

S.A. Pathan

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

ANTICIPATORY BAIL APPLICATION NO.2053 OF 2023

Sangita @ Kajal Mukhtar Shaikh ... Applicant

V/s.

The State of Maharashtra & Anr. ... Respondents

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PATHAN

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Mr. Shreyas P. Barsawade a/w Mr. Chaitanya P Dixit
for the Applicant.

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

Mr. K. K. Ghalerao, API, Ghodegaon police station,
Pune Rural.

CORAM : AMIT BORKAR, J.

DATED : JULY 21, 2023

P.C.:

1. Apprehending arrest in connection with C.R. No.0145 of 2019 registered with Manchar police station for offences punishable under Sections 363, 376, 376(2) (n), 323, 324, 344 r/w 34 of the Indian Penal Code, 1860 (for short 'IPC') and under Section 4, 6, 8, 10, 21 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act'), the applicant is seeking relief of pre-arrest bail under Section 438 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.').

2. According to the prosecution victim's father lodged a report on 23 March 2019, alleging that on 22 March 2019, while she left to attend school for Xth Std. Examination, she did not return. On enquiry, it was revealed that unknown persons kidnapped her.

Accordingly, an offence under Section 363 of IPC was lodged. Initially, an A-Summary report was submitted. However, further investigation started after the victim was traced in the house of co-accused No.1 on 16 May 2023. According to the prosecution, the victim was in a frightened condition. Her mother was handed over with her custody. She was referred for the opinion of a psychiatrist, and a medical examination was also conducted. She was examined on 18 May 2023 and 19 May 2023. Her statement was also recorded. Based on her statement, co-accused No.1 was arrested. Co-accused No.3, the father of co-accused No.1, was also arrested. The present applicant is the mother of co-accused No.1.

3. The applicant, therefore, applied Section 438 of Cr.P.C. before the learned Sessions Judge, which came to be rejected by an order dated 3 July 2023. Aggrieved thereby, the applicant has filed the present anticipatory bail application.

4. The application was rejected by recording findings that black spots were noticed on the person of the victim, which raises the possibility of burning by cigarettes.

5. On perusal of the case papers, it appears that the victim's statement under Section 164 of the Code of Criminal Procedure was recorded on 29 May 2023. Apart from making statements against co-accused No.1 of forceful sexual assault, she alleged that the present applicant used to beat her was confined in the house. Medical examination of the victim indicates signs of possible torture (Burns of cigarettes) on the person of the victim. It appears that on the day of the incidents, the victim was a child within the

meaning of Section 2(d) of the POCSO Act.

6. Furthermore, while dealing with cases under the POCSO Act, the Apex Court, in the case of **Sumitha Pradeep v. Arun Kumar C.K. & Another** reported in 2022 SCC OnLine SC 1529 was considering grant of bail to an accused charged with an offence under Protection of Children from Sexual Offences Act, 2012. The Apex Court, in paragraph 16, observed as under:

“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.”

7. It, therefore, appears that even for the purposes of application under Section 438 of Cr.P.C., the offences under POCSO Act are treated as a separate class in view of Sections 28 and 29 of the POCSO Act. Considering the material which indicates the torture of the victim, coupled with the acts of abatement and instigation attributed to the applicant. The applicant is not entitled to relief under Section 438 of Cr.P.C.

8. In view of the aforesaid factors, no case for the exercise of power under Section 438 of the Criminal Procedure Code, 1973 is made out.

9. The anticipatory bail application is, therefore, rejected. No costs.

(AMIT BORKAR, J.)