IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Anticipatory Bail Application No.2613 of 2024

1. Uday Suresh Kotwal
   Age-60 Yrs, Occu-Retired & Chairman
   R/o. Datt Prasad Kulgaon Badlapur
2. Tushar Sharad Apate
   Age 57 Yrs, Occu-Business
   R/o Trimurti Gandhi Chouk,
   Kulgaon, Badlapur … Applicants

Versus

The State of Maharashtra
Through: Badlapur (E) Police Station,
In C.R.No.380 of 2024.
Notice to be served to the
Learned Public Prosecutor
Appellate side, Bombay High Court … Respondent

With

Anticipatory Bail Application No.2614 of 2024

1. Uday Suresh Kotwal
   Age-60 Yrs, Occu-Retired & Chairman
   R/o. Datt Prasad Kulgaon Badlapur
2. Tushar Sharad Apate
   Age 57 Yrs, Occu-Business

R/o Trimurti Gandhi Chowk,
Kulgaon, Badlapur … Applicants

Versus

The State of Maharashtra
Through: Badlapur (E) Police Station,
In C.R.No.391 of 2024.
Notice to be served to the
Learned Public Prosecutor
Appellate side, Bombay High Court … Respondent

Mr Vikas B Patil (Shirgaonkar), along with Mr Ajinkya J Patil (Shirgaonkar), Mr Shivraj V Patil (Shirgaonkar) and Mr Indrajeet V Patil (Shirgaonkar), for the applicants in both ABAs.
Mr HS Venegavkar, Chief Public Prosecutor, along with Ms Supriya Kak, APP, for the respondent/ State.
Ms Kavisha Khanna, for the Intervenor.
ACP Vijay Pawar along with ACP Dhanaji Kshirsagar, Crime Branch, Thane, are present.

Coram: R.N. Laddha, J.
Date: 1 October 2024.

P.C.:

By this application, the applicants seek pre-arrest bail in connection with CR Nos.380 of 2024 and 391 of 2024, registered at Badlapur Police Station, Thane, for offences

punishable under Sections 65(2), 74, 75 and 76 of the Bharatiya Nyaya Sanhita, 2023, and Sections 4(2), 6, 8, 10, and 21(2) of the Protection of Children from Sexual Offences Act, 2012 (for short, 'the POCSO Act').

2. The prosecution alleges that on August 12 and 13, 2024, two minor girls, each around four years old, were sexually assaulted by a contractual employee at their school. The applicants hold the positions of Chairman and Secretary at the educational institution where the victims were enrolled. The applicants are accused of failing to report these incidents, as mandated by Section 19(1) of the POCSO Act, which is punishable under Section 21(2) thereof.

3. Mr Vikas Patil, the learned Counsel representing the applicants, asserts the applicants' innocence and submits that the alleged incidents took place on August 12 and 13, 2024. However, the victims attended school on August 14 and participated in the Independence Day celebrations on August 15, accompanied by their parents. During these events, no complaints or grievances were reported, and the victims appeared to be in good health, showing no signs of distress. Furthermore, the learned Counsel argues that the applicants

only became aware of the alleged incidents on August 16, 2024, when they were contacted by the investigating agency. Therefore, the learned Counsel contends that the applicants could not have been involved in the crime, as they were unaware of the incidents until after they had occurred. Mr Patil, the learned Counsel, submits that there has been a significant delay in filing the FIR and carrying out the medical examinations. All the documentary and digital evidence are presently in possession of the investigating agency, indicating that there is no further evidence to be recovered or discovered from the applicants. The applicants are willing to comply with any conditions that the Court may impose.

4. On the other hand, Mr HS Venegavkar, the learned Public Prosecutor representing the respondent/ State, along with Ms Kavisha Khanna, the learned Counsel for the intervenor, jointly assert that the offence in question is serious. They emphasise that the applicants, who were responsible for the management of the educational institution, had an obligation to report the incident promptly. The learned Public Prosecutor contends that the victims' guardians had approached the school's principal with their

grievances regarding the incidents. The Principal subsequently informed the school management, but the applicants failed to take immediate action to report the crime. Additionally, the CCTV footage provided by the school authorities appears to have been tampered with, as there is no recording available from July 19, 2024 to August 16, 2024. The investigation regarding this tampering is ongoing. Mr Venegavkar, opposing the request for pre-arrest bail, argues that the applicants absconded and have not cooperated with the investigation. The prosecution apprehends that the applicants may further tamper with the evidence and influence the witnesses as the witnesses are still working in the institution where the applicants hold managerial positions.

5. The limited issue that arises for this Court's determination is whether, in the facts and circumstances of the case, the applicants are entitled to the relief of pre-arrest bail as envisaged under Section 482 of the Bharatiya Nagarik Suraksha Sanhita, 2023.

6. Before considering the rival contentions canvassed across the Bar and the material placed on record, this Court

finds it appropriate to refer to the relevant provisions under the POCSO Act and the line of decisions rendered by the Hon'ble Supreme Court in this aspect.

7. Section 19 of the POCSO Act casts an obligation on persons to report the offence and prescribes the procedure to be followed by the authorities thereafter. The Section reads as follows:

> *"19. Reporting of offences.—*
>
> *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of1974)any person(including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,—*
>
> *(a) the Special Juvenile Police Unit; or*
> *(b) the local police.*
>
> *(2) Every report given under sub-section (1) shall be—*
>
> *(a) ascribed an entry number and recorded in writing;*
> *(b) be read over to the informant;*
> *(c) shall be entered in a book to be kept by the Police Unit.*
>
> *(3) Where the report under sub-section (1) is*

given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection including admitting the child into shelter home or to the nearest hospital within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and

protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).”

8. Section 21 lays down the punishment for failure to report or record a case. The Section reads as follows:

“21. Punishment for failure to report or record a case.—

(1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions of sub-section (1) shall not apply to a child under this Act.”

9. The Hon’ble Supreme Court in ***Shankar Kisanrao Khade***

v. State of Maharashtra*[1]*, by issuing directions cast a duty on persons in charge of schools or educational institutions to report incidents of sexual assault to the Special Juvenile Police Unit or local police and highlighted the seriousness of non-reporting such crimes. The relevant portion of the directions are as follows:

> *"77.1. The persons in charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails, etc. or wherever children are housed, if they come across instances of sexual abuse or assault on a minor child which they believe to have been committed or come to know that they are being sexually molested or assaulted are directed to report those facts keeping upmost secrecy to the nearest Special Juvenile Police Unit (SJPU) or local police, and they, depending upon the gravity of the complaint and its genuineness, take appropriate follow-up action casting no stigma to the child or to the family members.*
>
> *****
>
> *77.6. The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening*

1. (2013) 5 SCC 546

> ***the offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.***"
>
> (emphasis supplied)

10. Similarly, in ***Tessy Jose v. State of Kerala***[2]**,** the Hon'ble Apex Court once again highlighted the need to report incidents of sexual abuse on minors by persons having knowledge of such incidents and observed as follows:

> *"**9.** ....The provisions of Section 19(1), reproduced above, put a legal obligation on a person to inform the relevant authorities, inter alia, when he/she has knowledge that an offence under the Act had been committed. The expression used is "knowledge" which means that some information received by such a person gives him/her knowledge about the commission of the crime. There is no obligation on this person to investigate and gather knowledge. ..."*

11. In the decision of ***State of Maharashtra v. Maroti***[3]**,** the Hon'ble Supreme Court, while discussing the requirement of prompt reporting of offences under the POCSO Act, emphasised that the length of the punishment was not an

2. (2018) 18 SCC 292
3.(2023) 4 SCC 298

indication of the seriousness of the offence punishable under Section 21(2) of the POCSO Act. The observations are as follows:

> *"**12.** To achieve the avowed purpose, a legal obligation for reporting of offence under the Pocso Act is cast upon on a person to inform the relevant authorities specified thereunder when he/she has knowledge that an offence under the Act had been committed. Such obligation is also bestowed on person who has apprehension that an offence under this Act is likely to be committed. Besides casting such a legal obligation under Section 19, the legislature thought it expedient to make failure to discharge the obligation thereunder as punishable, under Section 21 thereof. True that under Section 21(1), failure to report the commission of an offence under sub-section (1) of Section 19 or Section 20 or failure to report such offence under sub-section (2) of Section 19 has been made punishable with imprisonment of either description which may extend to six months or with fine or with both. Sub-section (2) of **Section 21 provides that any person who being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of Section 19 in respect of a subordinate under his control, shall be punishable with imprisonment with a term***

which may extend to one year or with fine. Certainly, such provisions are included in with a view to ensure strict compliance of the provisions under the Pocso Act and thereby to ensure that the tender age of children is not being abused and their childhood and youth is protected against exploitation.

13. Looking at the penal provisions referred above, making failure to discharge the obligation under Section 19(1) punishable only with imprisonment for a short duration viz. six months, one may think that it is not an offence to be taken seriously. However, according to us that by itself is not the test of seriousness or otherwise of an offence of failure to discharge the legal obligation under Section 19, punishable under Section 21 of the Pocso Act. We are fortified in our view, by the decisions of a three-Judge Bench of this Court in Vijay Madanlal Choudhary v. Union of India [Vijay Madanlal Choudhary v. Union of India, (2023) 12 SCC 1 : 2022 SCC OnLine SC 929] and a two-Judge Bench in Shankar Kisanrao Khade v. State of Maharashtra [Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546 : (2013) 3 SCC (Cri) 402].

****

***15.** In Vijay Madanlal Choudhary case [Vijay Madanlal Choudhary v. Union of India, (2023)*

12 SCC 1 : 2022 SCC OnLine SC 929] , this Court observed that ***the length of punishment is not only the indicator of the gravity of offence and it is to be judged by a totality of factors, especially keeping in mind the background in which the offence came to be recognised by the legislature in the specific international context.*** *In this context, it is also relevant to note that the United Nations Convention on Rights of Children, which was ratified by India on 11-12-1992, requires the State parties to undertake all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices, etc. Articles 3(2) and 34 of the Convention have placed a specific duty on the State to protect the child from all forms of sexual exploitation and abuse.*

16. Prompt and proper reporting of the commission of offence under the Pocso Act is of utmost importance and we have no hesitation to state that its failure on coming to know about the commission of any offence thereunder would defeat the very purpose and object of the Act. *We say so taking into account the various provisions thereunder. Medical examination of the victim as also the accused*

would give many important clues in a case that falls under the Pocso Act. Section 27(1) of the Pocso Act provides that medical examination of a child in respect of whom any offence has been committed under the said Act, shall, notwithstanding that a first information report or complaint has not been registered for the offence under the Act, be conducted in accordance with Section 164-ACrPC, which provides the procedures for medical examination of the victim of rape.

*****

18. *We refer to the aforesaid provisions only to stress upon the fact that a prompt reporting of the commission of an offence under the Pocso Act would enable immediate examination of the victim concerned and at the same time, if it was committed by an unknown person, it would also enable the investigating agency to commence investigation without wasting time and ultimately to secure the arrest and medical examination of the culprit. There can be no two views that in relation to sexual offences medical evidence has much corroborative value.*

*****

21. *If FIR and the materials collected disclose a cognizable offence and the final report filed under Section 173(2)CrPC on completion of*

investigation based on it would reveal that the ingredients to constitute an offence under the Pocso Act and a prima facie case against the persons named therein as accused, the truthfulness, sufficiency or admissibility of the evidence are not matters falling within the purview of exercise of power under Section 482CrPC and undoubtedly they are matters to be done by the trial court at the time of trial. This position is evident from the decisions referred supra.

*****

30. *True that the FIR and the charge-sheet still remain in fact in respect of the other accused.* ***But then, non-reporting of sexual assault against a minor child despite knowledge is a serious crime and more often than not, it is an attempt to shield the offenders of the crime of sexual assault.*** *Be that as it may in view of the decision in Shankar Kisanrao Khade case [Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546 : (2013) 3 SCC (Cri) 402] holding non-reporting of such a crime as serious and in view of the position obtained from a conjoint reading of Sections 19(1) and 21 of the Pocso Act, such persons are also liable to be proceeded with, in accordance with law. In this context, it is also relevant to refer to an observation made by this Court in the said case that this Court under parens*

> *patriae jurisdiction has a duty to give directions for compliance of the provisions under the Pocso Act."*
>
> (emphasis supplied)

12. Lastly, a profitable reference can be made to the decision of ***Just Rights for Children Alliance v. S. Harish***[4], where the Hon'ble Apex Court directed the Courts to exercise prudence or constrain itself from displaying any leniency or flexibility while dealing with offences under Section 21 of the POCSO Act, especially against schools or educational institutions who failed to discharge their legal obligation of reporting the instance of abuse or exploitation. The relevant portion reads as follows:

> *"**259.** We endorse the view and the directions issued by this Court in Shankar Kisanrao Khade (supra) and are of the considered view that a meaningful effect to the provisions of the POCSO can only be given if such directions are complied with to the letter and spirit. **We further caution the courts to refrain from showing any form of leniency or leeway in offences under Section 21 of the POCSO, particularly to schools/educational institutions,** special homes, children's homes, shelter homes, hostels, remand homes, jails, etc. **who failed to***

4. 2024 SCC OnLine SC 2611

> ***discharge their obligation of reporting the commission or the apprehension of commission of any offence or instance of child abuse or exploitation under the POCSO. Section(s) 19, 20 and 21 of the POCSO are mandatory in nature, and there can be no dilution of the salutary object and purport of these provisions. Merely because Section 21 prescribes a lesser threshold of punishment, the same in no way derogates or detracts from the gravity or severity of the offence which has been sought to be punished as held in Maroti (supra). It is a settled position of law that the length of punishment is not the only indicator of the gravity of the offence and it is to be judged by a totality of factors, especially keeping in mind the background in which the offence came to be recognized by the legislature in the specific international context*** *i.e., the United Nations Convention on Rights of Children, particularly Article(s) 3(2) and 34 of the said Convention."*
>
> (emphasis supplied)

13. Given the aforementioned context, it is clear that the legislature has imposed a legal obligation on the individuals who either suspect or are aware of an offence under the POCSO Act to report the incident to the Special Juvenile Police Unit or the local police. This duty is not merely a

procedural formality or a minor issue that can be overlooked. The repercussions of failing to report such incidents are serious, regardless of the length of the punishment outlined in Section 21 of the POCSO Act. Furthermore, Courts must exercise caution and restraint when dealing with cases involving school authorities or educational institutions that have failed to comply with the legal requirement to report instances of sexual assault on minors.

14. Now, reverting to the present case, it is undisputed that the applicants are the persons responsible for managing the school's operations where the unfortunate incidents occurred. The primary accusation against the applicants is their failure to report these incidents as mandated by Section 19(1) of the POCSO Act. There is *prima facie* material indicating that the victims' guardians voiced their concerns to the class teacher, Principal and other staff members on the day the incidents occurred. There is material to indicate that the applicants were aware of the incidents before August 16, 2024. Despite having knowledge, these incidents were not reported to the Special Juvenile Police Unit or the local police. At this juncture, the applicants have expressed concerns about the delay in filing the FIR. It appears from the records that on

August 15, 2024, one of the victims was taken to a private hospital by her guardian for a medical examination. Moreover, the delay appears primarily due to the applicants' negligence in not reporting the matter promptly. That apart, there are suspicions regarding the integrity of the digital evidence provided by the school authorities. The footage from the day of the incidents is missing, and the Forensic Science Laboratory (FSL) report is still awaited.

15. The principles to be considered for granting anticipatory bail are settled. The Court, *firstly*, must consider the *prima facie* case against the accused; *secondly*, the nature of the offence; and *thirdly*, the severity of its punishment. While bail can be denied on the requirement of custodial interrogation, its non-requirement cannot by itself be the sole ground to grant pre-arrest bail. These aspects are highlighted in ***Sumitha Pradeep v. Arun Kumar C.K.***[5]

16. The power to grant anticipatory bail is an extraordinary power. While regular bail is generally considered the norm, the same principle does not apply to anticipatory bail. The Court must exercise careful and prudent discretion when

5. 2022 SCC OnLine SC 1529.

deciding whether to grant anticipatory bail, considering each case's specific circumstances. There is no straitjacket formula. While exercising this power, the Court must exercise caution, as granting protection in serious cases could potentially hinder investigation or lead to miscarriage of justice by allowing tampering with evidence. Suffice it to state that these principles are now well-settled and do not require reiteration. For reference, one may rely upon the case of ***Srikant Upadhyay v. State of Bihar***[6], which is now considered authoritative on this aspect.

17. The POCSO Act was enacted to safeguard children from sexual crimes, prioritising the welfare of the child over the interest of the perpetrators. Section 19 of the Act specifically requires the mandatory reporting of such incidents. Failure to comply with this provision would result in screening the offenders from legal punishment. Considering that the victims are minors, the trauma they endure can profoundly affect their adolescent years, leaving them with lasting and irreparable psychological scars. At this critical stage, there is a significant risk that the applicants may exert pressure on witnesses or tamper with evidence.

6. 2024 SCC OnLine SC 282.

18. In light of these circumstances and the precedents set by the Hon'ble Supreme Court, Mr Venegavkar rightly argues that these cases are not appropriate for granting pre-arrest bail. As a result, these applications for anticipatory bail stand rejected.

19. It is clarified that these *prima facie* observations are confined to determining the applicants' entitlement to pre-arrest bail only.

(R.N. Laddha, J.)