

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

ANT. BAIL APPLICATION NO.1114 OF 2020

Pramod Anand Dhumal ... Applicant
Vs
The State of Maharashtra ... Respondents
...

Mr. Aniket Nikam i/by Mr. Vivek Arote for the Applicant.

Mrs. Veera Shinde, APP for the Respondent-State.

API Ranjitsing Pardesi attached to Virar Police Station present.

CORAM : SANDEEP K. SHINDE J.
DATE : 7th JANUARY, 2021.

JUDGMENT :

Apprehending the arrest in connection with Crime No.580 of 2020 dated 11th June, 2020 for the offence punishable under Section 354-D of the Indian Penal Code, 1860 (“**IPC**” for short) and Section 67A of the Information Technology Act, 2000 (“**IT Act**” for short), applicant is seeking pre-arrest bail.

2 Applicant is editor of local weekly Marathi newspaper and social activist. Complainant, a house-wife, a 37 year old lady, had received messages in the form of offending images, revealing overt sexual desire on her Face-Book account, from the cell phone of the applicant. On 13th November, 2018, she had indicated her disinterest. Even thereafter, applicant had sent message like “I love you” to the complainant and link (Short for ‘Hyperlink’) on her face-book. She tapped the link, whole document was containing lascivious material. Soon thereafter, she lodged the complaint whereupon the subject crime has been registered against the applicant under Section 354-D of the IPC and Section 67-A of the IT Act.

3 Applicant was denied pre-arrest protection by the learned Sessions Judge.

Section 67-A of the IT Act reads as under:

“67-A. Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form.- *Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.”*

Whereas Section 67 of the IT Act reads as under:

“67. Punishment for publishing or transmitting obscene material in electronic form.-- *Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.”*

5 So far as Section 67 is concerned, before offence thereunder can be said to be complete, publication or transmission of material in the electronic form is essential. If such material; is lascivious or appeal to prurient interest or its effect is such as to tend or deprave or corrupt persons, who are likely, having regard to the all relevant circumstances, to read, see or hear the matter contend or embodied in it. Material in the electronic form could be video files, audio files, text messages, animation, etc. Lascivious means lewd, lustful or feeling and or revealing an overt or offensive sexual desire or which tend to excite lust. As against this, before the offence can be said to be complete under Section 67-A of the IT Act, prosecution must demonstrate or show that accused has published or transmitted material containing sexually explicit act. Explicit means “clear and detail”, with no room for confusion or doubt or when sexual activity is graphically described or represented electronically. When such act is

electronically published or transmitted particularly amongst adult, it is punishable under Section 67-A of the IT Act. Expression Explicit means “Stated clearly and precisely and or prescribing or representing sexual activity in direct and detailed way”. Expression “Sexual Activity” is defined in Black’s Law Dictionary as “Physical sexual activity or both persons engaged in sexual relations”.

6 Thus, provisions of Section 67 and 67-A of the IT Act do attract and operate in distinct situation and circumstances. Section 67 refers to publishing or transmitting “Obscene Material” in electronic form; whereas Section 67-A refers to transmitting or publishing material containing sexual explicit act. Therefore, the offence under Section 67 of the IT Act is grave and punishment prescribed for the first conviction is imprisonment, which may extend to five years and fine, which may extend to 10 Lakhs and in the event of second or subsequent conviction with imprisonment for a term, which may extend to seven years

and also with fine, which may extend to 10 Lakhs. In so far as the Section 67 is concerned, it is attracted only when lascivious material is published or transmitted but it does not encompass, transmission or “material containing sexually explicit act”. Thus, offence under Section 67 of the IT Act is punishable with imprisonment for a term, which may extend to three years and with fine, which may extend to five lakhs and on second conviction with imprisonment for a term, which may extend to five years and also fine, which may extend to ten lakhs.

7 In the case in hand, the offence under Section 67-A of the IT Act is registered against the applicant. I have perused the investigation record and the images/material allegedly sent on the face-book account of the complainant by the applicant. No doubt, images sent and the link on tapping was revealing material tends to excite lust but it was not the material containing “sexually explicit act”. To attract Section 67-A of the IT Act, material must be of the

nature describing or representing sexual activity in a direct or detailed way. Herein, material of this nature was not sent by the applicant to the complainant on her face-book account. Thus, prima-facie, the penal provisions of Section 67-A of the IT Act are not attracted to the facts of the case at hand.

8 The punishment prescribed for offence under Section 67 of the IT Act three years, for the first conviction and five years in the event of subsequent or second conviction. It is in these circumstances, prima-facie, facts of the case may attract Section 67 and not 67-A of the IT Act.

9 Now so far as the offence under Section 354-D is concerned, it is cognizable bailable and triable by any Magistrate. Herein, the applicant attempted to establish contact the complainant to foster personal interaction despite clear indication of disinterest shown by her. Material on record suggests, complainant has shown her disinterest

in clear terms by sending him a message on 30th November, 2018, but even thereafter, applicant attempted to contact her by sending obscene images. Therefore, prima-facie, applicant's complicity in the common offence of stalking is evident, which is punishable under Section 354-D of the IPC. However, it is, bailable being, the first offence.

10 Though the material on record suggests complicity of the applicant in commission of offence under Section 67 of the IT Act, it may be stated that applicant has handed over his cell phone to Investigating Officer from which device, he had sent messages/images to the complainant. Even otherwise prosecution relies on electronic evidence and for the same, applicant's custodial interrogation is not required. Thus, in consideration of the fact of the case and punishment prescribed for the first offence under Section 67 of the IT Act, which may extend to three years, I am inclined to grant pre-arrest bail to the applicant. Hence, following order:

ORDER

(i) In the event of arrest of the applicant in Crime No.580 of 2020 registered with Virar Police Station, Palghar he shall be released on executing PR bond for the sum of Rs.50,000/- with one or more sureties in like sum.

(ii) The applicant shall attend the concerned police station on 2nd and 4th Monday commencing from January, 2021 between 11 a.m. to 1 noon till the charge is framed.

(iii) The applicant shall furnish his permanent residential address and contact number to the Investigating Officer forthwith.

(iv) The applicant shall not tamper with the evidence or attempt to influence or contact the complainant, witnesses or any person concerned with the case

11 The application is accordingly allowed and disposed of.

12 It is made clear that observations made here-in-above be construed as expression of opinion for the purpose of bail only and the same shall not in any way influence the trial in other proceedings.

(SANDEEP K. SHINDE, J.)