

REPORTABLE

IN THE SUPREME COURT OF INDIA
(CRIMINAL APPELLATE JURISDICTION)

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CRIMINAL APPEAL NO. 329 OF 2021

[@ SPECIAL LEAVE PETITION (CRL.) NO. 253 OF 2021]
(ARISING OUT OF S.L.P. (CRL.) DIARY NO. 20318 OF 2020)

APARNA BHAT & ORS.

...APPELLANT (S)

VERSUS

-STATE OF MADHYA PRADESH & ANR.

....RESPONDENT(S)

JUDGEMENTS. RAVINDRA BHAT, J.

Certified to be true copy
Assistant Registrar (Judl.)
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Supreme Court of India

A woman cannot be herself in the society of the present day, which is an exclusively masculine society, with laws framed by men and with a judicial system that judges feminine conduct from a masculine point of view."

– Henrik Ibsen

1. Leave granted. The appellants are public-spirited individuals, concerned about the adverse precedent set by the imposition of certain bail conditions in a case involving a sexual offence against a woman; they impugn a part of the judgment of the Madhya Pradesh High Court¹ that imposed these bail conditions. With the consent of counsel for the parties, the appeal was heard finally. The appellants also filed an

¹ In *Vikram v. The State of Madhya Pradesh*¹ in MCRC 23350/ 2020, dated 30.7.2020

application², seeking directions that all the High Courts and trial Courts be directed to refrain from making observations and imposing conditions in rape and sexual assault cases, at any stage of judicial proceedings, that trivialize the trauma undergone by survivors and adversely affect their dignity. Certain intervenors also preferred an application in support of the appeal, seeking clear directions to all Courts to refrain from imposing “*irrelevant, freaky or illegal bail conditions*”.

2. Ibsen, the prescient nineteenth century author, made a powerful statement (quoted as the epigram at the beginning of this judgment); sadly, even today, in the twenty first century, after 70 years as a republic with the goal of equality for all, many courts seem to be oblivious of the problem. In a sense, this judgment is not as much about only the merits of the impugned conditions of the bail order, but is meant to address a wider canvas of (what appears to be) entrenched paternalistic and misogynistic attitudes that are regrettably reflected at times in judicial orders and judgments.

3. The brief facts of the case are that on 20.04.2020 at about 2.30 a.m., the accused-applicant, a neighbour of the complainant, entered her house and caught hold of the complainant’s hand, and allegedly attempted to harass her sexually. Accordingly, Crime No. 133/2020 was registered at Police Station, Bhatpachlana, District-Ujjain for the offences punishable under sections 452, 354A³, 323 and 506 of the Indian Penal Code (IPC). The case was investigated and a charge sheet was filed. The accused filed an application under Section 438 of Code of Criminal Procedure, 1973 (hereafter “CrPC”) seeking pre-arrest bail. The High Court, by the impugned

²CrI. M.P No. 102226/2020

³Section 354A reads as follows:

“354A. Sexual harassment and punishment for sexual harassment.—

(1) A man committing any of the following acts—

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.”

order, even while granting bail to the applicant imposed the following condition which is under challenge in this petition.

(i) *“The applicant along with his wife shall visit the house of the complainant with Rakhi thread/ band on 3rd August, 2020 at 11:00 a.m. with a box of sweets and request the complainant -Sarda Bai to tie the Rakhi band to him with the promise to protect her to the best of his ability for all times to come. He shall also tender Rs. 11,000/- to the complainant as a customary ritual usually offered by the brothers to sisters on such occasion and shall also seek her blessings. The applicant shall also tender Rs. 5,000/- to the son of the complainant – Vishal for purchase of clothes and sweets. The applicant shall obtain photographs and receipts of payment made to the complainant and her son, and the same shall be filed through the counsel for placing the same on record of this case before this Registry. The aforesaid deposit of amount shall not influence the pending trial, but is only for enlargement of the applicant on bail.”*

4. The appellants submit that the expressions *“in the interest of justice”*, *“such other conditions court considers necessary”* and *“as it may think fit”* as provided in the bare text of the Section 437(3)(c) as well as Section 438(2)(iv) of the CrPC, give discretion to the Courts to impose such other conditions as may be required in the facts of a particular case, but those conditions have to be in consonance with the other conditions in the provisions, the purpose of granting bail and no other consideration.

5. The appellants cite *Kunal Kumar Tiwari v. State of Bihar*⁴ and *Sumit Mehta v. State (NCT of Delhi)*⁵ and argue that this court’s observations in those decisions must be followed by every court while considering and dealing with bail applications. They also rely on the observations made in para 18 of *State of M.P v. Madanlal*,⁶ and urge that in cases of sexual offences, the idea of compromise, especially in the form of marriage between the accused and the prosecutrix is abhorrent, and should not be considered a judicial remedy, as it would be antithetical to the woman’s honour and dignity. Likewise, reliance was placed on *Ramphal v. State of Haryana*⁷, where the

⁴ (2018) 16 SCC 74

⁵ (2013) 15 SCC 570

⁶ (2015) 7 SCC 681

⁷ CrI. A. No. 438/2011 decided on 27.11.2019

court took note of the compromise between the survivor and accused, but found that such compromise is of no relevance when deciding on cases of rape and sexual assault.

6. The appellants brought to the notice of this Court, various decisions and orders where the observations made by the judges in offences against women including cases under the Protection of Children from Sexual Offences Act, 2012 (POCSO) were extraneous. The appellants submitted that the courts, in many cases, especially under the POCSO Act, granted bail on the plea that an agreement to marry had been reached between the accused and prosecutrix. Additionally, they also submitted that while adjudicating matters of sexual harassment and rape, judges have made shocking remarks on the character of the prosecutrix.

7. Reference is made to *Ravi Jatav v. State of M.P.*⁸, where the High Court of Madhya Pradesh, while granting bail (to an accused of committing offences under Sections 376-D, 366, 506, 34 IPC) imposed conditions that the accused “*shall register himself as a Covid-19 Warrior*” and was to be assigned work of Covid-19 disaster management at the discretion of the District Magistrate. In *Rakesh B. v. State of Karnataka*⁹, the Karnataka High Court granted bail to an accused alleged to have committed offences under Sections 376, 420, 506 IPC and Section 66-B of the Information Technology Act, 2000 (“IT Act”), and made remarks on the survivor’s conduct. The relevant extract is produced below:

“c) nothing is mentioned by the complainant as to why she went to her office at night, that is, at 11 PM; she has also not objected to consuming drinks with the petitioner and allowing him to stay with her till morning; the explanation offered by the complainant that after the perpetration of the act she was tired and fell asleep, is unbecoming of an Indian woman; that is not the way our women react when they are ravished;”

8. The appellants submit that no observation/condition should be made in any judgment, or orders which reflects bias of the judge or affects the dignity of a woman

⁸ MCRC No. 13734/2020 order dated 19.05.2020 passed by Madhya Pradesh High Court.

⁹ Cr. P. No. 2427/2020, order dated 22.06.2020 passed by High Court of Karnataka.

or affects the conduct of the trial in a fair and unbiased manner. They highlight that the impugned order, while granting bail, imposed a condition that the applicant shall visit the house of the complainant. The appellants submit that this is unacceptable and no observation/condition should be made which permits the accused to meet/have access to the survivor and her family members.

9. The appellants also cite *Mohan v. State*¹⁰, where the Madras High Court had referred the case of rape of a minor to mediation and observed that the case was fit for attempting a compromise between the parties. Likewise, *Samuvel v. Inspector of Police*¹¹ is cited, where the High Court of Madras referred to mediation, a case of rape where the prosecutrix was a minor and had become a mother of a child as a consequence of rape, because the accused agreed to marry her. It is urged that no observation/condition should be made which initiates or encourages compromise that disparages and downgrades an otherwise heinous crime thus indicating that such offences are remediable by way of a compromise/ by marriage.

10. *Sopikul Sk. @ Safikul Islam v. State*,¹² an order of the High Court of Calcutta in a POCSO case granting bail is cited; here, relief was given to the accused since the prosecutrix had attained majority and the accused intended to marry her. Further, in the case of *Gyanaranjan Behera v. State of Odisha*,¹³ the Orissa High Court in a POCSO case granted interim bail to the accused for the purpose of marrying the prosecutrix. In *Suraj Kushwah v. State of M.P.*,¹⁴ the Madhya Pradesh High Court granted temporary bail to the accused for a crime under sections 376 (2)(n), 506 IPC read with Sections 3(1) (W-II), 3(2)(V), 3(2)(v-a) of the SC/ST (Prevention of Atrocities) Act, 1989 for the purpose of solemnizing marriage with the prosecutrix. The appellants submit that in POCSO and rape cases, no observation/condition should be made, which takes note of the fact that the survivor has attained majority and that the accused has offered to marry her.

¹⁰ M.P No. 2/2014 in CrI. A No. 402/2014 order dated 18.06.2015

¹¹ CrI. O.P. No. 1881/2015.

¹² CRM No. 2961/2020 Order dated 16.04.2020 of the Calcutta High Court

¹³ BLAPL No. 2596/2020 Order dated 02.06.2020, passed by Orissa High Court.

¹⁴ CRA No. 3353/2020 Order dated 02.09.2020 passed by the Madhya Pradesh High Court

11. *Vikas Garg v. State of Haryana*¹⁵, by the High Court of Punjab is cited, where the court granted bail to three persons accused of committing offences under Sections 376D, 376(2)(n), 376, 292, 120-B, 506 IPC and Section 67 of the IT Act, and made observations regarding the prosecutrix's "casual relationships", "promiscuous attitude", "voyeuristic mind", etc. The appellants submit that no observation/condition should be made which grants bail on the ground that the victim is of "loose character" or is "habituated to sexual intercourse."

12. Counsel for the Intervenors submitted that under sections 437(2) and 438, the power to impose conditions have been expressed in very wide terms by using the phrase "any condition." Recently, High Courts while granting bail under these sections have started imposing irrelevant conditions. The Intervenors have annexed around twenty-three orders in which such conditions for bail were imposed. They argue that the conditions that can be imposed under the law are clearly laid down by the Supreme Court in the case of *Munish Bhasin v. State*¹⁶ and reiterated in *Parvez Noordin Lokhandwalla v. State of Maharashtra*.¹⁷ Accordingly, it is clear that imposing conditions like rendering community service in COVID hospitals or in any other institution, plantation of trees, contributing to any particular charity relief fund, etc. is impermissible in law. The Intervenors further submit that the accused, during pendency of the trial are presumed innocent and their guilt is as yet to be adjudicated by the Court. Imposition of conditions like compulsive community service, etc. is violative of the right to equality and personal liberty, including procedure established by law in the Indian Constitution.

13. The Intervenors also submit that the Court while deciding a bail application, cannot assume the role of a social reformer or fund raiser for charities and impose conditions which have no nexus with the offense or relevance with the object of the bail provisions.

¹⁵Cr. M. No. 23962/2017, order dated 13.09.2017 passed by the Punjab and Haryana High Court

¹⁶(2009) 4 SCC 45

¹⁷(2020) 10 SCC 77

14. It was submitted that in IA No. 102226/2020, the appellants have brought to the notice of this Court, several other instances in which similar directions have been made by High Courts and Trial Courts across the country. Such wide prevalence necessitates the urgent intervention of this Court to *firstly*, declare that such remarks are unacceptable and have the potential to cause grave harm to the prosecutrix and the society at large, *secondly*, reiterate that judicial orders have to conform to certain judicial standards, and *thirdly*, take necessary steps to ensure that this does not happen in the future.

15. It was further submitted that this Court should intervene and issue directions or guidelines on bail and anticipatory bail to ensure that courts impose only those conditions as are permissible in law. Further, this Court was urged to issue directions on gender sensitization of the bar and the bench, particularly with regard to judicial empathy for the prosecutrix.

16. The learned Attorney General, who had been issued notice in this matter, made his submissions in support of the appeal; he also filed a detailed note suggesting the steps that should be taken to sensitize all stakeholders, especially courts, while dealing with offences against women. Highlighting the observations made in *Kunal Kumar (supra)*, *Sumit Mehta (supra)*, *State of Punjab v. Gurmit Singh*¹⁸ and *Sakshi v. State*¹⁹, the learned Attorney General submitted that while relying upon the observations made in the above-mentioned cases, the court may highlight that in cases of crimes against women, the following additional considerations may be kept in mind:

- i. Bail conditions should not mandate or even permit contact between the accused and the victim.
- ii. Bail conditions must seek to protect the complainant from any harassment by the accused.

¹⁸ (1996) 2 SCC 384

¹⁹ (2004) 5 SCC 518

- iii. Where considered necessary, the complainant/prosecutrix may be heard on whether there is any peculiar circumstance which may require additional conditions for her protection.
- iv. Wherever bail is granted, the complainant may immediately be informed that the accused has been granted bail.
- v. Bail conditions must be free from stereotypical or patriarchal notions on women and their place in society, and must strictly be in accordance with the requirements of the CrPC.
- vi. The Courts while adjudicating a case, should not suggest or entertain any notions (or encourage any step) towards compromises between the prosecutrix and the accused to get married, as it is beyond their powers and jurisdiction.

17. On gender equality and gender sensitization, the Attorney General argued that to achieve the goal of gender justice, it is imperative that judicial officers, judges, and members of the bar are made aware of gender prejudices that hinder justice. Accordingly, he submitted that the foremost aspect to facilitate a gender sensitive approach, is to train judges to exercise their discretion and avoid the use of gender-based stereotypes while deciding cases pertaining to sexual offences. *Secondly*, judges should have sensitivity to the concerns of the survivor of sexual offences.

18. Reliance was placed on the Bangkok General Guidance for Judges on Applying a Gender Perspective in South East Asia, by the International Commission of Jurists. It was pointed out that the following stereotypes are often encountered in the course of judicial decision-making and should be avoided: -

- i. Women are physically weak;
- ii. Women cannot make decisions on their own;
- iii. Men are the head of the household and must make all the decisions related to family;
- iv. Women should be submissive and obedient;
- v. Good women are sexually chaste;

- vi. Every woman wants to be a mother;
 - vii. Women should be the ones in charge of their children;
 - viii. Being alone at night or wearing certain clothes make women responsible for being attacked;
 - ix. Women are emotional and often overreact or dramatize hence it is necessary to corroborate their testimony;
 - x. Testimonial evidence provided by women who are sexually active may be suspected when assessing “consent” in sexual offence cases; and
 - xi. Lack of evidence of physical harm in sexual offense case means consent was given.
19. The Attorney General submitted that training for gender sensitization for judges at all levels of the judiciary should mandatorily be conducted at regular intervals by the National Judicial Academy and State Judicial Academies. He emphasized that any directions towards gender sensitization should include judges of all levels of the judiciary. Further, the counsel urged that courses on gender sensitization should be included in the curriculum of law schools, and the All-India Bar Exam should include questions on gender sensitization as well. In addition to this, he recommended that a detailed curriculum may be prepared with the help of subject matter experts by each High Court, to be a part of the syllabus for the Judicial Services Exams and training for inducted judges.

Nature of the beast²⁰: the problem

20. Women often experience obstacles in gaining access to mechanisms of redress, including legal aid, counselling services and shelters. They are re-victimized and exposed to further risk of violence through the denial of redress in the context of informal trials or negotiations between families and community leaders. The payment

²⁰ A phrase that means the traits inherent to a thing or situation, especially a negative or difficult one (See <https://idioms.thefreedictionary.com/the+nature+of+the+beast>)

of financial compensation by the perpetrator or his family for acts of violence against women, in lieu of legal remedies, was a recurrent concern *vis-à-vis* the formal and informal justice systems. Violence against women in India is systematic and occurs in the public and private spheres. It is underpinned by the persistence of patriarchal social norms and inter- and intra-gender hierarchies. Women are discriminated against and subordinated not only on the basis of sex, but on other grounds too, such as caste, class, ability, sexual orientation, tradition and other realities.²¹

21. Gender violence is most often unseen and is shrouded in a culture of silence. The causes and factors of violence against women include entrenched unequal power equations between men and women that foster violence and its acceptability, aggravated by cultural and social norms, economic dependence, poverty and alcohol consumption, etc. In India, the culprits are often known to the woman; the social and economic "costs" of reporting such crimes are high. General economic dependence on family and fear of social ostracization act as significant disincentives for women to report any kind of sexual violence, abuse or abhorrent behaviour. Therefore, the actual incidence of violence against women in India is probably much higher than the data suggests, and women may continue to face hostility and have to remain in environments where they are subject to violence. This silence needs to be broken. In doing so, men, perhaps more than women have a duty and role to play in averting and combating violence against women.

22. Unlike many other victims of interpersonal crimes such as theft, robbery or muggings, survivors of sexual assault are vulnerable to being blamed for their attack, and thus victim-blaming (overtly or in more subtle forms) in sexual assault cases has been the focus of several writings. Myths and stereotypes "*underlie and fuel sexual*

²¹Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, on her Mission to India (22 April to 1 May, 2013) A/HRC/26/38/Add.1 (accessible at www.ohchr.org > Documents > A-HRC-26-38-Add1_en)

violence against women and inform negative societal reactions".²² Joanne Conaghan points out pertinently that *"removing the doctrinal debris of a legally instituted gendered hierarchical order does not necessarily get rid of deeply ingrained social and cultural attitudes which law has long endorsed and which continue to infuse the criminal justice process, albeit in more covert, less accessible forms."*²³

23. Sexual violence is varied in degree. At the highest (or, rather most aggravated) level, is rape with or without attendant violence. However, there are a substantial number of incidents which fall within the rubric of sexual violence, that amount to offences under various penal enactments. These outlaw behaviours such as stalking, eve-teasing, shades of verbal and physical assault, and harassment. Social attitudes typically characterize this latter category of crimes as "minor" offences. Such "minor" crimes are, regrettably not only trivialised or normalized, rather they are even romanticized and therefore, invigorated in popular lore such as cinema. These attitudes – which indulgently view the crime through prisms such as "boys will be boys" and condone them, nevertheless have a lasting and pernicious effect on the survivors.

24. The United Nations Organisation has defined "violence against women" as *"any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."*²⁴ The effect of offensive behaviour against women, which laws criminalize-

²² Shannon Sampert, *"Let Me Tell You a Story: English-Canadian Newspapers and Sexual Assault Myths"* (2010) 22:2 Canadian Journal of Women and the Law 301 at 304; also Janice Du Mont, and Deborah Parmis; *"Judging Women: The Pernicious Effects of Rape Mythology"* (1999) 19:1-2 Canadian Woman Studies 102 at 102

²³ Joanne Conaghan, *Law and Gender* (Oxford: Oxford University Press, 2013) at 113

²⁴The Declaration on the Elimination of Violence Against Women (also 'DEVAW'). Articles 1 and 2 read as follows:
"Article One:

For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article Two:

Violence against women shall be understood to encompass, but not be limited to, the following:

physical, verbal, or other acts which threaten or give them acute discomfort, undermining their dignity, self-worth and respect, is to silence or subdue the survivor.

25. In *The Standard of Social Justice as a Research Process*²⁵ two scholars of psychology made a strong indictment of the (contextually, Canadian) criminal justice process:

“The more general indictment of the current criminal justice process is that the law and legal doctrines concerning sexual assault have acted as the principle [sic] systemic mechanisms for invalidating the experiences of women and children. Given this state of affairs, the traditional view of the legal system as neutral, objective and gender-blind is not defensible. Since the system is ineffective in protecting the rights of women and children, it is necessary to re-examine the existing doctrines which reflect the cultural and social limitations that have preserved dominant male interests at the expense of women and children.”

Previous rulings

26. In *Kunal Kumar Tiwari v. State of Bihar (supra)*, this court while dealing with Section 437(3)(c), Cr. PC (general conditions of bail) observed as follows:

“9. There is no dispute that Sub-clause (c) of Section 437(3) allows Courts to impose such conditions in the interest of justice. We are aware that palpably such wordings are capable of accepting broader meaning. But such conditions cannot be arbitrary, fanciful or extend beyond the ends of the provision. The phrase 'interest of justice' as used under the Sub-clause (c) of Section 437(3) means "good administration of justice" or "advancing the trial process" and inclusion of broader meaning should be shunned because of purposive interpretation.”

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”

²⁵(1997), 38 *Can. Psychology* 91, K. E. Renner, C. Alksnis and L. Park at p. 100

27. In *Sumit Mehta v. State (NCT of Delhi)* (*supra*) this court, with respect to the conditions that can be imposed validly under section 438(2) of the CrPC, observed that:

“11. While exercising power under Section 438 of the Code, the Court is duty bound to strike a balance between the individual's right to personal freedom and the right of investigation of the police. For the same, while granting relief Under Section 438(1), appropriate conditions can be imposed Under Section 438(2) so as to ensure an uninterrupted investigation. The object of putting such conditions should be to avoid the possibility of the person hampering the investigation. Thus, any condition, which has no reference to the fairness or propriety of the investigation or trial, cannot be countenanced as permissible under the law. So, the discretion of the Court while imposing conditions must be exercised with utmost restraint.”

28. It was urged that the observations made in *Kunal Kumar* and *Sumit Mehta* ought to be followed while imposing bail conditions. The appellants relying upon the observations made in para 18 of *State of M.P v. Madanlal*,²⁶ submit that in cases of sexual offences, the concept of compromise, especially in the form of marriage between the accused and the prosecutrix shall not be thought of, as any such attempt would be offensive to the woman's dignity.

“18. ... We would like to clearly state that in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the “purest treasure”, is lost. Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has

²⁶ (2015) 7 SCC 681