



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 14TH DAY OF JANUARY, 2022

BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

CRIMINAL PETITION NO.7143/2021

BETWEEN:

SMT. LALITHA,
AGED ABOUT 58 YEARS,
W/O NAGASUBRAMANYA BHAT,
SRI DURGA NILAYA,
YEDONI, BALPA, SULLIA TALUK,
DAKSHINA KANNADA-574232.

... PETITIONER

(BY SRI SACHIN B.S., ADVOCATE)

AND:

1. THE STATE OF KARNATAKA,
SUBRAMANYA POLICE STATION,
REP. BY STATE PUBLIC PROSECUTOR,
HIGH CUORT BUILDING,
BENGALURU-560001.
2. GURURAJ L., S/O LALAPPA,
AGED ABUOT 39 YEARS,
KILLARA HATTI B. THANDA,
UPPARA NANDI HAL POST,
LINGASAGUR TALUK,
RAICHUR-54125.

PRESENT ADDRESS:
R/AT SAMRUDHI NILAYA,
NEAR NIVEDENA HOMESTAY,
NEAR PETROL BUNK,

KULKANDA, KUKKE SUBRAMNAYA,
SULLIA TALUK, D.K.574239.

... RESPONDENTS

(BY SRI V.S. HEGDE, SPP2 ALONG WITH
SRI KRISHNA KUMAR, HCGP FOR R-1,
SRI CHANDRASHEKAR R.P., ADVOCATE FOR R-2)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 439(2) OF CR.P.C PRAYING TO QUASH THE IMPUGNED ORDER DATED 10.08.2021 IN CR.NO.56/2021 ON THE FILE OF V ADDITIONAL DISTRICT AND SESSIONS JUDGE, D.K., MANGALURU, SITTING AT PUTTUR, D.K., AND DIRECT THE RESPONDENT NO.1 POLICE TO ARREST THE RESPONDENT NO.2 AND COMMIT HIM TO THE CUSTODY.

THIS CRIMINAL PETITION COMING ON FOR ORDERS THROUGH VIDEO CONFERENCE THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

This petition is filed under Section 439(2) of Cr.P.C praying this Court to quash the impugned order dated 10.08.2021 in Crime No.56/2021 on the file of V Additional District and Sessions Judge, D.K., Mangaluru, sitting at Puttur, D.K., and direct respondent No.1 police to arrest respondent No.2 and commit him to the custody.

2. Heard the learned counsel for the petitioner, the learned High Court Government Pleader appearing for respondent No.1-State and the learned counsel for respondent No.2.

3. The factual matrix of the case is that accused No.1 has been prosecuted for the offence punishable under Sections 376(2), 506 and 384 of IPC and Sections 4, 5(f), 6, 8 and 14 of Protection of Children from Sexual Offences Act, 2012 ('POCSO Act' for short) and Section 67(b) of the Information Technology Act. The allegation made against respondent No.2 herein/accused No.1 is that he being the lecturer of the victim student College, subjected the victim girl for sexual act with the help of his wife and she was made naked and photograph was also taken and the caused life threat not to disclose the same to anybody and subsequently, on several occasions subjected her for sexual act. The victim girl stated that when he demanded money, she has stolen an amount of Rs.10,000/- from the house and given to respondent No.2. Based on the complaint, case has been registered against both respondent No.2 and also his wife, who is arraigned as accused No.2. During the crime stage, respondent No.2 herein has filed an application for grant of bail and also sought for interim bail and interim bail was not granted and on the next day, the Trial Court considered the material and passed the order enlarging him on bail. Hence, the present

petition is filed under Section 439(2) of Cr.P.C. for cancellation of the bail.

4. The main contention of the learned counsel for the petitioner before this Court is that allowing the bail application is illegal, perverse and without application of mind. It is also contended that the Trial Court without considering the presumption enunciated in the POCSO Act, granted bail. The Trial Court over-looked how the incident took place and failed to appreciate the allegations made in the complaint which constituted prima facie case against respondent No.2. The learned counsel submits that the incident took place when the victim girl was below 16 years of age, which makes it mandatory on the Court to issue notice to the informant/complainant/victim. In the present case, without giving an opportunity to the victim girl/complainant/informant, the order has been passed. Hence, the order of granting bail is perverse, capricious and unlawful. The learned counsel submits that there is a serious apprehension of tampering with evidence. The learned counsel in support of his argument brought to the notice of this Court, particularly page No.15 of the order of the Trial Court, wherein the Trial Court has observed that taking into note of the facts and

circumstances of the case, family background, present health condition of accused No.2(wife), minor daughter and threat of losing employment of accused No.1, it appears that this is a right case to exercise discretion in favour of accused No.1 by granting bail. Hence, the very reasoning given by the Trial Court is perverse and it requires interference of this Court.

5. The learned counsel in support of his arguments also relied upon the judgment of this Court passed in CrI.P.No.6696/2020 dated 29.01.2021, wherein this Court has exercised the powers under Section 482 of Cr.P.C. relying upon the judgment of the Apex Court in the case of **MAHIPAL v. RAJESH KUMAR @ POLIA AND ANOTHER** reported in **(2020) 2 SCC 118** and in the case of **NEERU YADAV v. STATE OF UTTAR PRADESH AND ANOTHER** reported in **2016 (15) SCC 422**, wherein the Apex has categorically held that if the order impugned is passed, if it is absolutely perverse and totally indefensible, the Court can exercise the powers under Section 482/439(2) of Cr.P.C. Hence, it is a fit case to exercise the powers under Section 439(2) of Cr.P.C. to cancel the bail granted in favour of respondent No.2.

6. The learned counsel for the petitioner would also submit that the Court has to take note of the speed in which the order has been passed without giving an opportunity to the victim/informant, which mandates giving notice before passing any bail order and the Trial Court failed to take note of the severity of the offence and presumption under the Act. The statement of the victim is also recorded under Section 164 of Cr.P.C. and even the same has also not been considered.

7. The learned counsel for respondent No.2 would vehemently contend that the alleged offence was taken place in 2018 and the said fact was disclosed after two and half years and no explanation is given regarding delay is concerned. The learned counsel submits that the victim girl herself explaining the situation in her family wrote a letter to respondent No.2 and those documents are placed before the Trial Court and the same has been considered. The Trial Court while passing the order in detail discussed in paragraph Nos.8 to 14 and not only given the reasons as contended by the learned counsel for the petitioner and elaborate discussion is made in the order. The learned counsel brought to the notice of this Court that the Trial Court has observed that the complainant/victim girl and the

Investigating Officer even the learned Special Public Prosecutor have ample opportunity to seek the cancellation of the bail of accused No.1 in the event of collecting incriminating materials or violation of condition of bail by accused No.1. When such an observation is made and detailed order has been passed, this Court cannot invoke Section 439(2) of Cr.P.C.

8. The learned counsel for respondent No.2 in support of his arguments filed the written submissions and the copy of the written submissions is also served on the other side. The learned counsel relied upon the judgment of the Apex Court in the case of **MYAKALA DHARMARAJAM AND OTHERS v. STATE OF TELANGANA AND ANOTHER** reported in **(2020) 2 SCC 743**, wherein the Apex Court discussed the factors to be considered while granting and cancelling bail and the principles are also summarized. The rejection and cancellation of the bail also distinguished and held that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with liberty of individual and hence it must not be lightly resorted to.

9. The learned counsel also brought to the notice of this Court the judgment of the Apex Court in the case of **X v. STATE OF TELANGANA AND ANOTHER** reported in **(2018) 16 SCC 511**, wherein with regard to the cancellation of the bail it is held that when warranted and principles are also summarized. Bail once granted should not be cancelled unless a cogent case, based on supervening events has been made out.

10. The learned counsel also relied upon the judgment of the Apex Court in the case of **SHIVASHARANAPPA AND OTHERS v. STATE OF KARNATAKA** reported in **(2013) 5 SCC 705**, wherein the Apex Court held that the Court must determine whether in circumstances of case, behaviour of witnesses concerned is acceptably natural allowing for variations. If behaviour is absolutely unnatural, testimony of witness may not deserve credence and acceptance, as was the case in present case.

11. The learned counsel also relied upon the two letters, which have been addressed to respondent No.2 by the victim girl, wherein she has stated that she was subjected to sexual act by her brother and also in the second letter, wherein an

allegation is made against the brother-in-law and sought for help from respondent No.2 and hence the Court has to take note of the conduct of the victim girl and delay in lodging the complaint has not been properly explained and all these factors are considered by the Trial Court while granting the bail and exercised the discretion in favour of respondent No.2 and no grounds are made out to invoke Section 439(2) of Cr.P.C.

12. The learned SPP appearing for respondent No.1-State would submit that in a hurried manner bail was granted and no opportunity is given to the victim and also order passed by the Trial Court is perverse and it requires interference of this Court. The learned SPP submits that the age of the victim girl as on the date of the alleged incident of sexual act i.e., 2018 was 14 years 10 months 21 days and hence it is mandatory on the part of the Court before passing the order to give an opportunity either to the victim/complainant/informant and the same has not been complied with and order has been passed in a hurried manner and the same is perverse.

13. Having heard the respective learned counsel and also taking note of the factual aspects of the case, first this Court has

to look into the contents of the complaint, wherein specific allegation is made against respondent No.2 that he being a lecturer of the College in which the victim girl was studying was subjected to sexual act and the said fact came to light when the victim girl was taken to doctor on 28.07.2021 and on insisting, the victim girl disclosed that when she was studying in 8th standard, in the month of October 2018, respondent No.2 called her in connection with project work and when she went to the house of respondent No.2, respondent No.2 and his wife persuaded her to stay in the room and made her naked and subjected her for sexual act and photographs was also taken and caused threat not to reveal the same to anybody. Subsequently also she was subjected for sexual act on several occasions. It is also alleged in the complaint that she was blackmailed to bring the money stating that photographs would be shown to others and accordingly an amount of Rs.10,000/- was collected from the victim girl and the victim girl stolen the same and given the same to respondent No.2. Hence, the mother had lodged the complaint with the police and case has been registered.

14. The Trial Court order reveals that the accused was taken to custody on 08.08.2021 and produced before the Court

at 6.30 p.m. and though interim application was moved, the Trial Judge considering the gravity of the allegations, remanded to the judicial custody and posted the case for objection on the next day and vide order dated 10.08.2021, exercised the discretion and granted bail. No doubt, after detailed discussion, the Trial Court has assigned the reasons, but the law mandates that when the victim is below the age of 16 years, an opportunity has to be given before passing the order to the victim/complainant/informant. In the case on hand, the said mandatory provision of opportunity is not given to the victim and the order has been passed within two days i.e., the accused was produced on 08.08.2021 at 6.30 p.m. and the bail application was considered on 09.08.2021 giving an opportunity to the Public Prosecutor as well as the learned counsel for the accused and the order was passed on the very next day and no such opportunity is given to the victim/complainant/informant and admittedly in the year 2018 i.e., when the victim girl was subjected to sexual act, she was aged about 14 years 10 months 21 days and her date of birth is 22.12.2004 as per the school records and it is the fact that she was studying in II PUC when the complaint is lodged. No doubt, the Trial Judge while giving

reasons in paragraph No.10 noticed with regard to the discrepancy of whether she was studying in 8th or 9th standard, but the fact is that no notice is given as mandated under the law. When the victim girl was not behaving normally, she was taken to the doctor and on persuasion, she revealed that she was subjected to sexual act and hence there was a delay in lodging the complaint. In a heinous offence of rape on the minor girl, the delay in lodging the complaint cannot be a ground to disbelieve the case of the complainant.

15. The second contention of the learned counsel for the petitioner before this Court is that capricious order is passed. The learned counsel also brought to the notice of this Court page No.15 of the Trial Court order, wherein the Trial Court has assigned reasons that having regard to the facts and circumstances, family background, present health condition of accused No.2 (wife), minor daughter and threat of losing employment of accused No.1, it appears that this is a right case to exercise the discretion in favour of accused No.1. But it is not the only reason given by the Trial Court and the Trial Court in detail discussed in paragraph No.9 regarding her age as 17 years and I have already pointed out with regard to she was studying

in 8th or 9th standard discrepancy and also in paragraph No.11 held that not specifically and clearly stated how many times accused No.1 has committed the act. On perusal of the complaint, it is specific that in the month of October 2018, she was subjected to sexual act and apart from that in page No.2, in paragraph No.1 end, it is specifically stated that afterwards also she was subjected to sexual act on several occasions and the same has been lost sight of by the Trial Court while exercising the discretion.

16. The other reason given by the Trial Court in paragraph No.12 is that accused No.1 has produced the copy of the marriage invitation card of accused Nos.1 and 2 to show that their marriage was solemnized on 16.05.2019 and when such being the case, without complete investigation, it is not possible to believe that, in the month of October 2018, before their marriage accused Nos.1 and 2 had committed the alleged offence. These are all the discussions with regard to the very admissibility of the evidence and the Trial Court ought not to have made such an observation while exercising the discretion under Section 439 of Cr.P.C. with regard to the evidence is concerned and the Trial judge proceeded to pass the order that

there is no specific allegation that how much amount accused No.1 had demanded but the victim girl had given Rs.10,000/- and these are all not the occasion to consider the aspect while considering the bail application. The Court has to look into whether a prima facie case has been made out or not while exercising discretion under Section 439 of Cr.P.C. and even gone to the extent of assessing the evidence of the prosecution while exercising the discretion and hence there is a force in the contention of the learned counsel for the petitioner that a perverse order has been passed by the Trial Court.

17. Apart from that, while summing up to exercise the discretion, the reason assigned by the Trial Court is that taken the health condition accused No.2, minor daughter and threat of losing employment of accused No.1 when heinous offence of rape is alleged against the lecturer in whose college the minor girl was studying. The reasons assigned by the Trial Court is nothing but perverse and though elaborately discussed in the order, but the very approach in exercising the discretion under Section 439 of Cr.P.C. it is nothing but capricious order.

18. This Court would like to refer to the judgment of the Apex Court in the case of **RAMESH BHAVAN RATHOD v. VISHANBHAI HIRABHAI MAKWANA (KOLI) AND ANOTHER** reported in **(2021) 6 SCC 230**, wherein the Apex Court has held that the Court has to look into the seriousness and gravity of the offence committed and severity of punishment in the event of conviction. It is further discussed with regard to Section 439 of Cr.P.C. is concerned while granting of bail necessity of recording reasons for grant or denial of bail. Though Court considering bail application does not need to launch into detailed evaluation of facts on merits since criminal trial is still to take place, yet the Courts granting bail cannot be oblivious of its duty to apply judicial mind and to record reasons, brief as they may be, for the purpose of deciding whether or not to grant bail. It is further observed that mandatory duty of Court to record (at least brief) reasons when granting bail order. The grant of bail under Section 439 of the Cr.P.C. is a matter involving the exercise of judicial discretion. Judicial discretion in granting or refusing bail, as in the case of any other discretion which is vested in Court as judicial institution, is not unstructured. The duty to record reasons is significant safeguard

which ensures that the discretion which is entrusted to the Court is exercised in a judicious manner. The recording of reasons in judicial order ensures that thought process underlying order is subject to scrutiny and that it meets objective standards of reason and justice. Thus, the bail order which does not contain reasons for prima facie concluding that bail should be granted is liable to be set aside for non-application of mind.

19. Having considered the principles laid down in the judgment referred supra and also the judgments referred by the learned counsel for the petitioner in the cases of **Mahipal** and **Neeru Yadav** (supra) and also the judgments referred by the learned counsel for respondent No.2 in **Myakala Dharmarajam** (supra), no doubt it is settled law that cancellation of bail is a harsh order because it interferes with liberty of individual and hence it must not be lightly resorted to. The Apex Court in the case of **X v. STATE OF TELANGANA** (supra) has held that bail once granted should not be cancelled unless a cogent case, based on supervening events has been made out and the he Court cannot exercise the powers under Section 439(2) of Cr.P.C.

20. Having considered the principles laid down in the judgments referred supra and also the factual aspects of the case, it is specific in the case on hand that accused No.1 called the victim girl and subjected for sexual act and also taken the photographs and subsequently blackmailed the victim girl and collected an amount of Rs.10,000/-. It is important to note that when serious allegations are made and no doubt two letters are addressed in favour respondent No.2, but whether those letters are addressed by the victim girl or not is a matter of trial and while considering the bail application those documents also cannot be relied upon and the same is subject to proof, but the fact is that she was subjected to sexual act and when the same is alleged and filing of complaint after two and half years cannot be a ground when specific allegation is made in the complaint that he had caused life threat and also taken photographs of subjecting her for sexual act. Apart from that, when the victim girl was taken to the doctor and on persuasion only she revealed the said fact and all these factors are to be considered by the Trial Court while considering the bail application. In the case on hand, first of all the victim girl is aged about 14 years 10 months 21 days and as mandated under the law Section 376(3) of IPC

as well as under Section 439 (1A) of Cr.P.C. which is amended in 2018 has not been considered by the Trial Court and ought to have given an opportunity to the complainant/informant/victim before passing the order and the same has not been complied.

21. I have already pointed out that in detail discussion was made and detailed order has been passed analyzing the facts of the case and failed to take note of the prima facie case alleged against respondent No.2 herein and also assigned the reason that health condition of accused No.2 is not good and if bail is not granted, respondent No.2 is going to lose his job and the reasons assigned is nothing but perverse and the Trial Court undertaken to evaluate the evidence collected by the State considering the bail application and without giving notice to the victim girl, an order has been passed in a hurried manner as contended by the learned counsel for the petitioner and it is nothing but an order passed hurriedly and tried to analyze the evidence on record taking note of the discrepancy that ought not to have been done while considering the bail application. No doubt in the order, an observation is made that the victim/Investigating Officer/Public Prosecutor is having an opportunity to seek for cancellation of bail, if material is

collected against respondent No.2 and in any case of violation. But in the case on hand, it is not the case of the petitioner that respondent No.2 has violated the conditions of the bail order, but the observation of the Trial Court is that if incriminating material is collected, the option is open to the victim. The submission of the learned counsel is that this Court can give an opportunity to the petitioner to approach the Trial Court and the said situation does not arise when the order has been passed in non-compliance with the mandatory provisions of Section 439(1A) of Cr.P.C. and Section 376(3) of IPC and amended provision is brought into force in 2013. Apart from that, an exercise is made to analyze the evidence available on record and hurriedly passed the order. When such being the factual aspects of the case, it is nothing but perverse order is passed by the Trial Court while enlarging him on bail. The learned counsel for respondent No.2 submits that as on the date of lodging the complaint, the victim girl was aged about 17 years and the said contention cannot be accepted for the reason that the Court has to take note of subjecting the minor girl for sexual act and not the date of complaint. Hence, it is appropriate to invoke Section 439(2) of Cr.P.C. to cancel the bail granted by the Trial Court.

22. In view of the discussions made above, I pass the following:

ORDER

The petition is allowed. The bail granted by the Trial Court vide order dated 10.08.2021 passed in Crime No.56/2021 on the file of V Additional District and Sessions Judge, D.K., Mangaluru, sitting at Puttur, D.K., is hereby set aside. The accused be arrested and commit him to custody under Section 439(2) of Cr.P.C.

**Sd/-
JUDGE**

MD