

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO. 1663 OF 2020**

Rafique Afzal Shaikh .. Applicant
Versus
The State of Maharashtra & Anr .. Respondents

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Mr.Ganesh Gole with Ateet Shirodkar for the applicant.
Mr.Nitesh Mohite for the complainant.
Mr.S.H.Yadav, APP for the State.

**CORAM: BHARATI DANGRE, J.
DATED : 25th AUGUST 2022**

P.C:-

1 The applicant is charged for offence punishable u/s.377, 354 IPC and Section 8 and 12 of the POCSO Act, 2012. He was arraigned as accused no.1 in C.R.No. 348/2019 registered with Koparkhairne police station and was apprehended on 30/9/2019.

On completion of investigation, charge-sheet has been filed and his Bail Application filed before the Addl. Sessions Judge, Thane came to be rejected on 28/8/2020. He seek his release on bail and the learned counsel Mr.Gole arguing his case, would submit that the material compiled in the charge-sheet prima facie fail to establish the charge u/s.377 IPC and as far as the offence u/s.8 of the POCSO Act is concerned, it invite a

Tilak

punishment not less than three years, but extending to five years and Section 12 of the Act prescribe punishment, which may extend to three years and fine. Submitting that it is almost three years that he remain incarcerated, he has undergone more than half of the punishment, which he would undergo, on conviction, his release is prayed for.

2 The subject FIR came to be registered on the complaint filed by the mother of the victim girl, stating that she is residing on the given address with her daughters and the incident reported took place on 30/9/2019, when she along with her daughters was at home. The victim girl, aged 7 years was playing outside the house along with her friend and when they returned at 12.30 p.m, her friend informed the complainant that when they were playing outside the building, a person with beard, removed apparel including her pant and expanding her anus with his hands, poured red colour water into it.

The victim girl corroborated the said statement. The incident was reported to her sister-in-law and they carried out search of the bearded person, even by inquiring with the watchman, who stated that the said person, was the applicant, who was residing in Ganesh Apartment. A report was lodged with the police station.

3 During the course of investigation, statement of the victim girl is also recorded by the police, where she state that

while she was playing with her friend, and there was one uncle who send her friend away and called her inside the house. She state that he removed her clothes as well as removed his own clothes. When she started shouting, he pressed her mouth and he slept on her and later on, poured red colour water into her anus and threw the bottle out of the window. She was thereafter asked to wear the clothes and was let go out. When she came out, her friends were waiting for her.

4 The victim girl was referred to medical examination on 1/10/2019 and the history of sexual assault recorded by the Doctor is different than what the complainant and the victim girl have stated. It is recorded as under :-

“Victim’s mother stays that victim’s friend Naina (12 years) took her to a man of 50 yrs of age in a colony nearby house saying that he’ll give them money. When victim went there, this man undressed her and spread her legs poured water over genitals and did penetrative sexual contact with victim. The incident happened on 27/9/2019”.

5 The local examination of the private parts in column no.VII record as under :-

- (d) clitoris is inflammed.
- (f) Hymen – concerned, it is recorded as under:-
Hymen/opening absent/Edges irregular/
- (j) Anus – No injuries.

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In the column of provisional opinion, it is recorded that the victim is examined after about three days of the incident. Evidence of injuries to the genitals/anus are recorded as 'nil'. In the column of 'evidence of injuries suggestive of application of force/ restrain', the following observation is endorsed.

"Inflamed edges of hymen and Urethra"

In the column of overall opinion, tickmark is made on the following :-

"Overall findings are consistent with sexual intercourse/assault. However, final opinion is kept pending till receipt of FSL report".

In the pictorial representation, accompanying the report, the hymen is shown to be absent.

6 The case of the prosecution has surfaced in the charge-sheet through the two witnesses, being the complainant and the victim girl herself.

The complainant reported to the police station on the basis of the information supplied by one Shweta, the friend of the victim, who stated that the old man had expanded her anus and poured some coloured water inside it. The complainant do not make any reference to penetrative sexual assault. In her statement, the victim girl also state that on removing the clothes, the man slept on her and she corroborate her friend who stated that, some red colour water was poured in her anus, by enlarging it.

Tilak

Surprisingly, the medical report record the history as 'penetrative sexual contact' with the victim, the incident taking place on 27/9/2019.

7 Proceeding on the presumption that there was penetrative sexual assault, report is prepared by Medical Officer of Navi Mumbai Municipal Corporation on examining her on 1/10/2019. The victim is examined after three days and her clitoris is described as 'inflammed' and there is no hymen present. As far as anus is concerned, which was alleged to have been protracted by the applicant, it do not report of any injuries. The opinion given is '*inflammed edges of hymen and urethra*', whereas, according to the victim girl herself, her vagina was neither touched nor was there any manipulation alleged.

8 The question that arises for consideration is whether the act of pouring red colour water, by expanding the anus would fall within the ambit and scope of Section 377, which prescribe punishment for committing unnatural offence.

What would amount to an unnatural offence is not defined, but as indicated in Section 377, whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, is liable for punishment under the said Section.

The explanation appended to the Section state that penetration is sufficient to constitute the carnal intercourse necessary to describe the offence mentioned in Section 377 IPC.

The offence is punishable with Imprisonment for life or with Imprisonment for description of a term, which may extend to 10 years and is also liable for fine and is considered to be a grave offence.

9 The question that arises is, whether the alleged act of the applicant of pouring some liquid into the anus of the victim girl, would amount to a carnal intercourse.

10 Carnal intercourse in Section 377 is clearly distinguishable from sexual intercourse as defined in Section 375 IPC. What amounts to a carnal intercourse is, therefore, important to find out.

The word ‘carnal’ is defined in Major Law Lexicon by P. Ramanatha Ayair’s Law Lexicon in 4th Edition, to mean anything pertaining to the flesh or to the sensual. Intercourse is defined in the same edition as ‘*social communication between individuals*’. Blacks Law Dictionary defined ‘intercourse’ as ‘physical sexual contact, especially involving the penetration of the vagina by the penis.

The genesis of Section 377 can be traced to clause no.361 and 362 of the IPC as originally drafted in 1837 when it criminalized “unnatural offences” and the said clauses at the relevant time read as under :

“OF UNNATURAL OFFENCES”

361. Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.

362. Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine”

The present section 377 IPC fail to define what would be covered within the term ‘unnatural offences’, but the Section itself offers the meaning to the said word as carnal intercourse against the order of nature with any man, woman or animal. It necessarily contemplate “intercourse”.

11 Carnal knowledge is an archaic or legal euphemism for sexual intercourse but the modern statutes like the Protection of Children from Sexual Offences Act, 2012 (for short ‘POCSO’), apply the term “sexual penetration”. It definitely warrant an act of the nature which is contemplated u/s.377 being against the order of nature and when the said Section is read, along with the explanation appended thereto, it would at the most, indicate that as per section 377 only the penal vaginal sexual intercourse is

Tilak

natural and all other forms of carnal intercourse such as anal or oral are unnatural.

The alleged act of expanding the anus by hands and pouring some substance into it, prima facie cannot be said to be covered in the term “carnal intercourse” which necessarily must involve pertaining to the flesh or the sensual pleasure.

12 As far as offence u/s.8 and 10 of POCSO Act, are concerned, the version of the victim girl that the applicant slept over her, would fall within sexual assault and sexual harassment, which would, on conviction, entail Imprisonment upto five years. The applicant on conviction be imposed with the Imprisonment of five years, but as on date, since the applicant is incarcerated for almost three years, he deserve his release on bail.

Observations made above are prima facie in nature and limited for the purpose of adjudication of the present applicant, and shall in no way, bind the Sessions Judge while he is trying the applicant for the offence with which he is charged.

This is however subject to the stipulation that he shall in no way establish contact with the victim girl or her family.

Hence, the following order :-

ORDER

- (a) The Applicant – Rafique Afzal Shaikh in connection with C.R.No.348/2019 registered

with Koparkhairne Police Station shall be released on bail on furnishing P.R. bond to the extent of Rs.25,000/- with one or two sureties of the like amount.

- (b) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police Officer. The Applicant should not tamper with evidence.
- (c) The Applicant shall report to the police station on every Monday between 10.00 am to 12 noon till framing of charge.
- (d) The applicant shall not establish contact with the victim girl or her family.

The Application is allowed in the aforestated terms.

(SMT. BHARATI DANGRE, J.)