tanaji Vishvambhar Waghmare vs. State of Maharashtra reported in 2011(3) LJSOFT (URC) 19 has held at para 2 thus :

2. The applicant was arrested by Mohol Police Station in C.R. No.57 of 2010 in case of rape u/s 376(g) of IPC. The offence is registered on the basis of report lodged by one Vikas Jadhav who claimed to be an eye witness. According to him, the present applicant and one more accused namely Sonu Kshirsagar had committed rape one after another on a mentally deranged woman. Two more witnesses also supported the statement of first informant Vikas Jadhav. The victim woman could not even disclose her name or say anything about the incident because of her mental condition. Medical report does not show any sign of rape. The C.A. Report also does not provide any corroboration. Investigation is completed and charge sheet is filed. The applicant is in custody since 7th June, 2010.

10. Considering the facts and circumstances of the case and taking note of the undisputed facts which have been enumerated herein above, I find that the Applicant deserves to be released on bail subject to the conditions as stipulated herein below. It is made clear that the findings rendered herein above are prima facie findings only for the purpose of considering the bail application and the CRMAB-139-12 learned Judge shall not in any way be influenced with the findings rendered herein above and shall deal with the criminal case on its own merits In view of the above, I pass the following :

ORDER

(i) The Applicant is directed to be released on bail subject to executing a personal bond of a sum of Rs.25,000/-with two solvent sureties inclusive of the father of the Applicant, of the like amount to the satisfaction of the Registrar (Judicial) of this Court.

(ii) The father of the Applicant, who is present in Court, shall furnish an undertaking to the satisfaction of the Registrar (Judicial) of this Court to the effect that he will ensure the presence of the Applicant during the course of the trial before the Children's Court, and allow the Applicant to reside with him at his residence in Ribandar.

(iii) The Applicant shall not in any way directly or indirectly contact the Victim or any of the witnesses of the prosecution.

(iv) The Applicant shall not tamper with the evidence of the prosecution in any manner whatsoever.

(v) The Applicant shall not leave the State of Goa without the permission of the learned Children's Court.

(vi) The Applicant shall not enter the school or the boarding premises at St. Xavier Centre at Old Goa, where the Victim is presently staying until the statement of the Victim is recorded by the learned Children's Court.

(vii) Application stands disposed of accordingly.