



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 1979 OF 2022

Surender Vijay Paswan ... Applicant

V/s.

State of Maharashtra and Anr. ... Respondents

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Mr. Prabhanjay R. Dave a/w. Mr. Pradeep P. Kumawat, Advocate for Applicant.

Ms. Pallavi N. Dabholkar, APP for Respondent-State.  
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CORAM : G. A. SANAP, J.

DATE : 10<sup>th</sup> NOVEMBER, 2023

P. C:-

1. The applicant/accused has made this application for bail in C.R.No. 245 of 2020 registered with Oshiwara Police Station, Mumbai for the offences punishable under Sections 376(2)(n) of Indian Penal Code (for short "IPC") and under Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act").

2. Learned Advocate for the applicant/accused submitted that despite granting sufficient time, the prosecution has not collected

the sample of the child and therefore there is no DNA report. Learned Advocate further submitted that as per the report of the ossification test the Medical Officer has certified that her age was 17 years but not more than 18 years. Learned Advocate submitted that victim had attained the age of understanding and therefore was aware of the consequences of her act. Learned Advocate further submitted that act appears to be consensual. The learned Advocate submitted that victim despite request made by the police has not come for the purpose of recording her 164 statement of Cr.P.C. Learned Advocate submitted that accused is languishing in jail for 2 years 10 months. Learned Advocate submitted that even if the record of the ossification test is taken into consideration, there is a margin of 2 years on either side of age. Learned Advocate therefore submitted that subject to appropriate condition, he be released on bail.

3. Learned APP submitted that victim on the date of the crime was minor. Learned APP further submitted that in FIR it was stated that on a promise of marriage the accused by force established physical relations with her. Learned APP submitted that if the accused is enlarged on bail then he would pressurise the victim and prosecution witnesses.

4. It is seen that in this case, on the last date the Investigating Officer was directed to file affidavit as to the steps taken till date for obtaining DNA report and the steps proposed for taking DNA sample of the child. Investigating Officer has stated that the child has been given in adoption and concern Institution is not disclosing the particulars of the adoptive parents. The difficulty expressed by the Investigating Officer in my view is reasonable. It is further pertinent to note that in the factual situation since the child is given in adoption, the DNA test of the said child may not be in the interest of the child and future of the child.

5. Keeping the above facts in mind, the bail application needs to be decided. Even if the report of the Radiologist with regard to the ossification test is taken into consideration it would show that the victim had attained the age of 17. The Medical Officer has stated that the victim was not more than 18 years of age. In case of ossification test there is always a margin of two years on either side of the age. In any case, it appears that the victim on the date of the incident had attained the age of understanding. She was in a position to understand the consequences of her act. The accused has taken the defence of consensual act. In my view, at this stage, the said defence cannot be accepted. However, in the totality of the facts and circumstances, the accused cannot be denied bail. After

filing charge-sheet the charges have not yet been framed. The possibility of completion of a trial in near future is very bleak. The accused has been in jail for 2 years and 10 months. In my view, therefore, further incarceration of the accused in jail is not warranted. The apprehension put forth by the learned APP can be taken care of by imposing appropriate conditions.

6. Accordingly, I proceed to pass the following Order:

**ORDER**

- (i) Applicant Surender Vijay Paswan be released on bail in C.R.No. 245 of 2020 registered with Oshiwara Police Station, Mumbai, on executing P.R.Bond in the sum of Rs.25,000/- (Rupees Twenty Five Thousand only) with solvent surety in the like amount.
- (ii) Applicant shall not in any way tamper with the prosecution evidence.
- (iii) Applicant shall not pressurize or threaten the prosecution witnesses and victim.
- (iv) Applicant shall not enter Mumbai, till the completion of the trial except for the purpose of attending the case, on the given date and that too

by reporting his appearance at Oshiwara Police Station, in advance.

7. The Bail Application is allowed in the aforesaid terms and is accordingly disposed of.

(G. A. SANAP, J.)