



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 15TH DAY OF JULY, 2024

BEFORE

THE HON'BLE MRS JUSTICE M G UMA

CRIMINAL PETITION NO. 4074 OF 2024

BETWEEN:

AJAY KUMAR BEHERA
AGED ABOUT 19 YEARS
S/O. CHANDRAMANI BEHERA
RESIDING AT MANCHENAHALLI VILLAGE
JIGANI HOBLI, ANEKAL TALUK
BENGALURU - 560 105
PERMANENT ADDRESS AT:
SATTOTHIRA VILLAGE
BONTH THANE
BHADRAK DISTRICT
ORISSA - 756 114

...PETITIONER

(BY SRI. ABISHEK N.N., ADVOCATE)

AND:

STATE OF KARNATAKA
BY JIGANI POLICE STATION
BENGALURU DISTRICT - 560 001
REPRESENTED BY SPP
HIGH COURT COMPLEX
BENGALURU - 560 001

...RESPONDENT

(BY SRI. B.A. BELLİYAPPA, SPP -I A/W
SMT. K.P. YASHODHA, HCGP)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 439 CR.P.C PRAYING TO ENLARGE THE PETITIONER ON BAIL IN CR.NO.271/2023 DATED 15.11.2023 OF JIGANI P.S., BENGALURU DISTRICT IN C.C.NO.48/2024 FOR THE OFFENCE PUNISHABLE UNDER SECTIONS 307, 376 OF IPC AND PENDING ON THE FILE OF THE ADDITIONAL CIVIL (JR.DN.) AND JMFC COURT, BENGALURU RURAL, IN THE INTEREST OF JUSTICE.





THIS CRIMINAL PETITION COMING ON FOR ORDERS THIS DAY, THE COURT PASSED THE FOLLOWING:

ORDER

The petitioner-accused is before this Court seeking grant of bail under Section 439 of Cr.P.C. in Crime No.271 of 2023 of Jigani Police Station, pending in CC No.48 of 2024 on the file of the learned Additional Civil Judge (Jr.Dn.) and JMFC, Bengaluru Rural, registered for the offences punishable under Sections 307 and 376 of the Indian Penal Code (for short 'IPC'), on the basis of the first information lodged by the informant Sathyaprakash.

2. Heard Sri N N Abhishek, learned counsel for the petitioner and Sri B A Belliyappa, learned State Public Prosecutor - I along with Smt K P Yashodha, learned High Court Government Pleader for the respondent -State. Perused the materials on record.

3. In view of the rival contentions urged by the learned counsel for both the parties, the point that would arise for my consideration is:



"Whether the petitioner is entitled for grant of bail under Section 439 of Cr.P.C.?"

My answer to the above point is in 'Negative' for the following:

REASONS

4. The petitioner being the sole accused is seeking grant of bail. He was apprehended on 18.11.2023 and since then, he is in judicial custody. The relative of the victim lodged the first information against unknown person. Later, the statement of the victim under Section 161 of Cr.PC was recorded and the petitioner was apprehended. The statement of the victim was recorded under Section 164 of Cr.PC by the learned Magistrate, wherein, the victim has stated that the petitioner being her neighbor came to her house asking for rod and when she opened the door, he barged into the house, threatened with a knife, assaulted her and committed penetrative sexual assault. Even though, she tried to escape from his clutches, she was not successful. However, she assaulted the petitioner with the cooker lid.



5. The wound certificate issued by Vijayashree Hospital, Bengaluru shows the examination of the victim on the date of incident itself i.e., 15.11.2023, with a history of assault and noted three injuries, out of which, one injury was grievous in nature i.e., degloving injury over right side of head. On the very same day, the victim was shifted to the Victoria Hospital, Bengaluru. The wound certificate issued by the Victoria Hospital, discloses three injuries and it is opined that injury Nos.1 and 3 are grievous in nature i.e., tenderness, swelling over the left eye and laceration over the neck.

6. The victim was also subjected to medical examination at Vanivilas Hospital, Bengaluru to ascertain as to whether she was subjected to sexual assault by the petitioner. The Assistant Professor, Department of O.B.G., Vanivilas Hospital, Bengaluru examined the victim on 16.11.2023 at 1.00 a.m. and noted her physical condition. But strangely, neither the final opinion nor the provisional opinion was given. There is also no explanation as to why the opinion of the doctor was not given when such a serious allegations of committing sexual assault is made.



7. As per the direction of the Court, The Assistant Professor, Department of O.B.G., Vanivilas Hospital, Bengaluru, who issued the medical report, appeared before the Court and produced another report pertaining to the victim, which contains the provisional opinion. There is absolutely no explanation as to why there are two reports, one with provisional report and another one without it.

8. CWS.6 to 8 are the circumstantial witnesses who are said to have seen the accused entering and coming back from the house of the victim just before and after the incident. The sample collected during investigation, both from the petitioner as well as from the victim were sent for FSL examination. The copy of the FSL report is produced by the learned High Court Government Pleader. Item No.24 refers to the sealed cover containing cervical smear of the victim. The result of the examination shows seminal stains detected in the sample. Similarly, item No.26 is the nail clippings of the victim and as per the result of examination at Sl.No.8, the male skin tissue of a human was detected in item No.26. Interestingly, the DNA profiling was done and as per the skin tissue detected in Sl.No.26 is identical and matching with Y-Chromosomal DNA



profile result of Ajay Kumar Behra i.e., the petitioner herein, as per the sample blood was sent in Sl.No.35. At item No.29, a packet containing the underwear of the victim was also sent for FSL examination and as per the result of examination, at Sl.No.3, 6 items were also detected with seminal stains of the petitioner. Therefore, there are sufficient *prima facie* materials to connect the petitioner to the offence in question.

9. Admittedly, the petitioner was subjected for medical examination on 18.11.2023 at General Hospital, Anekal. According to the wound certificate, he had sustained two simple injuries which corroborates the statement of the victim that she had assaulted the petitioner during the incident. All these materials *prima facie* disclose that the petitioner is the author of the crime. I do not find any reason to suspect or to reject the version of the victim at this stage. Looking to the nature and seriousness of the offence, I am of the opinion that the petitioner is not entitled for grant of bail.

10. Before parting with the matter, I have to highlight the disturbing facts and circumstances which are observed by the Court while verifying the documents that are produced.



The petitioner has produced the medical report which was part of the charge sheet filed by the Investigating Officer. This report is issued by the Assistant Professor, Department of O.B.G., Vanivilas Hospital, Bengaluru. As per this document, the victim aged 23 years had arrived at the Hospital on 15.11.2023 at 6.44 p.m. The date and time of commencement of the examination is on the same day at 7.00 p.m. But at the end of the report, it is stated that date and time of completion of examination is on 16.11.2023 at 1.00 a.m. That means to say the victim was subjected to examination in Vanivilas Hospital for about 6 hours. However, no provisional opinion was expressed by the Medical Officer even after examination of the victim for such a long period. It is not even stated that the opinion is kept pending awaiting FSL report.

11. It is disturbing to note that a male Medical Officer has subjected the victim for examination with the history of sexual assault and the examination lasted for about 6 hours, without there being any explanation and without any opinion, even a provisional opinion. It is pertinent to note that as per the report, there were two witnesses i.e., Sowmya and junior Dr. Jahnvi while conducting the medical examination.



Unfortunately, even the Medical Officer who conducted medical examination of the victim and was asked to appear before the Court, was not in a position to say as to what was the designation of Dr. Jahnavi, who was said to be present during examination and why she herself has not conducted medical examination of the victim.

12. It is also pertinent to note that the medical report produced along with the charge sheet contains the instructions to the doctors in the first and second pages itself and as per instructions, it is made mandatory for the examiner to give the provisional opinion immediately after examination of the survivor, on the basis of the history and findings of detailed clinical examination. In spite of that, the Medical Officer has not thought it fit to give his provisional opinion at the end of the report. Moreover, he was not having any reasonable explanation for not giving such opinion.

13. It is pertinent to note that when the Medical Officer who examined the victim at Vanivilas Hospital was required to be present before the Court, learned State Public Prosecutor has also appeared before the Court and produced another



medical report dated 18.11.2023, said to be pertaining to the victim when she was examined on 16.11.2023 at 1.00 a.m. Strangely, this report contains an opinion which reads as under:

"After examination of (victim) there are no fresh genital injuries. Final report awaited. (after FSL reporting)".

14. This report is also signed by very same Assistant Professor, Department of O.B.G., Vanivilas Hospital, Bengaluru. There is absolutely no explanation as to why the Medical Officer who examined the victim had given two medical reports, one with the provisional report and the other one without it. It is also pertinent to note that the format in which these medical reports were written are also different. When the medical report signed by the Medical Officer who examined the victim and noted her physical condition, without any provisional report is attached to the charge sheet filed by the Investigating Officer, one more medical report in a different format issued by the same Medical Officer with the provisional report is not



inspiring the confidence in the mind of the Court about its genuineness.

15. It is pertinent to note that as per the medical report issued by the Vanivilas Hospital, Bengaluru, the victim had arrived at the Hospital on 15.11.2023 at 6.44 p.m. and the examination commenced at 7.00 p.m. Interestingly, there is one more wound certificate pertaining to the victim issued by the Victoria Hospital, Bengaluru, according to which, the victim was in Victoria Hospital and subjected to examination on the very same day at 6.44 p.m. The Medical Officer was also not in a position to explain as to how the victim could be at two different hospitals at the same date and time.

16. It is relevant to refer to the wound certificate issued by the Victoria Hospital, which is handwritten by a casualty Medical Officer, which is not readable. I do not find any reason as to why the type written or computer generated or atleast legibly written medical reports and the wound certificates are not being provided by the medical practitioners/Hospitals. It is to be understood that the medical examination of the victim of sexual assault is to be held without loss of time to enable the



medical practitioners to examine the victim for the purpose of noting her physical condition, the injuries or any other traces on her body, which may provide support to be considered as an important piece of evidence to be placed before the Court against the accused during trial. Such medical reports or the wound certificates will help the prosecution to substantiate its contention and to corroborate the version of the victim and other witnesses. At the same time it may even support the defence taken by the accused. These documents are not the personal documents of the author who writes it, but the same are referred very frequently by the Investigating Officers, Prosecutors, Advocates representing the victims/accused and the Courts at various level. Unfortunately, many a times, all of us are finding it difficult to read and understand such material documents and it will be left to our imagination about its contents.

17. The victim of rape in the present case was aged 23 years. She was subjected to medical examination initially at a private hospital i.e., Vijayashree Hospital on 15.11.2023 where three external injuries, out of which, one grievous in nature were noted. Later, the victim is said to have been sent to



Victoria Hospital, Bengaluru. On examination, three injuries, out of which, two grievous in nature were noted. It is thereafter, she was again examined by another Medical Officer at Vanivilas Hospital, according to whom, the victim had not sustained any genital injuries as per the report produced when he appeared before the Court. But there is no such opinion in the report produced along with the charge sheet.

18. When the victim of sexual assault is subjected for medical examination, some basic protocol is to be followed. There cannot be any second opinion that the medical examination of such victim should always be victim friendly. We should never forget that the victim will always have the right to privacy. All those who are part of criminal justice system who deal with such victim should be sensitive about the nature of offence, condition of the victim and her mental status immediately after commission of the crime. The Police or the Medical Officers who deal with such victims as first responders should be very sensitive in handling them. Such victims would have the devastating experience from the gruesome act of the accused and it may take months or even years together to come out of the emotional trauma. In spite of such horrifying



experience, atleast some such victims are dare enough to complain about the crime committed against them. The system has to take care of such victims at all levels, at any cost. Dealing with such victims in the Police Stations and the Hospitals mechanically and casually will definitely lead to a situation where such victims may not come forward to complain about their ordeal or may repent for having reported the crime and thereby it may result in a society which may not repose confidence in the system, which will lead to failure of the entire criminal justice system and the society will lead to total anarchy as the victim and her family members may be compelled to suffer the trauma silently and helplessly. If the criminal justice system is robust to deal with the accused in accordance with law, the victim will have the solace that the society is with her in hard times. But when the system is not taking care of such victims, but only highlights the rights of the accused, naturally the complainant or the victim will lose faith in such system.

19. The procedures that are to be adopted during investigation and trial should always be victim centric. Under the guise of investigation and trial, there cannot be secondary



victimization and the victim cannot be compelled to re-visit the horrifying experience and re-experience the trauma again and again. The officials who are at the helm of affairs and deal with the victim at the initial period should have the sensitivity with which she is to be treated. If a person is basically not sensitive, cannot develop such sensitivity even if he/she is educated and subjected to sensitizing programs. However, holding sensitizing programs very frequently for all the concerned including the top level officers who are required to oversee the functioning of their subordinates and on their failure, to make them accountable, may bring some solace to the victim at the crucial time.

20. It is not as if the legislator has not taken care of the right of the victim of such crime and her privacy. It is pertinent to note that Section 27 of Protection of Children from Sexual Offences Act (for short 'the POCSO Act') deals with medical examination of a child and sub section (2) reads as under:

"27. *Medical examination of a child.*—

(1) xxx



(2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

(Emphasis supplied)

21. But Section 164-A(1) of Cr.P.C. which was inserted by Act 25 of 2005 with effect from 23.06.2006, reads as under:

*"164A. **Medical examination of the victim of rape:** - (1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence."*

(Emphasis supplied)



22. From the above, it is evident that while Section 27(2) of POCSO Act mandates medical examination of the victim only by a woman doctor, the victim of similar nature, if she is not a child, could be examined by any registered medical practitioner as stated in Section 164-A of Cr.P.C. There is absolutely no reason as to why similar requirement to compel examination of an adult female who is the victim of sexual assault, should not be held only by a female medical practitioner or atleast in her supervision and why such victim is being compelled to face the embarrassment to undergo physical examination by a male medical practitioner. The requirement of consent by the victim or the person competent to give consent referred to in Section 164-A (1) of Cr.P.C. is a farce as the situation will only compel the unfortunate victim or her family members to sign the format mechanically, without knowing the consequences.

23. Very strangely, Section 53 of Cr.P.C deals with examination of accused by medical practitioner at the request of police officer. It is pertinent to note that sub Section (2) of Section 53 reads as under:



"53. Examination of accused by medical practitioner at the request of police officer.—

(1) xxx

(2) *Whenever the person of a female is to be examined under this Section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.*

(Emphasis supplied)

24. Reference to the provision of law dealing with medical examination of the victim of sexual assault differs when such victim is a child who is required to be examined only by a woman doctor, but when such victim is an adult, it could be by any registered medical practitioner, not necessarily by a woman doctor or a female registered medical practitioner. However, right of an accused when she is a lady is safeguarded, as the law mandates examination of the person of a female accused to be made only by or under the supervision of a female registered medical practitioner.

25. It is pertinent to note that in the new enactment i.e., The Bharatiya Nagarik Suraksha Sanhita, 2023 (for short



'the BNSS'), Section 53(2) of Cr.P.C. was replaced by Section 51(2), which reads as under:

"51(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner."

(Emphasis supplied)

26. Similarly, Section 164-A of Cr.P.C. is replaced with Section 184 of BNSS, which reads as under:

*"184. **Medical examination of the victim of rape:** - (1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within*



twenty-four hours from the time of receiving the information relating to the commission of such offence."

(Emphasis supplied)

27. Thus, it is clear that both these provisions found in the repealed Cr.P.C. are copied verbatim in BNSS without noticing the anomaly which is causing great injustice and embarrassment to the victim of sexual assault, who is more than 18 years of age. It is very disturbing that when such a right to privacy is recognized even to an accused who is a female, there cannot be any justification for not extending such privilege to the victim. An impression would be created in the mind of the general public that the system is more concerned about the right of the accused than the right of a victim. When the right of an accused is taken care of from the day when FIR is registered, till he is acquitted or till he comes out by serving the sentence, a victim is lost in the entire criminal justice system as her voice is not heard by anybody. When we cannot afford a congenial atmosphere to the victim of such crime to undergo investigation, including medical examination of her person by noticing her condition and recognizing her right to



privacy, we have no right to speak about the right of the victim in the entire system. Unless we assert and safeguard the rights of the victim at least on par with the accused, we have no right to showcase that we are dispensing justice in a victim centric criminal justice system.

28. The incidental observation of the medical report produced as part of the charge sheet has disturbed the mind of the Court to enquire about the glaring lapses and also to refer to the provisions of law, both under the repealed Cr.P.C. and in the new BNSS. Unfortunately, the victim in the present case was subjected to medical examination in three different hospitals, out of which, two are very prestigious Government hospitals in Bengaluru. If the condition of the victim in the metropolitan city, that too, in the very big Government Hospitals like Victoria and Vanivilas Hospitals is so pathetic, we can imagine the plight of the unfortunate victims who are subjected to medical examination in any other hospitals. No reasonable explanation is forthcoming for parading the victim of such crime in three different Hospitals, which would add insult to the injured. It is high time for both the Central and the State Government to take note of these situations and to



address the same by concrete measures. The system must have an in-built mechanism to support and strengthen the victim and her family members at the time of distress to enable them to question any invasion over the right to privacy and to seek immediate remedial measures. Then only, the victim of such crime and her family members may repose confidence in the system and voluntarily come forward to report regarding such offences. Therefore, I deem it appropriate to request both the learned Additional Solicitor General of India and the learned State Public Prosecutor to take note of the situation and to draw the attention of the concerned, atleast to suggest an amendment to Section 184 of BNSS and to educate and sensitize all the stakeholders viz., Police officials, Prosecutors, Doctors and other Medical Officials who respond to the victim in the system. There may be instances where even the judicial officers may act insensitively and they also may require sensitization periodically. Moreover, there must be constant over seeing the functioning of the sub-ordinates by the superior officers to make them accountable for any lapse in this regard.

29. As per Section 439 (1A) of Cr.P.C (Now Section 483 (2) of BNSS) before considering the bail application filed by the



accused in respect of offences under Sections 376(3), 376AB or Section 376DA or Section 376 DB of IPC, the Court is required to issue notice to the informant. Of course, there is no specific provision for issuance of notice to the informant or victim under POCSO Act. However, in ***Bibi Ayesha Khanum Vs Union of India***¹, the Division Bench has directed issuance of notice to the victim of an offence under POCSO Act, before considering the bail application.

30. In ***State of Karnataka Vs Shivanna Alias Tarkari Shivanna***², the Hon'ble Supreme Court at paragraphs 10.1 and 10.2 has held and directed that the Investigating Officers to take immediate steps for recording the statement of the victim under Section 164 of Cr.P.C, as far as possible by a lady Judicial Magistrate.

31. It, therefore, follows that even in the absence of specific provisions for recording of the statement of the victim by a lady Magistrate or for issuance of notice to the victim before considering the bail application under POCSO Act, the Courts have made it mandatory to get the victim's statement

¹ WP No.2318/2022 DD 23.02.2022

² (2018) 8 SCC 913



recorded by a lady Magistrate and for issuance of notice to her while considering the bail application for the offences under POCSO Act. That means, the Courts wanted the procedure to be victim friendly. Therefore, till suitable amendment is brought to Section 184 of BNSS, the Investigating Officers shall get the victim of a rape necessarily examined by or under the supervision of a female registered medical practitioner. Necessary directions in this regard may have to be issued by the Department/s concerned.

32. In view of the discussions held above at paragraphs 4 to 9, I answer the above point in the 'Negative' and proceed to pass the following:

ORDER

(i) The Criminal Petition is ***dismissed***.

(ii) Learned Additional Solicitor General of India and the learned State Public Prosecutor are directed:

(a) to take note of the concern expressed by the Court and to draw the attention of the concerned to suggest suitable amendment to Section 184 of Bharatiya Nagarik Suraksha Sanhita, 2023 and to have meaningful sensitization programs for all the stakeholders who respond to the victim in the System;



(b) to see that till a suitable amendment is brought to Section 184 of Bharatiya Nagarik Suraksha Sanhita, 2023, the medical examination of the victim of rape is to be conducted only by, or under the supervision of a female registered medical practitioner;

(c) to see that the Hospitals or the medical practitioners have to provide computer generated or atleast legibly written wound certificate/s or medical report/s and;

(d) to report about the steps that are taken in this regard, atleast within three months.

At this stage, learned counsel for the petitioner seeks liberty to move similar petition before the Trial Court after examination of the material witnesses.

Liberty is granted, as prayed for.

Office is directed to provide a copy of this Order to learned Additional Solicitor General of India and the learned State Public Prosecutor, for information and needful action.

Sd/-
JUDGE

*bgn/-

CT:VS

List No.: 1 Sl No.: 1