

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

BAIL APPLICATION NO.789 OF 2022

Mr. Ekrar @Ikrar Abrar Khan ...Applicant

Versus

The State of Maharashtra and
Anr. ...Respondents

....

Mr. Khalid Gujar with Ms Deepa Panicker for the Applicant.

Mr. H.J. Dedhia, APP for the Respondent No.1-State.

Mr. Advait Sethna (Legal Aid) with Mr. Rangan Majumdar for
Respondent No.2.

CORAM: G.A. SANAP, J.

DATED: 6th DECEMBER, 2023.

P.C:-

1. The Applicant has made this application for bail in C.R. No.1288 of 2020 registered at Malvani Police Station, District-Mumbai, for the offences punishable under Sections 363, 366 (A), 368, 376 and 376(3) of the Indian Penal Code, 1860 and Sections 4, 5(j-ii), (l) and 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO).

2. I have heard Mr. Khalid Gujar, learned Advocate for the Applicant, Mr. H.J. Dedhia, learned APP for the Respondent -State

and Mr. Advait Sethna, learned Advocate for Respondent No.2-victim. Perused the records and proceedings.

3. Learned Advocate for the Applicant-accused submitted that there was a love affair between the Applicant and the victim. It is pointed out from the record that the alleged sexual assault was with consent of the victim and therefore the Applicant alone could not be blamed for this situation. Learned Advocate took me through the statement of the victim and pointed out that the victim has admitted that they had married. Learned Advocate for the Applicant submitted that the marriage of Muslim girl having attained the age of 15 years is voidable and not void. Learned Advocate submitted that therefore, in this case the prosecution of the Applicant is not at all sustainable. In order to seek support to his submission he has placed reliance on following two decisions :-

(i) ***Mrs. Tahra Begum vs. State of Delhi and Ors in W.P.***

(CRL) No.446 of 2012;

(ii) ***Fija and Anr. Vs. State Govt. of NCT of Delhi and***

Ors. in W.P (CRL) 763 of 2022.

4. Learned APP submitted that considering the age of the

victim, defence of consensual act cannot be entertained at this stage. Learned APP further submitted that considering the nature of the crime committed by the Applicant this is not a fit case for bail.

5. Learned Advocate for the Respondent No.2-victim, relied upon the following decisions :

- (i) *X(minor) vs. The State of Jharkhand and Anr., MANU/SCOR/26579/2022;*
- (ii) *Tasleem Shah vs. State of U.P and 3 Ors., Criminal Misc. Bail Application No.46917 of 2022;*
- (iii) *Jagbir vs. State (N.C.T. of Delhi) 2022 SCC Online Del 2159.*

Learned Advocate for Respondent No.2 submitted that in case of a minor, the defence of consensual sexual act cannot be entertained and made resistance to release the Applicant on bail. The learned Advocate submitted that mandate of a law needs to be considered while deciding the bail application in such a crime of aggravated penetrative sexual assault. The learned Advocate further submitted that even in the application the Applicant has not pleaded that there was a marriage between him and the victim before lodging the

report. The learned Advocate submitted that the solitary statement made by the victim cannot be made foundation of the defence of the Applicant. It is submitted that this fact will have to be independently proved by producing the documentary evidence and on that basis the defense would have to be evaluated. It is seen that the Applicant has not even pleaded in his application that they got married as per the Muslim Law. If there was a marriage, then the Applicant was required to plead and prima facie establish the same by producing the *Nikahnama*. There is no whisper of the marriage as well as any *Nikahnama*.

6. Undisputably, the victim on the date of the commission of the crime was of 15 years and four months old. In view of this factual position, the defence of a consensual act on account of love affair between the Applicant and the victim is not legally tenable. The provisions, which have been enacted with the particular object in mind needs to be construed in such a manner so that the purpose of the enactment is not frustrated. As long as the mandate of the law stands, such defence cannot be entertained. In the decisions relied upon by the learned Advocate for the Applicant, issue of

legality of marriage was involved. In this case, the Applicant has not pleaded the defence of a marriage in his application. In the facts and circumstances, the decisions relied upon by the learned Advocate would be of no help to fortify the submissions.

7. The victim in her statement has consistently stated that she was subjected to penetrative sexual assault against her consent. In my view this statement of the victim that she was subjected to sexual assault against her consent and wish will have to be taken into consideration at this stage for the purpose of deciding the bail application. The legal position has been aptly enunciated in the decisions relied upon by the learned Advocate for Respondent No.2 and the same is applicable to the facts of the case. In view of this, I am of the opinion that no case has been made out to enlarge the Applicant on bail. Accordingly, this application is rejected.

8. Fees of the appointed learned Advocate be paid as per the rules.

(G.A. SANAP, J.)