



Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.1207 OF 2022

Unnikrishnan Rajeevkumar Bhaskaran]
Alias Rajiv Unnikrishnan] Applicant
Vs.
State of Maharashtra and another] Respondents

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Mr. Nishad Nevgi a/w Mr. Gauraj Shah, Samaa Shah, Junaid Badgujar i/b S.N. Juris, for Applicant.

Mr. A.A. Palkar, A.P.P, for Respondent No.1 – State.

Mr. Manish Singh a/w Ms. Archana Tiwari, for Complainant.

Mr. Ganesh B. Pawar, Investigating Officer – P.I – Samatanagar Police Station.

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CORAM : PRITHVIRAJ K. CHAVAN, J.
DATE : 23rd JANUARY, 2024.

ORDER:

1. This is an application under section 439 of the Code of Criminal Procedure, 1973 (for short “Cr. P.C”).

2. The applicant has been arraigned as an accused in C.R. No.634 of 2021 by *Samata Nagar* Police Station, Mumbai of the offences punishable under sections 376 (2) (f), (i), (n), 500, 506 of the Indian Penal Code (for short “I.P.C”) and under sections 4,6,8

and 12 of The Protection of Children from Sexual Offences Act, 2012 (for short “POCSO Act”) and also under Sections 43 (a) and 67-A of The Information Technology Act, 2000. After investigation, a charge-sheet has been filed in the Court bearing Special Case No.445 of 2021. The case is pending for framing a charge.

3. A few facts germane for disposal of the application seeking bail can be summarized as follows.

4. This is a peculiar case in which two minor victims aged about 9 and 13 respectively, closely related to the applicant have been sexually exploited and molested by him by betraying the trust. The applicant had also betrayed their trust by administering some stupefying substance as well as showing them pornographic videos and also by snapping the victims nude videos. He extended threats of making the same viral in case the victim discloses his acts.

5. Admittedly, victims’ aunt (their father’s sister) is married to the applicant. Victims used to call the applicant as “Fufa”. Complainant is the victims’ mother. It is an interfaith love marriage between the applicant and his wife, in the sense, the applicant is a

Hindu, whereas his wife is a Muslim. Ever since applicant's marriage with his wife, both families were on visiting terms to their respective homes. The applicant gained trust of the family of the complainant and, therefore, had frequent visits to their house. The victims also used to visit the house of the applicant.

6. Two months before the matter reached the Police Station, the complainant discovered one of her daughters (victim) panicked and scared. Upon inquiry, she realized that whenever the victim had been to the house of the applicant at *Kandivali*, he used to molest her against her wishes. He used to snap videos and photographs and show pornographic videos on his mobile phone. He used to touch her private parts inappropriately. Whenever the victim used to bleed or had a stomach-ache after sexual exploitation by the applicant, he used to administer some medicines and tablets. The applicant had threatened her not to disclose the said acts to anyone, else, he would make her photos and videos viral.

7. It is alleged that the applicant had sent a link on victim's mobile phone through a website viz "xhamaster" and upon opening the same, the victim noticed her nude photographs

with a caption beneath that ‘*those photographs will be sent to others*’.

8. The complainant narrated the same to her husband, however, since her father-in-law was not keeping well, in order to keep him away from such happenings, the matter was not immediately reported. However, complainant’s husband warned the applicant not to repeat such acts in respect of his daughters. Complainant’s father-in-law passed away on 17th August, 2021. It is also alleged that the applicant hacked mobile phones of not only the complainant but also the victims, pursuant to which, they received inappropriate and troublesome messages on their mobile phones from the complainant’s mobile phone. On 19th August, 2021, a message was received by the victims purportedly sent from the mobile phone of the complainant (their mother) indicating “*my family is chutiya and phupa has done zabardasti has forced himself on the daughter*”.

9. On 26th August, 2021, another victim received a message on her school group indicating “sex chat”. When it was clicked, she noticed it as a private chat which had a previous message in the

form of threats to make the videos of all the three daughters of the complainant viral. The message reads thus,

“u and ur family is chutiya fuck all of u from phuppa and “do you think I am fucking idiot I am right dawn ready to take (victim)”.

10. The record further reveals that the applicant had sent messages by using an APP called “Snap Chat” through a website “xhamaster” and asked the victim to open the link. It is alleged that the applicant had subsequently tendered apology to the victim’s father.

11. Investigating Officer registered the crime, investigation was conducted and a charge-sheet was filed. An application for bail came to be rejected by the Additional Sessions Judge on 5th March, 2022 and, therefore, the applicant is now before this Court.

12. I heard Mr. Nevgi, Counsel for the applicant at a considerable length. At the outset, Mr. Nevgi would argue that this is a totally concocted and false case against the applicant genesis of which is a suit for partition in the family of complainant’s husband. He submits that applicant’s wife was being forced by her brothers to

give no objection certificate to the effect that she would relinquish her share in their father's property in favour of her brothers. The applicant, however, took strong objection by persuading his wife not to sign any such declaration or to give no objection to relinquish her rights in favour of her brothers. Since applicant's wife refused to sign any such declaration, relations became sour and there was bitterness amongst the two families, resulting into lodging a false report against the applicant.

13. Complainant's father-in-law died on 17th August, 2021, leaving behind him his wife, three sons and three daughters including wife of the applicant as his legal heirs. It is contended that just two days after his father-in-law's death, on the night of 19th August, 2021, suddenly the applicant was summoned by Police Personnel of Bandra Police Station for an inquiry on the alleged allegations levelled by the complainant against him.

14. The Counsel has denied the allegations of hacking mobile phones of the victims and the complainant since, according to him, there is no report from Forensic Science Laboratory indicating any such offence alleged to have been committed by the applicant. The

Counsel would question the statements of the victims under Section 164 of the Cr. P.C on the ground that the same have been recorded as late as eight months after lodging the report. According to him, there are vital contradictions in the F.I.R as well as medical report submitted by the prosecution. Medical history of the victims is in stark contradictions with that of the allegations in the report. He contends that there was no history of any local physical injury, tear or bleeding in her genitalia including fourchette, labia majora, labia minora, hymen, perineum which starkly contradicts victim's statement wherein she had stated that there was bleeding from her private part.

15. The counsel was at pains to argue that the so-called extra judicial confession of the applicant referred to at page 122 in the form of an apology to the father of the victim on which the prosecution heavily relies, does not *per se* indicate commission of the alleged offence by him. He has also made an attempt to indicate that language alleged to have been used by him in the chat with the victims is not his language. Counsel has placed reliance on certain precedents of this Court. He contends that stringent conditions be imposed while granting bail to the applicant as the trial would not

be concluded in near future. According to him, there are no antecedents as the applicant is a law abiding citizen.

16. Learned A.P.P, Mr. Palkar though contends that the applicant is being prosecuted for committing serious offences under Sections 4, 6, 8 and 12 of the POCSO Act a/w 43(a) and 67-A of the Information Technology Act, 2000 as well as Section 376 (2) (n) (i) (f), 500, 506 of the I.P.C and the victims' statements recorded under Section 161 and 164 of the Cr. P.C are in place, yet according to him, the victim appears to have improved her statement and, therefore, he supported arguments of the Counsel by adding that there is no medical evidence in support of penetrative sexual assault.

17. Counsel for the intervener, Mr. Manish Singh, however, strongly objected the application by reiterating the fact that the applicant to whom the victims were treating like their father have been molested by taking disadvantage of the trust reposed by them in him. He would argue that the applicant had admitted the chat which is at page No.122 impliedly admitting his guilt. The Counsel submits that the delay is quite natural since the complainant herself

came to know about alleged incidents quite late and, therefore, even the medical examination of the victim, *prima facie*, does not indicate that they were subjected to penetrative sexual assault. It is submitted that in case of release of the applicant, it would result in causing a trauma and shock to the victims who are still 13 and 15 years of age and likelihood of coercing and tampering the witnesses by the applicant cannot be ruled out. He submits that property dispute has nothing to do with the crime committed by the applicant. The Counsel would invite my attention to the text messages alleged to have been sent by the applicant to the victims (Page 170 and 175 of the record) by contending that he is an expert hacker who had, in a crafty manner, concealed his criminal activities by taking disadvantage of his knowledge in the technology.

18. There is no dispute as regards *inter se* relations between the victims and the applicant. It reveals from the complaint and the statement of the mother of the victims that the victims have been visiting the house of the applicant prior to 4 to 5 years of lodging a report. The alleged acts of the applicant displaying porn clips and videos to the victim and touching her private parts as well as sexual exploitation started since then. The applicant also used to take

photos and videos of the younger victim and used to threaten her to make it viral. It is quite obvious that the victim of such a tender age, due to the threats given by the applicant obviously did not disclose his criminal activities to her mother for a considerable time. Her statement recorded by the panel comprising lady Police Inspector of Samata Nagar Police Station and others revealed that younger victim visited applicant's house at Kandivali on 10 to 12 occasions. The applicant used to show pornographic videos to her and used to ask to do in the same manner what was shown in the pornographic videos. The applicant used to exploit the victim sexually during night hours and sometimes used to administer stupefying substance. However, as and when the victim used to bleed or used to have pain in stomach, he used to give some medicines. The victim did not disclose anything to her mother, obviously, due to the threats given by the applicant. Naturally, it has resulted in some delay in reporting the matter to the Police.

19. In her statement under section 164 of the Cr. P.C recorded by 63rd Metropolitan Magistrate, Andheri, Mumbai on 6th April, 2022, the victim had reiterated all the aforesaid facts. It appears that even aunt of the victim who is the wife of the applicant had

acted in connivance with her husband in exploiting the victims. Similar is the statement of the elder victim recorded by the learned Magistrate under Section 164 of the Cr. P.C.

20. The complainant, in her statement under Section 164 of the Cr. P.C had stated what has been disclosed to her by her daughters regarding alleged acts of the applicant. She had also stated that the applicant had tendered apology of her husband and further promised that he would leave the city. However, thereafter, he started giving threats and blackmailing the complainant and the victims by hacking their mobile phones. He manipulated and sent messages to the victims as if they were sent by the complainant and also threatened to kidnap them.

21. *Prima facie*, I do not see any reason to disbelieve the statements of the victims and the complainant not only recorded by the Investigating Officer under Section 161 of the Cr. P.C but also under Section 164 by the Metropolitan Magistrate. Counsel for the applicant himself has invited my attention to a communication made by the applicant to the father of the victim which reads thus;

“Bhai. Sorry to bother. If you don’t want to talk please let me know. I will stop texting and calling you. I don’t want to call you again and again and make you angry or feel uncomfortable.

All I wanted to talk and make clear was (elder victim) and (younger victim) misinterpreted some.

*All I wanted to talk and make clear was (elder victim) and (younger victim) misinterpreted **some of my actions as wrong doings to them.***

*I agree I kept a **very open mouth with them.** But I wanted a chance to explain. That’s the only reason I wanted to talk to you. **The truth is, I am a guy who had experienced the same from my dad’s friend. Keeping that in mind my whole effort was never to do anything as such.** Some of the stories are not true or again like I said is misinterpreted.*

I am scared now and worried how this will all come back in my life and effect me in future.

*I don’t feel like living anymore. **I am sorry. I din mean any wrong doings to them.** Please believe me and give me a chance to talk.*

Still if you are not interested please reply saying you doings to them. Please believe me and give me a chance to talk.

Still if you are not interested please reply saying you don’t want to talk. And I will not call you on this. Will live with this fear.

We are ready to leave Mumbai if that also needs to be done.

Prima facie, it may not be said to be an extra judicial confession, but, indeed, an implied admission of his guilt. At this stage, it is sufficient to note that the admissions given by the applicant cannot be lightly brushed aside in the light of the facts and attending circumstances referred hereinabove. His admission at page 124 to the effect that that he had an experience from his dad's friend is a mystery which only can be unearthed during trial. This may not be, *per se* confession of the guilt, as already stated, yet, in the given sets of facts and circumstances, this aspect cannot be ignored coupled with the fact that all the conversations of the applicant with the victims on their mobile, as transpired from the record. *Prima facie*, it indicates that the applicant had a feeling of repentance, for, whatever, had been done by him or committed by him had something to do with his similar childhood experience from his father's friend. Communications between the applicant and the victim as recorded on page Nos. 127 and 128 of the record would, *prima facie*, point out as to how the applicant had systematically seduced the gullible victim by betraying the trust which she had reposed in him as an elderly family person.

22. Medical history furnished by the prosecution from the Municipal Corporation Greater Bombay Hospital reveals that last incident of molestation occurred on 10th March, 2019. Obviously, there could hardly be any visible evidence in the form of any recent sexual assault or penetrative sexual assault. However, it has been opined by the examining Doctor that the history of sexual assault cannot be ruled out.

23. Section 3(a) and (b) of the POCSO Act defines what is a penetrative sexual assault. Sections 3 (a) and 3(b) read thus;

3. Penetrative sexual assault.- A person is said to commit “penetrative sexual assault” if -

(a) he penetrates his penis, **to any extent**, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, **to any extent**, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person;

which obviously means that even in case of penetrative sexual assault, it is not essential that there must be some injury to the

hymen, labia majora, labia minora of the victim. Mere touching of the penis to the private part of the victim constitutes an offence under section 4 of the POCSO Act in view of the definition of “penetrative sexual assault” provided in sections 3 (a) and 3 (b) as above. While defining offence of rape, it is held by the Supreme Court in case of **State of Uttar Pradesh Vs. Babul Nath**¹ that in order to constitute an offence of rape, it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt of penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of IPC. Keeping in mind this position, it cannot be said that the allegations against the applicant are totally concocted or false. The applicant indeed betrayed the trust reposed in him by the victim and succeeded in executing his illegal act of molesting her which definitely constitutes offence not only under the POCSO Act but also under the provision of the I.P.C.

1 (1994) 6 Supreme Court Cases 29

24. Section 5 (l) (m) (n) of POCSO Act read thus;

“5. Aggravated penetrative sexual assault-

(a) to (k)....

(l) whoever, commits penetrative sexual assault on the child more than once or repeatedly; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

which contemplate what is aggravated sexual assault and section 6 provides punishment which shall not be less than 20 years but **which may extend** to imprisonment for life. Punishment is so stringent that it also provide **death sentence**.

25. The applicant is being prosecuted for the offences punishable under sections 4,6,8 and 12 of the POCSO Act. Presumptions under Sections 29 and 30 of the POCSO Act would be considered by the trial Court at the relevant time. Even though, there is no

specific bar to invoke the presumptions at the time of considering an application for bail since what has been provided is that when an accused is being prosecuted for committing an offence, the presumption would operate. It is needless to delve deep into this aspect, nevertheless, the material placed on record and the discussion made hereinabove is, *prima facie*, sufficient to show the complicity of the applicant in the alleged offence.

26. Counsel for the applicant has placed reliance on **Guidelines & Protocols – Medico-legal care for survivors/victims of Sexual Violence**. He invites my attention to clause 21 of the said Guidelines which reads thus;

“21. Provisional clinical opinion

. Drafting of provisional opinion should be done immediately after examination of the survivor on the basis of history and findings of detailed clinical examination of the survivor.

. The provisional opinion must, in brief, mention relevant aspects of the history of sexual violence, clinical findings and samples which are sent for analysis to FSL.

. An inference must be drawn in the opinion, correlating the history and clinical findings”

In the case at hand, provisional opinion has been given by the examining Doctor in brief which has already been referred hereinabove. The inference which has been drawn by the officer has already been stated in clear terms that history of sexual assault cannot be ruled out. Guidelines for responding to children read thus:

“ The prevalence of child sexual abuse in India is known to be high. A National Study on Child Abuse conducted by the Ministry of Women and Child Development showed that more than 53 per cent children across 13 states reported facing some form of sexual abuse while 22 per cent faced severe sexual abuse. Both boys and girls reported facing sexual abuse.

Most commonly, abusers are persons who are well known to the child and may even be living in the household. Children are considered soft targets for sexual abuse because they may not realize that they are being abused. Abusers are also known to use chocolates and toys to lure children. Further, children are more easily threatened and less likely to speak out about the abuse.

While the principles of medical examination and treatment for children remains the same as that for adults, it is important to keep some specific guidelines in mind:

. In case the child is under 12 years of age, consent for examination needs to be sought from the parent or guardian.

. Children may be accompanied by the abuser when they come for medical treatment, so be aware and screen when you suspect abuse. In such situations, a female person appointed by the head of the hospital/institution may be called in to be present during the examination.

. Do not assume that because the child is young he/she will not be able to provide a history. History seeking can be facilitated by use of dolls and body charts.

. Believe what is being reported by the child. There are misconceptions that children lie or that they are tutored by parents to make false complaints against others. Do not let such myths affect the manner in which you respond to cases of child sexual abuse.

. Specific needs of children must be kept in mind while providing care to child survivors. Doses of treatment will have to be adjusted as required in terms of medical treatment. For psychological support, it is imperative to speak with the carer/s of the survivor in addition the survivor themselves.

. Health professionals must make a note of the following aspects while screening for sexual abuse. Assurance of confidentiality and provision of privacy are keys to enabling children to speak about the abuse. However genital and anal examination should not be conducted mechanically or routinely. A few indicators for routine enquiry are -

- Pain on urination and/or defecation
- Abdominal pain/generalized body ache
- Inability to sleep
- Sudden withdrawal from peers/adults
- Feelings of anxiety, nervousness, helplessness
- Inability to sleep
- Weight loss
- Feelings of ending one's life

27. It is thus clear that most commonly abusers are persons who are well known to the child and may be living in the house. It is needless to say anything more on this aspect. It is also stated as to how the children are more easily threatened and less likely to speak out about the abuse.

28. The applicant is also being prosecuted under Sections 43 (a) and 67-A of the Information Technology Act, 2000. As already stated, material in the form of exchange of messages through electronic form between the applicant and the victim produced by the prosecution reveal that it is something in the form of obscene material which will have to be proved by the prosecution during trial.

29. Counsel has tendered multiple authorities. As a matter of fact, each case has its own peculiar facts and circumstances and

there cannot be any strait jacket formula in either granting or refusing bail. It is a discretion to be exercised on sound judicial principles as well as taking into account the relevant facts and circumstances of each case.

30. In case of **Ravi @ Rohidas S/o Mutthayya Marathi Vs. State of Karnataka**², there were contradictions between the statement before the Police *vis-a-vis* under Section 164 of the Cr.P.C and, therefore, Karnataka High Court granted bail to the accused. Order of the Karnataka High Court will only have a persuasive value. Material placed in the case at hand is quite clinching in comparison with the material placed before the said High Court. In the said case, the learned Single Judge took into consideration medical report *sans* considering the definition in Section 3 (1) (a) and (b) of the POCSO Act.

31. Similarly, in case of **Geethkumar Somnathan Pillai Vs. The State of Maharashtra & another**,³ the applicant was released by the single Judge of this Court under the provisions of POCSO Act and under Section 376 of the I.P.C precisely on the ground that

2 Criminal Petition No.5931 of 2018

3 Bail Application No.2891 of 2019

there is improvement in the statement by the victim recorded under Section 164 of the Cr.P.C. This also cannot be considered as a ratio decidendi in view of the facts and circumstances of the case at hand. One of the grounds in the said application was parity. In the said case, age of the victim is not mentioned. As such, this order would not be of any assistance to the applicant.

32. In case of **Rakesh @ Rinkya Sanjay Patil Vs. The State of Maharashtra**⁴, Single Judge of this Court released the applicant on bail only on the ground that no injuries were not found on labia majora and labia minora. Hymen of the victim was intact. Again there is non consideration of Section 3 (a) and (b) of the POCSO Act.

33. Even in case of **Bhaskar Pundlik Shinde Vs. The State of Maharashtra**⁵, accused was granted bail on the ground that statement of the victim under Section 164 of the Cr.P.C recorded quite late.

4 Criminal Bail Application No.1646 of 2021

5 Criminal Bail Application No.1876 of 2021

34. Having considered the entire facts and material placed on record including the chat between the applicant and the victim as well as chat between the applicant and father of the victim and also considering the fact that the applicant is a close relative of the victim and the family, in case of his release, it would definitely have it's adverse impact upon the mind of the victims, who have already been traumatized. Even chances of influencing them cannot be ruled out. It is not clear whether the applicant has roots in the society who may abscond in case of his release as he does not appear to be a permanent resident of State of Maharashtra.

35. Considering all these aspects, I am not inclined to release the applicant on bail. Application stands rejected. However, the trial Court is requested to expedite hearing of the case as the accused has been incarcerated ever since his arrest on 2nd September, 2021.

36. The Trial Court shall make an endeavour to dispose of the case within six months from the date of passing of this order. In case, trial is not concluded as above, liberty to the applicant to revive his prayer for bail.

37. Application stands disposed of.

[PRITHVIRAJ K. CHAVAN, J.]