

Nikita

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

BAIL APPLICATION NO.928 OF 2023

Bhagwat Babasaheb Ghumare

... Applicant

V/s.

The State of Maharashtra

... Respondent

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Mr. Sudarshan Salunke i/b Mr. Prabhanjan Gujar, for
the Applicant.

Ms. Vilasini Balasubramanian for Respondent No.2.

Mr. P.H. Gaikwad, APP for the State/Respondent.

Mr. Dhiraj R. Gupta, PSI, Bharati Vidyapeeth Police
Station Pune.

CORAM : AMIT BORKAR, J.

DATED : AUGUST 2, 2023

P.C.:

1. This is an application under Section 439 of Code of Criminal Procedure, 1973 in connection with C.R. No.351 of 2022 registered with Bharati Vidyapeeth Police Station, Pune for the offences punishable under Section 376, 375(2)(n), 506 of the Indian Penal Code, 1860 and Section 4, 5(1), 5(n), 6, 8 , 12 of the Protection of Children from Sexual Offences Act, 2012.

2. The prosecution story in short is as under:

Informant Bhagyashri Bhagwat Ghumare has lodged FIR

contending that, herself, her husband i.e. accused from this case, her daughter (victim aged 15 years and 2 months) along with her son Swaraj aged 10 years are residing together. On 27/5/2022 at about 4.00 p.m. when informant was at her home, she shouted on her daughter i/e. Victim and victim got very much frightened. It is contended that, victim disclosed informant that, since last one and half year accused had committed forcible sex with victim and accused had threatened victim that if she discloses said fact to anyone, he will kill victim and her mother. Hence, informant had lodged FIR against accused/applicant with Bharati Vidyapeeth Police Station and above referred crime came to be registered.

3. Mother of the victim on 28th May 2022, lodged a report against the applicant (father of victim), alleging that the day before lodging of report (27th May 2022) at 4.00 p.m., the victim disclosed to the informant (mother) that the applicant was committing forcible sexual intercourse with her and threatened her not to disclose incidents, else he will kill her mother. The immediate incident disclosed was of 24th May 2022, when it is alleged that between 6.00 to 7.00 a.m., when the informant was out of home to attend Yoga classes, and the victim was sleeping in the Hall of their house, the applicant committed forcible sexual intercourse with the victim. The birth date of the victim is stated to be 18th March 2007.

4. The applicant was arrested on 28th May 2022, during investigating the investigation agency recorded a statement of victim, informant, informant's friend (advocate) who is consulted before lodging the report and the mother of the advocate. The

victim was sent for medical examination. After completion of investigation, charge-sheet is filed.

5. The Sessions Judge rejected the application filed by the applicant under Section 439 of the Criminal Procedure Code, 1973, came to be rejected by order dated 14th October 2022.

6. The learned advocate for the applicant submitted that the applicant is falsely implicated in this case. Lodging of prosecution is out of matrimonial discord between the mother of victim and the applicant. The report was lodged at the instance of informant's friend (advocate) after due deliberation. The video recording of the statement of victim is in breach of Section 23 of POSCO Act, 2012. There is inconsistency in the statement of informant and the statement of witness. Relying on the Judgment of Apex Court in the case of **Dataram Singh Vs. State of Uttar Pradesh and Anr.** reported in (2018) 3 SCC 22, it is submitted that based on well settled principle that bail is rule and jail is exception, the applicant is entitled to relief under Section 439 of Code of Criminal Procedure, 1973.

7. Per contra, the learned advocate for the victim, and the learned APP, invited my attention to the statement of victim recorded under Section 161 and 164. Informant's statement (mother) and two other witnesses. They invited my attention to the report of the medical examination and history stated by the victim to the Doctor. According to them, therefore, the statements are consistent, the medical evidence supports the allegation of penetrative sexual assault. There is no material to indicate

matrimonial discord between the mother and the applicant. In support of their statement, they relied on the judgment in the case of **Sumitha Pradeep v. Arun Kumar C.K. & Another** reported in 2022 SCC OnLine SC 1529.

8. With the assistance of the advocate for the parties, I have duly scrutinize the material on record. On perusal of the statement of victim, informant and two other witnesses, I find that there is no material inconsistency. Moreover it is well settled that inconsistency in statement of witnesses need to be adjudicated at the stage of trial. There is no serious dispute, at this stage, about the age of victim which was 15 years and 2 months on the date of alleged first incident. The medical examination indicates “evidence of vaginal penetration with no fresh physical or genital injuries at present.”

9. Considering the relationship of victim and the applicant (father), delay, if any, in lodging report cannot be a ground to release the applicant on bail. Prima facie, foundational facts to attract presumption under Section 29 of POSCO Act, 2012 are placed on record.

10. In this context it would be profitable to refer to the relevant observations of the Apex Court in the case of Apex Court in the case of **Sumitha Pradeep v. Arun Kumar C.K. & Another** reported in 2022 SCC OnLine SC 1529 has emphasized need of prima facie case by observing thus:

“16. We are dealing with a matter wherein the original complainant (appellant herein) has come before this Court praying that the anticipatory bail granted by the High Court

to the accused should be cancelled. To put it in other words, the complainant says that the High Court wrongly exercised its discretion while granting anticipatory bail to the accused in a very serious crime like POCSO and, therefore, the order passed by the High Court granting anticipatory bail to the accused should be quashed and set aside. In many anticipatory bail matters, we have noticed one common argument being canvassed that no custodial interrogation is required and, therefore, anticipatory bail may be granted. There appears to be a serious misconception of law that if no case for custodial interrogation is made out by the prosecution, then that alone would be a good ground to grant anticipatory bail. Custodial interrogation can be one of the relevant aspects to be considered along with other grounds while deciding an application seeking anticipatory bail. There may be many cases in which the custodial interrogation of the accused may not be required, but that does not mean that the *prima facie* case against the accused should be granted anticipatory bail. The first and foremost thing that the court hearing an anticipatory bail application should consider is the *prima facie* case put up against the accused. Thereafter, the nature of the offence should be looked into along with the severity of the punishment. Custodial interrogation can be one of the grounds to decline anticipatory bail. However, even if custodial interrogation is not required or necessitated, by itself, cannot be a ground to grant anticipatory bail.”

11. On overall consideration of the facts, considering the relationship of applicant and the victim, in my opinion, the offence alleged against the victim is heinous in nature. In the absence of material to indicate existence of matrimonial discord between mother of victim and the father. At this stage the possibility of false prosecution is ruled out, however, it will be for the applicant during trial to raise the defense as is permissible in law.

12. Considering the age of victim, 15 years and 2 months on the

date of first incident, relationship of applicant and victim (father and daughter), consistent material in the form of statement of victim, informant and two other witnesses statement under Section 164 of Code of Criminal procedure, 1973, supported by medical evidence, no case for release of applicant on bail is made out.

13. In so far as the judgment relied upon by the applicant is concerned, there cannot be dispute about the preposition of law that bail is rule and the jail is exception. Each case needs to be adjudicated on well settled principle, such as nature and gravity of offence, the possibility of applicant influencing the witness, the possibility of applicant absconding, and all other factor laid down by the Apex Court. As observed considering the heinous nature of allegations made against the applicant, the judgment in the case of **Dataram Singh** (supra) is incapable in the facts of the case.

14. It is made clear that the observations made in the present order are only for the purpose of deciding the application under Section 439 of the Criminal Procedure Code, 1973. However, the learned Trial Court shall decide the trial on its own merits uninfluenced by the observations made in this order.

15. The Bail Application stands rejected. No costs.

(AMIT BORKAR, J.)