

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION NO. 8878 of 2022

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SALIMBHAI IBRAHIMBHAI MIR

Versus

STATE OF GUJARAT

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Appearance:

MR ND NANAVATY for NANAVATY ADVOCATES(1373) for the Applicant(s)
No. 1

MR LB DABHI, ASSISTANT PUBLIC PROSECUTOR for the Respondent(s)
No. 1

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CORAM:HONOURABLE MR. JUSTICE NIKHIL S. KARIEL

Date : 02/08/2022

ORAL ORDER

1. Heard learned Senior Advocate Mr. Nirupam Nanavaty for the applicant and learned Additional Public Prosecutor Mr. L. B. Dabhi on behalf of the respondent-State.

2. By way of this application under Section 438 of the Code of Criminal Procedure, 1973, the applicant prays for being released on anticipatory bail in connection with **FIR No. 11218009220115 of 2022** registered with **Kamlabaug Police Station, District Porbandar** on 19.03.2022 for offences punishable under Sections 363, 366 and 376 of the Indian Penal Code and Section 4, 6 and 8 of the Protection of Children from Sexual Offences Act, 2012.

A. Learned Senior Advocate Mr. Nanavati would take this Court through the FIR as well as the affidavit filed by the Investigating Officer before the learned Sessions Court and the order passed by the learned Sessions Court and would submit that while initially when the prosecutrix had appeared before the concerned Police Station, the case of the prosecutrix was that she had traveled from Porbandar out of her own volition to Chotila and from Chotila she had gone to Gandhinagar where she had gone to the house of the applicant and upon the daughter of the applicant calling up the mother-in-law of late son of the applicant one Tarunaben where the prosecutrix was employed she had been informed that the parents of the prosecutrix have submitted a complaint before the concerned Police Station as regards the prosecutrix being missing and whereas thereupon, on the next date, the applicant had dropped her to the Police Station at Porbandar. Learned Senior Advocate Mr. Nanavati would submit that since the prosecutrix did not want to return to her parents and since parents also were not willing to take back the prosecutrix, the prosecutrix on 22.03.2022 had been sent to one Sakhi One Stop Center at Porbandar i.e. Non-Governmental Organization and whereas it is later i.e. approximately after eight days that the prosecutrix had changed her stand and had alleged that the present applicant had offered beer to the prosecutrix at Junagadh and after she had consumed the same, the present applicant had raped her. Learned Senior Advocate

Mr. Nanavati would submit that this is a clear case of the applicant qualifying her stand. Learned Senior Advocate Mr. Nanavati would further submit that the present applicant had in no way asked the prosecutrix to leave the house of Tarunaben or leave her parents and join him rather at same point of time since the applicant was in need of a domestic help, he had asked the parents of the prosecutrix whether they would be willing to send the prosecutrix with him and whereas the present applicant was also ready to take care of the educational expenses of the prosecutrix and wheres upon the parents of the prosecutrix not agreeing, the matter had ended there. Learned Senior Advocate Mr. Nanavati would submit that the prosecutrix having come to the house of the applicant of her own volition and it further appears that at both the houses i.e. at Junagadh as well as at Gandhinagar, daughters of the present applicant were present and further considering that there was an improvement by the prosecutrix, and further considering the age of the present applicant which is stated to be around 61 years, it is requested that the applicant may be considered for grant of anticipatory bail.

3. The applicant having initially approached the learned Sessions Court, praying for the very selfsame relief of being released on anticipatory bail, having not succeeded before the learned Sessions Court, has approached this Court.

4. Learned Senior Advocate for the applicant submits that the nature of allegations are such for which custodial interrogation at this stage is not necessary. Besides, the applicant is available during the course of investigation and will not flee from justice. In view of the above, the applicant may be granted anticipatory bail.

Learned Senior Advocate for the applicant on instructions states that the applicant is ready and willing to abide by all the conditions including imposition of conditions with regard to powers of Investigating Agency to file an application before the competent Court for his remand. He would further submit that upon filing of such application by the Investigating Agency, the right of applicant-accused to oppose such application on merits may be kept open.

5. Learned APP Mr. Dabhi appearing on behalf of the respondent-State has vehemently opposed the present application. Learned APP Mr. Dabhi would submit that the prosecutrix was a young girl aged around 17 years and being unaware of the ways of the world and upon the prosecutrix going to the house of the present applicant, the applicant has instead of protecting the prosecutrix, had taken advantage of her. Learned APP Mr. Dabhi would submit that a further statement by the prosecutrix, who is a 17 year girl, could not be treated as improvement in the version

and whereas it is submitted by learned APP Mr. Dabhi that the prosecutrix has also reiterated the allegations, in her statement under Section 164 of the Code of the Criminal Procedure before the learned Magistrate. Having regard to the said submissions learned APP Mr. Dabhi would submit that this Court may not exercise discretion in favour of the applicant at this stage.

6. Having heard the submissions made by learned Senior Advocate Mr. N. D. Nanavati as well learned APP Mr. Dabhi and having perused the investigation papers and whereas considering the nature of the offence and the role attributed to the present applicant, this Court proposes not to discuss the evidence in detail and whereas the following aspects have been considered by this Court:

[1] While it appears that the prosecutrix had given different versions of her leaving the home and of traveling and also of the later incidents but at the same time, as regard the aspect of having left voluntarily, without any inducement by the present applicant, is one fact which is common in all the versions of the prosecutrix.

[2] It also appears very clearly that while the present applicant was not instrumental in the prosecutrix having left her residence rather as said by the prosecutrix in her statement on 22.03.2022 since her mobile phone had been seized by her

parents, more particularly, since she was having an affair with some boy of the locality and since her parents were not permitting her to drive a scooter, had decided to leave her place. It also appears that from Porbandar the prosecutrix had traveled to Junagadh and whereas at the house of the present applicant, she had met daughter of the present applicant who is stated to have asked the prosecutrix why she had come to the house of the present applicant whereas it was replied that she had come to do the household work.

[3] It also appears that the prosecutrix had stayed for around four days at the house of the present applicant and thereafter they had left for Gandhinagar.

[4] That at Gandhinagar the second daughter of the present applicant, appears to have come to know about the fact that the prosecutrix was a minor and had come without informing her parents and therefore, the present applicant and his driver had dropped the prosecutrix at the Police Station.

[5] It appears that the statement of the prosecutrix after she had returned back, had been first recorded on 22.03.2022, wherein no allegations of the rape etc. have been made by the prosecutrix.

[6] It also appears that the statement was in the presence of

members of Women and Child welfare Committee.

[7] It appears that after the statement of 22.03.2022, the prosecutrix had been counseled on 31.03.2022 and it was at that time that the prosecutrix had for the first time stated about the allegation that the present applicant had raped her.

[8] It appears that thereafter on the 01.04.2022 the statement of the prosecutrix had been recorded by the Investigating Officer again in the presence of the Child Welfare Officer and others.

[9] It further appears that the statement of the prosecutrix under Section 164 of the Code of the Criminal Procedure had been recorded by the Judicial Magistrate First Class.

[10] It further appears that there are variations and improvements in the statements of the prosecutrix. It appears that in her first statement, the prosecutrix does not state about having traveled from Porbandar to Junagadh rather the prosecutrix stated about traveled to Porbandar to Chotila.

10.1. As far as the alleged incidents are concerned, it appears that in statement dated 22.03.2022 the prosecutrix does not state about any offence committed by the present applicant. In statement dated 01.04.2022 while the allegation of rape have been made, what would be pertinent to mention is that in the said statement the present applicant is stated to have offered liquor to

the prosecutrix and whereas after consuming the same, the prosecutrix had allegedly lost consciousness and where after the applicant is allegedly have taken advantage of the prosecutrix. It appears that in the statement under Section 164 of the Code of the Criminal Procedure a further improved version is stated by the prosecutrix.

[11] It also appears that in the statement of the 01.04.2022 there is no reference to any party where friends of the applicant had been present at the house of the applicant whereas in the statement before the Judicial Magistrate First Class, it is stated that there was a party at the house of the present applicant.

[12] It also appears that in the medical examination of the prosecutrix, the doctors have found no injury whatsoever, more particularly, having regard to the fact that injury has been mentioned by the prosecutrix in her statement under Section 164 of the Code of the Criminal Procedure before the learned Magistrate.

[13] It also requires to be noted that the present applicant is aged about 62 years, suffering from various ailments.

[14] It also appears that at both the residences of the applicant i.e. on the residence of the applicant at Junagadh and at Gandhinagar, daughters of the present applicant had been present

when the prosecutrix had come to the residence.

[15] It also requires to be mentioned that the act on part of the applicant of having dropped the prosecutrix at the Police Station concerned i.e. at Porbandar prima facie to this Court reflects upon the fact that at the relevant point time the present applicant did not in any way take advantage of the prosecutrix, whereas in case if any advantage had been taken then in normal course of human behavior, the applicant would not have dropped the prosecutrix after traveling such a long distance i.e. from Gandhinagar to Porbandar.

7. In this view of the matter and considering the law laid down by the Hon'ble Apex Court in the case of **Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.** reported in **(2011)1 SCC 694**, this Court is inclined to consider this application.

8. In the result, the present application is allowed by directing that in the event of applicant herein being arrested pursuant to the **FIR No. 11218009220115 of 2022** registered with **Kamlabaug Police Station, District Porbandar**, the applicant shall be released on bail on furnishing a personal bond of Rs.50,000/- (Rupees Fifty Thousand only) with one surety of like amount, on the following conditions:

- (a) shall cooperate with the investigation and make himself available for interrogation whenever required;
- (b) shall remain present at the concerned Police Station on **08.08.2022** between 11:00 a.m. and 2:00 p.m.;
- (c) shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the fact of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
- (d) shall not obstruct or hamper the police investigation and not to play mischief with the evidence collected or yet to be collected by the Police;
- (e) shall at the time of execution of bond, furnish the address to the Investigating Officer and the Court concerned and shall not change his residence till the final disposal of the case or till further orders;
- (f) shall not leave India without the permission of the Court and, if having passport shall surrender the same before the Trial Court within a week.
- (g) **shall mark his presence once in a month before the concerned Police Station for six months.**

9. Despite this order, it would be open for the Investigating Agency to

file an application for police remand of the applicant to the competent Magistrate, if he thinks it just and proper and learned Magistrate would decide it on merits. The applicant shall remain present before the learned Magistrate on the first date of hearing of such application and on all subsequent occasions, as may be directed by the learned Magistrate. This would be sufficient to treat the accused in the judicial custody for the purpose of entertaining application of the prosecution for police remand. This is, however, without prejudice to the right of the accused to seek stay against an order of remand, if ultimately granted, and the power of the learned Magistrate to consider such a request in accordance with law. It is clarified that the applicant, even if, remanded to the police custody, upon completion of such period of police remand, shall be set free immediately, subject to other conditions of this anticipatory bail order.

10. At the trial, the Trial Court shall not be influenced by the *prima facie* observations made by this Court while enlarging the applicant on bail. Rule is made absolute to the aforesaid extent.

Direct service is permitted.

Mrs. J. J. Kedia

(NIKHIL S. KARIEL,J)