

Heard Mr. Dessai, learned Senior Counsel appearing

on behalf of the applicant and Mr. Lotlikar, learned Special Public Prosecutor appearing on behalf of the respondent.

2. By the above Miscellaneous application, filed under Section 439 of Criminal Procedure Code, 1973 (Cr.P.C., for short), the applicant, who has been arrested on 30/11/2013 in Crime No. 27/2013 registered at Crime Branch/CID Police, Dona Paula, for offences punishable under Sections 341, 342, 354-A, 376, 376(2)(f), 376(2)(k) and 376(C) of Indian Penal Code ('IPC', for short), has prayed for bail. By the above Revision Application, filed under Sections 397 and 401 of Cr.P.C., the applicant has challenged the order dated 15/01/2014 passed by the learned Sessions Court, Panaji, thereby rejecting the Bail application No. 613/2013, which was filed by him, before it.

3. On 21/11/2013, a complaint came to be filed by Ms. Sunita Sawant, Police Inspector, CID Crime Branch, Dona Paula, against the applicant, for offence punishable under Section 354-A, 376 and 376(2)(k) of IPC, alleging that on 21/11/2013, on various social sites, news channels of electronic media, news was published on the basis of which the Police Department initiated a preliminary enquiry, since the alleged incident was stated to have taken place in a Hotel in Goa. It was reported that the victim (female) had sent a detailed mail narrating the entire

incident to Ms. Shoma Chaudhury, Managing Editor of Tehelka. The said complaint dated 22/11/2013 of the P.I. states that during the enquiry, a copy of the information was received from the source purported to be written/sent by the alleged victim (female) namely, XYZ in which information, it was stated as under :

“..... As we made our way out of the elevator of block 7 at the Grand Hyatt Mr. Tejpal held my arm and pulled me back into the lift. He said- “lets go wake up bob” (Mr. De Niro) and I asked him why he wanted to do that. I then realised that Mr. Tejpal was simply pressing buttons on the lift's panel to make the elevator stay in circuit preventing it from stopping anywhere and for the doors to open. At this point he began to kiss me - from the first moment of his doing so....

.... Mr Tejpal lifted my dress up went down on his knees and pulled my underwear down. He attempted to perform oral sex on me and as I continued to struggle and hysterically asked him to stop. At that moment he began to try and penetrate me with his fingers. I became scared and protested him (illegible) and asked him to stop the lift. He would not (illegible). The lift stopped on the ground floor and Mr. Tejpal's hands were on me and could not press the button for yet another floor to keep it in circuit. As soon as the doors opened I picked up my underwear and began walking out of the elevator rapidly.

..... By this time he was holding me by the wrist and

had taken me into the lift (which is barely a few steps away from the lobby of block 7 where he had asked me to wait). When the doors closed he started to try and kiss me again. I told "Tarun please no. Just stop....."

..... Within second of my turning around he started to lift my dress. He lifted it all the way up and said "you're unbelievable". The door opened in the second floor, on Mr. De Niro's floor and he said again "the universe is telling us something" to which I said "I'm taking the stairs" and I started to walk out. He pulled me back in (illegible) that I was on the verge of (illegible)- by this point he was (illegible) comfortable physically manhandling me but screaming my sheer (illegible)....."

4. The complaint then proceeds to say that as it prima facie appeared that a cognizable offence was committed by the applicant, Editor-in-chief of Tehelka.com, during the THiNK Fest held at Hotel Grand Hyatt, Bambolim, Goa between 7th November, 2013 to 11th November, 2013, the complaint came to be lodged. The victim is an employee of Tehelka, being a journalist of that organization. Tehelka had organized THiNK Fest at hotel Grand Hyatt at Bambolim, Goa from 07/11/2013 to 11/11/2013. Distinguished world famous celebrities like Robert De Nero and Amitabh Bachchan had attended the Fest. There were also other high profile guests. Incident of alleged sexual assault on the victim took place on 7th and 8th November 2013 in

the elevator of the said hotel.

5. Replies filed by the respondent reveals the following:

Upon the said complaint of the P.I., Crime No. 27/2013 came to be registered initially for the offences under Sections 354-A, 376, 376(2)(k) of I.P.C. During the course of investigation, Sections 341, 342, 376(2)(f) and 376(C) of IPC were added to the Crime. The statement of the female victim journalist was recorded at Mumbai. The copies of the communications by e-mail, 'SMS' messages and voice recordings that had allegedly taken place between the victim, her Managing Editor and the applicant as also the mobile phone of the victim having, the 'SMS' messages and the voice recordings, which were produced by the female victim, were attached under the panchanama. The statement of the said female victim journalist was recorded by the learned Judicial Magistrate, First Class under Section 164(5-A) of Cr.P.C. on 27/11/2013. Panchanama of scene of offence was drawn and the scene was shown by the female victim. The said victim also identified the applicant and herself in the CCTV camera footage. The statements of Managing Editor of Tehelka.com and the staff members of Tehelka.com office at New Delhi have been recorded. Some more e-mail messages exchanged between the victim and the applicant came on record through the said witnesses. The

C.P.U. of the computer system, on which the applicant was working, was seized and sealed from the office premises of Tehelka office at New Delhi. It is alleged that the residential premises of the applicant at New Delhi was visited, but the applicant was not found at the said premises. Notice was sent to the applicant by e-mail and 'SMS' on his mobile phone asking him to report the Investigating Officer at Goa for the purpose of investigation. During the course of investigation, DVRs having recordings of CCTV Camera footage of Guest House Nos. 3 and 7 of Hotel Grand Hyatt, Bambolim, Goa were attached under the panchanama. The applicant filed anticipatory bail application No. 573/2013 which was dismissed by the Sessions court, Panaji by order dated 30/11/2013. Thereafter on 30/11/2013, the applicant was placed under arrest. On 01/12/2013, Police Custody remand for 6 days was granted by the J.M.F.C., Panaji and on 11/02/2014 further Police Custody remand for 4 days was granted. Since 11/12/2014, the applicant has been in the judicial custody. The mobile of the applicant has been attached during the arrest panchanama of the applicant. The e-mail account of the applicant and printouts of the e-mails exchanged by the applicant for the dates 18th , 19th and 20th November, 2013 with Ms. Shoma Chaudhuri, female victim and others were taken and attached under the panchanama. The clothes worn by the applicant on the alleged days of crime have been attached. The

statements of seven witnesses have been recorded under Section 164(5) of Cr.P.C. by the learned Judicial Magistrate, First Class, Panaji. The mobiles attached under panchanama were forwarded to CFSL, Hyderabad and the report has been received. It seems that about 159 witnesses have been examined and cited by the Investigating Officer. The charge sheet has been already filed against the applicant though a few reports from technical experts are still awaited and it appears that the case has been committed to the Court of Session. As already stated above, the applicant is now in judicial custody.

6. On 23/12/2013, the applicant, during the pendency of investigation, had filed Bail Application No. 613/2013 before the learned Sessions Judge, Panaji. By order dated 15/01/2014, the said application for bail came to be rejected. On 06/02/2014, the present application for bail, before this Court came to be filed and on 17/02/2014, charge sheet has been filed against the applicant.

7. It can be understood that the copy of the information received from the source purported to be written/sent by the victim (female) is nothing but the 'testimony' document annexed to the mail dated 18/11/2013 sent by the victim to Ms. Shoma Chaudhuri, with copy forwarded to Shaugat Dasgupta, Ishan

Tankha and Vishnu. In the 'testimony' document, the same facts as mentioned in the complaint are stated and the facts relate to the incidents which had taken place on 07/11/2013 and 08/11/2013.

8. In the 'testimony' annexed to the mail dated 18/11/2013, it is stated by the female victim that after the incident of 07/11/2013 when she was talking to Shaugat Das Gupta, Ishan Tankha and G. Vishnu, the applicant sent to her a text message from his personal mobile phone at 7.15 a.m. which said "the fingertips". She has further stated that "this was the extent he had managed to penetrate me before I pushed him and ran out of the lift."

9. It appears that the applicant had sent a text message insinuating that the victim misconstrued "a drunken banter". The victim girl, in the email dated 18/11/2013, sent to Ms. Shoma Chaudhury, with copies sent to Shougat Dasgupta, Ishan Tankha and Vishnu, to which the said 'testimony', was annexed, sought for a written apology from the applicant and an acknowledgment of the same to be circulated through the organization. In this email, the victim girl has mentioned as follows:- "Banter does not involve forcing on someone trying to disrobe them and penetrate them with your fingers despite them pleading for you to stop."

The applicant, by Gmail dated 19/11/2013 tendered written apology to the victim girl, calling it as an informal one. But the victim by Gmail dated 19/11/2013, sent to Ms. Shoma Chaudhury, with copies sent to Shougat Dasgupta, Ishan Tankha and Vishnu, insisted on personal apology of the applicant on the Tehelka letter head, by including certain admissions as mentioned in this Gmail. The applicant again gave an apology, by means of Gmail dated 19/11/2009 sent to the female victim with copy to Ms. Shoma Chaudhury, which is called as formal. In this apology, the applicant accepted that he violated the long-standing relationship of trust and respect between them and stated that he apologizes unconditionally for the shameful lapse of judgment that led him to attempt a sexual liaison with the victim on two occasions on 7 November and 8 November, despite the clear reluctance that the victim did not want such attention from him. He stated that he knows that the victim feels that he used his position as Editor, Tehelka to force his attention on her and that he acknowledges that he did at one point say to her contention that he is her boss. He stated about his unconscionable lapse.

10. It was contended by Mr. Dessai, learned Senior Counsel appearing on behalf of the applicant that in the said complaint of P.I. Sunita Sawant; in the mail dated 16/11/2013

sent to Eshan Tankha and in the email dated 18/11/2013 sent to Shoma Chaudhury as well as in the 'testimony' document, the incident, which is narrated, insofar as alleged rape is concerned, would only amount to an attempt to commit the offence, since nothing actually is stated to have been done, except an attempt. He pointed out that subsequently, in the statement of the victim (female), recorded on 26/11/2013, by the police under Section 161 of Cr.P.C. and on 27/11/2013, by the learned Judicial Magistrate, Panaji under Section 164(5) of Cr.P.C., there is complete volte-face. In these detailed statements under Sections 161 and 164 of Cr.P.C., inter alia, the incident stated is like this:- "Mr. Tejpal put his tongue in my mouth. I was pressing up me against side of the lift. Mr. Tejpal lifted up my dress. Having lifted up my dress, he went on knee and pulled my underwear down to my ankles. He put up his face between my thighs and his tongue in my vagina. I was begging him to stop and pushed his shoulders and started looking for a way to open the lift. Seeing this he stood up and put his fingers in my vagina. At this point, I became really terrified and pushed him hard and asked him to open the lift. He put his hands on my shoulders to stop me from struggling. Just as the lift opened on the ground floor of block 7, I pulled my panties and walked hurriedly out of the lift blinking back tears." Learned Senior Counsel appearing on behalf of the the applicant produced before this Court a chart of

comparative analysis of the mail dated 16/11/2013 sent by the female victim to her friend Ishan Tankha vis-a-vis the 'testimony' document annexed to the mail dated 18/11/2013 sent by female victim to Ms. Shoma Chaudhuri. He pointed out discrepancies and omissions between the two. The learned Counsel appearing on behalf of the applicant took me through the statements of the witnesses namely Ishan Tankha, Shaugat Dasgupta and G. Vishnu, recorded by the Investigating Officer which reveal that they were informed only about an attempt to take down the panties of the victim and only putting tongue into the mouth. Learned Counsel also produced before this Court a chart of statements' analysis of the said witnesses Ishan, Shaugat and Vishnu and showed as to how their statements are stereo type with exactly the same words. He questioned as to how three different people could narrate the incident in the same words, being identical line to line. Even otherwise, he pointed out that in all the three versions of the said witnesses, there is no story of actual rape. The learned Counsel for the applicant, therefore, was of the view and wanted this Court to believe that the prosecution case is hit by serious infirmities interse and shocking improvements, embellishments and exaggerations due to which the statements made by the victim do not at all inspire confidence. From the applicant's side, the CCTV footage was shown to me on a laptop, in the open Court. Learned Senior

counsel, appearing on behalf of the applicant, submitted that the CCTV footage also does not corroborate the version given by the female victim. Learned Counsel relied upon some cases including the case of ***“Sitaram Vs. The State of Maharashtra”*** (1974 Cri. L. J. 82), wherein the law regarding credibility of the testimony of the prosecutrix in cases of sexual offences, the question of acting upon the same as a basis for a finding of guilt, and the necessity of corroboration to the same, have been stated by learned Division Bench of Nagpur Bench of this Court. That was an appeal against conviction and not the application for bail.

11. In this regard, in the mail dated 16/11/2013, sent by the female victim to Ishan Tankha, as well as in the statement of the female victim, dated 18/11/2013, which is the 'testimony' document, inter alia, with reference to the applicant, the following has been stated:- “at that moment, he began to try and penetrate me with his fingers”. As is rightly contended by learned Special Public Prosecutor, prima facie, it cannot be said that the above words amount to merely an attempt. It can be said that they amount to saying that there was penetration with fingers. The above has to be read with following statement of the victim in the said 'testimony':- “while the four of us were talking in the balcony, Mr. Tejpal sent me a text message from

his personal phone number at 1.17 a.m., which said "The fingertips". This was the extent he had managed to penetrate me before I pushed him and ran out of the lift." As has been rightly submitted by learned Special Public Prosecutor, appearing on behalf of the respondent, the statements of the victim recorded by the police under Section 161 of Cr.P.C. and by the J.M.F.C., Panaji, under Section 164 of Cr.P.C. are graphic statements and have given all the details of what has been stated, in short, in the 'testimony' document. He submitted, and rightly so, that the contention of the learned Counsel appearing for the applicant that there is improvement, exaggeration and embellishment, cannot be considered at this stage. He submitted that hair splitting distinction cannot be made now. He further submitted that meticulous examination of evidence need not be done, while deciding the application for bail. Learned Special Public Prosecutor relied upon the judgment of the Apex Court in a recent case of "**Kanwar Singh Meena Vs. State of Rajasthan and another**", [AIR 2013 SC 296]. In paragraph 10 of the judgment (supra), the Hon'ble Apex Court has observed thus :

"That is to say, the gravity of the crime, the character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the witnesses

and obstructing the course of justice and such other grounds are required to be taken into consideration. Each criminal case presents its own peculiar factual scenario and, therefore, certain grounds peculiar to a particular case may have to be taken into account by the court. The court has to only opine as to whether there is prima facie case against the accused. The court must not undertake meticulous examination of the evidence collected by the police and comment on the same. Such assessment of evidence and premature comments are likely to deprive the accused of a fair trial.”

12. Considering the said narration of the information as given in the complaint of the Police Inspector and the statements made in the 'testimony' document, I am of the view that, at this stage, it is premature to say that there are infirmities of shocking nature which would drive this Court to believe that the version of rape given by the female victim is false.

13. A perusal of the apologies tendered by the applicant specially formal one dated 19/11/2013, prima facie, clearly reveals that the applicant has confessed of having committed the said offence. It was contended by learned Senior Counsel appearing on behalf of the applicant that the victim wanted closure of the entire episode with unconditional apology to be

submitted by the applicant. He submitted that the incident of rape is totally personal to the individual concerned and when individual desires to close the matter, her privacy ought not to be disturbed. He submitted that in order to protect the reputation of the institution i.e. Tehelka.com, the applicant, though nothing had actually happened in the manner as alleged by the victim (female), thought of finishing the matter by giving the apology in the manner as demanded and dictated by the victim girl. According to the learned counsel, the said apologies cannot amount to voluntary confessions and in any case they speak of lapse of judgment on the part of the applicant for reasons stated therein. However, a reading of the said apologies, prima facie, reveal that they are nothing but voluntary apologies coupled with confession, tendered by the applicant, as they refer to the email of the victim. The contention of the learned Counsel for the applicant that the said apologies do not amount to confession, is not acceptable at this prima facie stage. As submitted by the learned Special Public Prosecutor appearing on behalf of the respondent, the email, which was sent to Shoma Chaudhuri and others, was also forwarded to the applicant and he had not disputed the contents of the same. As has been rightly submitted by the learned Special Public Prosecutor, the said email read with two confessions, make out a very strong prima facie case against the applicant. The defence that the

victim committed a sting operation and emotionally blackmailed the applicant to make alleged confessions, cannot be accepted at this stage. As rightly submitted by the learned Special Public Prosecutor, though some terms were suggested by the victim girl, to be included in the formal apology, however, the words, which are mentioned in the said apology, were not suggested, but have been written by the applicant himself. The said apologies contain admission of the fact that there was no consent on the part of the applicant and that the applicant was the boss and there was shameful lapse of judgment and unconscionable lapse on his part.

14. Learned Senior Counsel for the applicant, from the CCTV footage tried to show as to how certain statements of the victim (female) like:- “Mr. Tejpal held my arm and pulled me back into the lift”, “I picked up my underwear and began walking out of the elevator rapidly”, “ He was still walking behind me”, “I was walking faster”, etc., are false, since they are not seen. He showed that before the event of going to the lift, the victim and the applicant had gone to the lawn, which fact has been not stated by the victim in any of her statements. This, according to the learned counsel, is a deliberate suppression. On the other hand, the learned Special Public Prosecutor submitted that the CCTV footage did not cover anything that happened inside the

lift. He further submitted that the facial expressions are not seen but the body language of both the applicant and the female victim, before the incident and after the incident can be clearly understood and the same speaks for the alleged incident. He showed coloured photographs (Printouts of CCTV footage) wherein the applicant is allegedly seen wiping his face (mouth) and the victim is seen organizing her dress. Therefore, according to the learned Special Public Prosecutor, the CCTV footage does not falsify the version as given by the victim (female). No doubt, the learned Senior Counsel for the applicant, then pointed out that at many places the applicant is seen having cloth on his face and the victim adjusting her dress. Be that as it may, I am not inclined to go meticulously into the appreciation of evidence, at this stage. Suffice it to say that the CCTV footage, prima facie, does not help the applicant to prove his innocence, since it did not cover the incident inside the lift, and insofar as the coverages of what happened outside, are concerned, they give rise to different views and truth will come when there is cross-examination of the victim on her version vis-a-vis the CCTV footage.

15. Considering the amended provision of Section 375 of IPC, which constitutes the insertion of any object, to any extent, into the vagina or application of mouth to the vagina, a rape, and

considering the other acts allegedly done by the applicant and fact that the applicant was the boss of the victim who said to her “well this is the easiest way for you to keep your job”, and since it is not stated by the applicant as to why the victim should tell lies, in my view, there is prima facie evidence against the applicant, for the offences with which he is sought to be prosecuted, insofar as this bail application is concerned.

16. It was contended by the learned Senior Counsel appearing on behalf of the applicant that the investigation is now totally complete and that there are about 159 witnesses cited by the prosecution and it can be understood that there would be a lot of time consumed for disposal of the case. He questioned as to who will compensate the applicant for his incarceration when ultimately he is found to be not guilty. He, therefore, submitted that to continue to keep the applicant in custody any further would be punitive and this would be only to teach him a lesson for his 30 or more years of professional activity. The learned Counsel appearing on behalf of the applicant submitted that in the present case, no physical injury has been caused to the victim (female) and further there is no penetration of penis. He submitted that the minimum punishment provided for the offence is 10 years imprisonment and, therefore, the offence cannot be termed as so serious as not to grant bail at this stage

to the applicant, when investigation is complete and charge sheet has been filed, even if this Court holds that there exists prima facie case. He submitted that the criteria now to be seen is only whether there is possibility of the applicant tampering with evidence and whether he is likely to abscond.

17. (a) Learned Counsel appearing on behalf of the applicant relied upon the Judgment of the Hon'ble Supreme court in the case of ***"Bhagirathsinh Judeja Vs. State*** (A.I.R. 1984 SC 372), wherein it is observed as under:

"5..... But even where a prima facie case is established, the approach of the court in the matter of bail is not that the accused should be detained by way of punishment but whether the presence of the accused is likely to abuse the discretion granted in his favour by tampering with evidence.

8. ... And the trend today is towards granting bail because it is now well-settled by a catena of decisions of this court that the power to grant bail is not to be exercised as punishment before trial is being imposed. The only material considerations in such a situation are whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour

by tampering with evidence. “

(b) Learned Senior Counsel, appearing on behalf of the applicant, has also relied upon the judgment of the Hon'ble Supreme Court in the case of **“Sanjay Chandra Vs. Central Bureau of Investigation”**, [(2012)1 SCC 40]. In the aforesaid case, it has been held by the Apex Court as under :

“21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, “necessity” is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or

that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson."

(c) In the case of "**Kashmira Singh Vs. State of Punjab**", [(1977) 4 SCC 291], relied upon by the learned Senior Counsel appearing on behalf of the applicant, the accused was charged under Sections 323 and 302 of IPC. It has been held that release of the appellant sentenced to life imprisonment on bail, pending disposal of his appeal by special leave, is justified where the Court is not in a position to dispose of the appeal expeditiously. It is the observation of the Apex Court that it would be a travesty of justice to keep a person in jail for a period of 5 or 6 years for an offence which is ultimately found not to have been committed by him.

18. According to the learned Counsel, appearing on behalf of the applicant, there is motive for the female victim to falsely implicate the applicant in this case and this would be disclosed during the course of trial. He urged that the character of the female victim is not beyond suspicion. In this regard, the learned Senior Counsel appearing on behalf of the applicant took me through the first apology of the applicant wherein it is alleged that he and the victim were playfully and flirtatiously talking about desire, sex and the victim was telling him the Bob Geldof story in graphic detail and about Aman and near impossibility of fidelity and of aftermath of meeting the applicant on one stormy evening in his office when he was sitting watching thunderclouds. He submitted that there is evidence to show that the victim was in the room of the guest Mr. Robert De Nero for about one and half hours in the night time. He questioned as to what did she do there for so long. The learned Counsel tried to produce, across the bar, for which there was strong opposition from the Special Public Prosecutor, some alleged messages/chat exchanged between the alleged victim and her friends Mallika and the daughter of the applicant through the instant messaging service "WhatsApp" wherein there are messages tending to disclose relationship between the victim girl and the guest namely 'Bob', who appears to be Mr. Robert De Nero. He submitted that though this evidence of 'Whats APP' is not relied

upon by the prosecution, the applicant can rely upon the same since the same is unimpeachable evidence of sterling quality and it is such material which inspires confidence. Learned Counsel relied upon the Judgment of the Apex Court in the case of ***“Prashant Bharti Vs. State (NCT of Delhi)”***, [(2013 9 SCC 293)], wherein it has been held that in order to invoke its inherent jurisdiction under section 482 Cr.P.C., the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/her defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution. The material should be sufficient to rule out, reject and discard the accusations levelled by the prosecution. Learned Counsel for the applicant, submitted that the evidence on record also reveals that on the relevant day and time, the applicant as well as the victim girl were drunk. He further submitted that the victim girl is from a modern society wherein such loose activities do not matter much. According to him, there is possibility of personal vendetta and that the complaint is not bonafide and has been filed with oblique motive. He pointed out from the statement of the

daughter of the applicant that the victim and she used to discuss freely on any subject from sex to work to cats. Learned Counsel submitted that this is a different kind of society where false implication is possible. He submitted that considering the past character of the victim and the modern society in which the parties have been brought up, and all other aspects as above, the applicant should be released on bail. He urged that the release is warranted so as to enable the applicant to effectually defend the case. He submitted that this is a question of fundamental right of liberty of the applicant which is sought to be violated. The learned Counsel appearing on behalf of the applicant relied upon the case of ***"Sushil Kumar Sharma Vs. Union of India and others"***, [AIR 2005 SC 3100(1)], wherein it is observed that the object of the provision of Section 498-A of I.P.C. is prevention of dowry menace, but many instances have come to light where the complaints are not bonafide and have been filed with oblique motive. In such cases, acquittal of the accused does not in all cases wipe out the ignominy suffered during and prior to trial. Some times adverse media coverages adds to the misery. It is observed that the question, therefore, is what remedial measures can be taken to prevent abuse of the well intentioned provision. Merely because the provision is constitutional and intra vires, that does not give a licence to unscrupulous persons to wreck personal vendetta or unleash

harassment. It may, therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with and till then, the Courts have to take care of the situation within the existing frame work. Learned Counsel for the applicant further relied upon the case of **“Raju and others Vs. State of M.P.”**, [(2008)15 SCC 133], wherein the Apex Court has observed that though a testimony of prosecutrix is believable on a par with that of injured witness, however, her testimony cannot always be presumed to be gospel truth and possibility of exaggeration or embellishment or false implication, where several persons are accused, cannot be ruled out. It is observed that plausibility of immoral past of prosecutrix, based on evidence, can be considered. Learned Counsel appearing on behalf of the applicant submitted that even otherwise, considering the serious discrepancies and inconsistencies in the statements of the victim, there appears to be deliberate improvements on material points which render her statements wholly unreliable. In this regard, he relied upon **“Narender Kumar Vs. State (NCT of Delhi)”**, [(2012) 7 SCC 171]. In the case supra, it has been held that conviction can be based on sole testimony of the prosecution without any corroboration, only if it inspires confidence. It is held that the Court must appreciate the evidence in the totality with utmost sensitivity and after so considered, in the facts and

circumstances of a case, if the Court finds the prosecutrix's version to be improbable and devoid of true genesis of crime, the same can be rejected. It is held that if the statement of the prosecutrix suffers from serious infirmities, inconsistencies and deliberate improvements on material points, no reliance can be placed thereon.

19. However, what the Apex Court has also held in the case of **“Narender Kumar”** (supra) is that the character of the prosecutrix is not relevant unless it is itself in issue. It has been held that merely on the ground of prosecutrix being a woman of “easy virtue” or “of loose moral character”, her testimony cannot be discarded, but in such case, her testimony should be appreciated cautiously. It has been held that such woman also has right to live with dignity and cannot be subjected to rape only for that reason. It has been held that right to refuse to submit to sexual intercourse has full play in the case of every woman.

20. Learned Special Public Prosecutor contended that the 'WhatsApp' conversation between the victim and her friend including the daughter of the applicant is not relied upon by the prosecution and production of the same in a bail application under section 439 of Cr.P.C. is not permissible. He questioned as

to what had prevented the applicant from producing the same before the Investigating Officer at the relevant time of investigation, if that really existed. He invited my attention to the statement of the daughter of the applicant wherein she has not even whispered about any such 'WhatsApp' conversation. He therefore submitted that such suspicious material, not relied upon by the prosecution, and regarding which there is no investigation, cannot be looked into. In the circumstance as pointed out by the learned Special Public prosecutor, I am not inclined to accept the said WhatsApp conversation as gospel truth. In any case, that does not render the case of the victim, insofar as the applicant is concerned, unreliable. As has been rightly pointed out by the learned Special Public Prosecutor, Section 53-A, which has been now inserted in the Evidence Act, lays down that in a prosecution for an offence under Section 354, Section 354-A, Section 354-B, Section 354-C, Section 354-D, Section 376, Section 376-A, Section 376-B, Section 376-C, Section 376-D or Section 376-E of the Indian Penal Code or for attempt to commit such offences, where the question of consent is in issue, evidence of character of the victim or of such person's previous sexual experience with any person, shall not be relevant on the issue of such consent or the quality of consent. Section 114-A of the Evidence Act provides that in a prosecution for rape, under clause A, clause B, clause C, clause D, clause E,

clause F, clause G, clause H, clause I, clause J, clause K, clause L, clause M, clause N of subsection (2) of Section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. In view of the above provisions, which are inserted in the Evidence Act, prima facie, it is clear that previous character of the victim or her previous sexual experience is not at all relevant. Besides the above, since the victim has specifically stated that she did not consent, it has to be presumed that she did not consent. In such circumstances, the case cannot be diluted on the ground of alleged character of the victim. Learned Special Public Prosecutor contended that the interest of society is to be primarily kept in mind while liberty of a person accused of an offence of heinous kind is in question. He urged that liberty of a person cannot be absolute in every case and if the interest of society requires, refusal of bail would be justified. He submitted that in given circumstances, the said right will have to give way. Learned Special Public Prosecutor relied upon ***“Masroor Vs. State of U.P. and another”***, [(2009)14 SCC 286]. In paragraph 15 of the judgment in the case supra, the Apex Court has observed thus :

“15. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the Courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned. In this context, the following observations of this Court in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan are quite apposite: (SCC p. 691, para 6)

“6.Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution.”

21. Learned Special Public Prosecutor relied upon the case of ***“Rajesh Ranjan Yadav alias Pappu Yadav Vs. CBI, through its Director”***, [(2007) 1 SCC 70] and submitted that the contention of the learned Counsel for the applicant that an efficacious conduct of the defence would not be possible without

the accused being on bail, is a consideration which is not permissible. In the case *supra*, the Hon'ble Supreme Court has held that if the argument that since the appellant is not on bail, he cannot conduct his defence effectively is to be accepted, then logically in every case bail has to be granted. It has been held that this contention cannot be accepted. Being in jail for long time also cannot be a ground for release on bail. In paragraph 16 of the judgment in the case *supra*, the Apex Court has observed thus :

“16. We are of the opinion that while it is true that Article 21 is of great importance because it enshrines the fundamental right to individual liberty, but at the same time a balance has to be struck between the right to individual liberty and the interest of society. No right can be absolute, and reasonable restrictions can be placed on them. While it is true that one of the considerations in deciding whether to grant bail to an accused or not is whether he has been in jail for a long time, the Court has also to take into consideration other facts and circumstances, such as the interest of the society.”

22. Learned Special Public Prosecutor also relied upon the case of **“N. Kannapan Vs. State (Union Territory) Andaman and Nicobar Islands”**, [(2013) 2 SCC 177] wherein the Hon'ble

Supreme Court has observed thus :

“20. Having considered the assertions made at the hands of the rival parties, we are satisfied, that there is prima facie material, to establish the involvement of the petitioners in activities violating the provisions of the Explosive Substances Act, 1908. The consequences of such violation are extremely serious. The minimum punishment on conviction, is 10 years rigorous imprisonment. For more serious activities, the punishment can extend to imprisonment for life, and with death penalty. In the pleadings, and during the course of hearing, we were informed that some of the accused are still absconding. Obviously all the accused are financially well placed. Releasing them from jail at the present juncture, when the prosecution has not even commenced to examine the main witnesses, could prove detrimental to the eventual outcome of the trial. At least till the culmination of the evidence of the material witnesses, it is not proper to order the release of the petitioners on bail. In the facts and circumstances noticed hereinabove, we hereby decline the prayer for bail made by the petitioners. The impugned orders passed by the High Court are accordingly affirmed.”

23. It was contended by the learned Counsel for the applicant that the case of **“N. Kannapan”**(supra) concerns

explosives and in the light of series of bomb blasts taken place in the Country, the offence was serious in nature which cannot at all be compared with the case of the applicant. I cannot agree with the above contention. In the case supra, the petitioners were stone quarry operators and were bringing in excess amount of explosives in clandestine manner and were unauthorisedly using the same in violation of Explosive Substances Act. They were not concerned with any bomb blasts for harming public. In the case supra, the factors to be considered for grant or rejection of bail, in a case where minimum punishment on conviction was 10 years rigorous imprisonment, which for more serious activities, could extend to imprisonment for life, were considered.

24. With regard to allegation of likelihood of delay being caused in the disposal of the case, the learned Special Public Prosecutor assured the Court that absolutely no delay would be caused by the prosecution in disposal of the present case, provided the applicant cooperates. He submitted that out of the said about 159 witnesses, many are only technical witnesses and the examination of said witnesses in the Court can be dispensed with if the accused admits the said documents. Be that as it may, as submitted by the learned Special Public Prosecutor, in view of the amendment to Section 309 of the Cr.P.C., when the

enquiry or trial relates to an offence under Section 376, Section 376A, Section 376B, Section 376C or Section 376D of the Indian Penal Code, the enquiry or trial shall, as far as possible, be completed within a period of two months from the date of filing of the charge sheet. In view of this recent amendment, merely on the ground that the trial is going to consume long time, the applicant cannot claim to be released on bail, since charge sheet has been already filed and the trial has to be completed within a period of two months from the date of filing of the charge sheet.

25. One of the offences for which the applicant has been charge sheeted is under Section 376(2)(k) of IPC which provides that whoever, being in a position of control or dominance over a woman, commits a rape on such woman, shall be punished with Rigorous Imprisonment for a term which shall not be less than 10 years, but which may extend to imprisonment for life, which shall mean imprisonment for remainder of that person's natural life and shall also be liable to fine. Thus, minimum punishment, in case of conviction of the applicant, for the above offence, if any, is bound to be not less than 10 years. It is further clear that this punishment may extend to imprisonment till death. There is no dispute that the accused being Editor-in-Chief of Tehelka.com and the victim girl being an employee of the said

establishment, was in a position of control or dominance over the victim girl. In the present case, there is evidence that the applicant had told the victim "Well, this is the easiest way for you to keep your job". Even written apologies tendered by the applicant reveal authoritative position of the applicant as Editor.

26. In the case of "***State of U.P. through CBI Vs. Amarmani Tripathi***," [(2005) 8 SCC 21], the matters to be considered in an application for bail have been stated. The Apex Court has observed thus :

"It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of accused absconding or fleeing if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail (see Prahlad Singh Bhati vs. NCT, Delhi 2001 (4) SCC 280 and Gurcharan Singh vs. State (Delhi Administration) AIR 1978 SC 179). While a vague allegation that accused may tamper with the evidence or witnesses may not be a ground to refuse

bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in [Kalyan Chandra Sarkar vs. Rajesh Ranjan](#), 2004 (7) SCC 528:

"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

- a. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.*
- b. Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.*
- c. Prima facie satisfaction of the court in support*

of the charge. (see Ram Govind Upadhyay vs. Sudarshan Singh, 2002 (3) SCC 598 and Puran vs. Ram Bilas 2001 (6) SCC 338."

27. At this stage, nobody knows whether the accused, if convicted, would become liable only to minimum imprisonment of 10 years or to the maximum imprisonment till death. It is contended by the learned Special Public Prosecutor that for the purposes of knowing the gravity and seriousness of the offence, what is relevant is the maximum punishment that is provided and in the present case, the same is imprisonment till death. On the contrary, learned senior Counsel appearing on behalf of the applicant submitted that from the case of **"Amarmani Tripathi"**(supra), it is clear that gravity of the offence and severity of punishment are two different things and since in the present case there is neither death or physical injury of any kind nor penetration by penis, the offence cannot be taken as grave. Even otherwise, according to him, label of sentence cannot play any relevancy. The learned Senior Counsel appearing on behalf of the applicant relied upon the order dated 30/07/2009 passed by the learned Single Judge of this Court in Criminal Application (Bail) No. 208 of 2009 (**Mr. Lawrence Dias Vs. State and another**), wherein it has been held that the offence, which is made punishable with death or imprisonment for life, cannot be

interpreted as synonymous with an offence, which is made punishable for imprisonment which may extend for life. In paragraph 13 of the said order, the learned Single Judge of this Court has observed thus :

“13. The case at hand, is covered under section 376(1) and is made punishable with imprisonment which shall not be less than seven years but which may extend to ten years or may be for life. This is certainly not a case which is covered by Section 437(1)(i) of the Code i.e. the case which is punishable with death or imprisonment for life. That being the position, after completion of investigations and filing of charge sheet the applicant could not ordinarily be denied bail on account of the restriction placed by Section 437(1)(i) of the Code.”

28. However, it is pertinent to note that in the same case of **“Mr. Lawrence Dias”** (supra), since it was found that the apprehension expressed by prosecution that the accused, if released on bail, would tamper with evidence, appeared to be reasonable, the application for bail was dismissed. In that case, the main and gravest offence committed by the applicant was under Section 376(1) of IPC, punishable for a term which shall not be less than 7 years, but which may be for life or for a term, which may extend to 10 years and also to fine. In the present case before me, the punishment is minimum 10 years

imprisonment which can extend to imprisonment till death. The punishment should be in proportion with the gravity of the offence. Amended section 375 of IPC does not make any distinction in the gravity of offence if no physical injury is caused or if penis is not inserted, etc. Therefore, the offence here is of very serious nature.

29. It cannot be expected from the prosecution to prove by any cogent evidence that there is possibility of the accused running from justice. The applicant is an influential person, who anyhow would like to protect his reputation and name. He is financially well placed person. He has numerous contacts, since he was Editor-in-chief of Tehelka.Com.. Therefore, as has been rightly contended by the learned Special Public Prosecutor, the severity of punishment itself is the criteria for deciding on the likelihood of the accused fleeing from justice. Since the punishment provided for the offence is minimum 10 years of imprisonment and maximum imprisonment till death, prima facie, there is likelihood of the applicant fleeing from justice.

30. There is a strong allegation made by the respondent that the applicant is likely to tamper with evidence/witnesses and I find that there is substance in it. The case would mainly rest on the ocular testimony of the female victim, who is working

as journalist for Tehelka.Com. It should be kept in mind that most of the other witnesses in the present case are the present or past employees of Tehelka.com of which the present applicant is the Editor-in-chief. No doubt, a statement has been made by the learned Counsel for the applicant that the applicant has resigned from the said establishment and even some of the witnesses have resigned. However, that does not take away the chance/possibility of the applicant influencing the minds of the said witnesses, since the applicant was their boss at some time. The victim, in her statement under Section 161 of Cr.P.C., has categorically stated that everyone she spoke to was most worried for her safety. She has stated that she knows as to what happens when one speaks out against a non-consensual act performed by a powerful man. She has stated that she knew that Mr. Tejpal, with his wealth, lawyers and political connections, could wipe her out any time he desired. She has stated that by the 15th November, she had made her decision and Mr. Tejpal could do anything, even take her life, but, she would not be able to face herself if she did not speak out. That shows how much terrified is the victim girl. It should be kept in mind that there is evidence on record to show that the mother of the victim was approached by the daughter of the applicant and there was a clear attempt to influence the victim. The daughter wanted to sit with the victim across the table and prima facie, it can also be said that there

was an offer to bribe the victim. At this stage, it can be said that there was an attempt to influence the victim. This visit of the mother of the victim was on 22/11/2013 at 8.30 p.m. which is after the FIR was registered. The mother of the victim, in her 161 Cr.P.C. statement to the police, has stated all these facts and she has lodged a complaint about the visit of the daughter of the applicant at her flat, with Pandav Nagar Police Station. She has stated that the victim and she were worried that Mr. Tejpal might soon start looking for other ways to intimidate them since he has access to their addresses in Mumbai and Delhi. The learned Special Public Prosecutor has contended that in a very serious offence of the type as is in the present case, which shakes the very fabric of the society, trying to contact/influence the victim(main witness) and almost offering bribe, is nothing but interference with the justice. He, therefore, submitted that mere possibility of the applicant doing such a thing is sufficient for refusal of bail. The learned Special Public Prosecutor submitted that though the said attempt/influence was made by the daughter of the applicant, however, the fact remains that the applicant has not distanced himself from the daughter and further there is prima facie evidence to show that the applicant himself has been sending messages to the friends of the father of the victim. Above all, there is prima facie evidence of threat given by the applicant to the Investigating Officer, herself. The

Investigating Officer has lodged complaint and a non-cognizable case has been registered. She has even filed an affidavit in this regard and there is entry in the case diary and the Investigating Officer has reported the matter to the superior officer. Then, the applicant appears to have complained against the Investigating Officer for having disclosed the name of the victim. In this regard, the learned Special Public Prosecutor has relied upon the judgment of the learned Single Judge of this Court in the case of “**John Fernandes Vs. State of Goa and another,**” [CD] 2010 BHC 2392], wherein it is observed that the Apex Court in the case of “**Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and another**” [AIR 1987 SC 1613] held that one of the solitary principles in granting bail is that the Court should be satisfied that the accused, being enlarged on bail, will not be in a position to tamper with the evidence. The learned Single Judge has held that when the allegations of tampering of evidence are made, it is the duty of the Court to satisfy itself whether those allegations are without basis (they can seldom be proved by a concrete evidence) and if the allegations are not found to be concocted, it would not be a proper exercise of jurisdiction in enlarging the accused on bail. As has been rightly observed by the learned Sessions Court, the possibility of the applicant, the Editor-in-chief of Tehelka.Com tampering with material witnesses who are/were employees of Tehelka, considering the relationship and

the past conduct of the applicant, cannot be ruled out.

31. Learned Special Public Prosecutor further submitted that in the present case, the applicant has violated sub-rule (19) of Rule 117 of the Goa Prison Rules and Section 46 of the Prisons Act by having with him in his possession a mobile phone, while in judicial custody. Learned Special Public Prosecutor pointed out that the cell phone has been seized from him and the investigation regarding the use of cell phone is still going on. He, therefore, submitted that the accused has absolutely no respect for rule of law. He submitted that this is nothing but indiscipline exhibited by the applicant and this shows the attitude of the applicant to violate the conditions, if any, put on the applicant. There is evidence on record, in this regard, of applicant talking on mobile to some body from Gurgaon and New Delhi. Mobile has been attached from the possession of the applicant and on 27/02/2014, an offence vide Crime No. 09/2014 under sections 120, 120B, 130, 188 of IPC and Section 46 and Rule 117(19) of Goa Prison Rules 2006 has been registered against the applicant. Hence, it is difficult to believe that the applicant would obey the conditions, if he is released on bail by putting any condition on him.

32. The learned Senior Counsel appearing on behalf of

the applicant has relied upon the orders in various cases wherein the accused charged with offence of rape has been released on bail after the charge sheet has been filed. The said orders/judgments and the cases are as follows :

- (i) Order dated 17/12/2004 in Criminal Miscellaneous Application No.240/2004 in the case of ***“Rohit @ Madhu Gorkha Vs. State”***.
- (ii) Judgment dated 10/09/2008 in Criminal Application No. 2718/2008 in the case of ***“Yasin Chandso Kamate Vs. State of Maharashtra”***.
- (iii) Order dated 21/07/2009 in Criminal Application No.2655/2009 in the case of ***“Viky Karamsingh Bahadur Vs. State of Maharashtra”***.
- (iv) Order dated 01/10/2009 in Criminal Application No.4170/2009 in the case of ***“Shiney Suraj Aahuja Vs. State of Maharashtra”***.
- (v) Order dated 11/01/2010 in Criminal Application No.5368/2009 in the case of ***“Santosh Ramchandra Nikam Vs. State of Maharashtra”***.
- (vi) Order dated 29/06/2010 in Criminal Application No. 2122/2010 in the case of ***“Mohan Dattatray Jadhav Vs. State of Maharashtra”***.

(vii) Order dated 26/02/2013 in Criminal Application

(Bail) No. 33/2013 in the case of “**Mr. Pramod**

Velip Vs. State and another” and

(viii) Order dated 22/05/2013 in Bail Application No.

311/2013 in the case of “**Rohit Chavan Vs.**

State, NCT of Delhi”.

33. In my view, the applicant cannot get any assistance from the orders passed in the cases supra, since all the said cases were prior to recent amendments made to Sections 375 and 376 of IPC and Section 309 of Cr.P.C. .

34. It was stated by the learned Senior counsel for the applicant that the mother of the applicant has brain cancer and is presently seriously ill due to which the applicant desires to be with her for ensuring treatment and support. There is no dispute that there are other family members to look after the mother. Looking to the seriousness of the offence, the likelihood of the applicant fleeing from justice and tampering with the witnesses, I am not inclined to consider the request of the applicant, for bail, on this ground.

35. Considering all the above aspects, I have no hesitation to agree with the submission of learned Special Public

Prosecutor, that at this stage, when the main witnesses are not yet examined, the case of the applicant for grant of bail fails on all parameters of bail. Charge sheet has been already filed. Since in terms of Section 309 of Cr.P.C., the trial, as far as possible, has to be completed within a period of two months from the date of filing of the charge sheet, the applicant could always renew his prayer for bail after the victim and other main witnesses are examined or after the completion of said two months, as the case may be. For the present, in my considered view, the applicant should not be admitted to bail. The impugned order dated 15/01/2014 passed by the learned Sessions Judge in Bail Application No. 613/2013, cannot be termed as erroneous or in utter discard to the bail jurisprudence. It is made clear that the learned Sessions Court shall not be influenced by the observations made by this Court on the facts of the prosecution case.

36. In the result, the Revision Application as well as the Bail Application are rejected.

U. V. BAKRE, J.

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