

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

BAIL APPLICATION NO. 790 OF 2023

Mohammad Khurshid Abdul Bakki Malik ... Applicant

Vs.

State of Maharashtra and Others ... Respondents

Mr. Sushil Pandey with Mr. Dev Tiwari, for Applicant.

Mr. S. R. Agarkar, APP for State.

Ms. Sana Shaikh, for Respondent No. 2.

Mr. Rahul Patil, PSI, Powai Police Station, Present.

CORAM:- N. J. JAMADAR, J.

DATED:- 9th JANUARY, 2024

PC:-

1) Heard the learned Counsel for the applicant and the learned APP for the State.

2) This application is preferred for bail in connection with CR No. 131 of 2019, registered with Powai Police Station, for the offences punishable under Sections 376 and 506 of the Indian Penal Code, 1860 and Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act).

3) The first informant- respondent No. 2, then 18 years of age, lodged a report with the allegations that while she was studying in the 10th Standard, she became acquainted with the applicant. Proximity developed. She disclosed the said fact to her mother. The applicant was permitted to reside with the victim and her family members.

4) Victim alleged that in the month of September, 2018, while her sister was admitted at Balasaheb Thakare Hospital, Jogeshwari, Mumbai and her mother was attending to her, applicant had forcible sexual intercourse with her without her consent and threatened the victim not to disclose the said act to her mother. Victim was allegedly exploited repetitively. Eventually, the victim became pregnant. When confronted, the applicant left the home of the victim on 12th March, 2019 without any intimation. Hence, the report.

5) The learned Counsel for the applicant submitted that the applicant and the victim were in a relationship. Even the family members of the victim had approved the relationship and the applicant was allowed to reside with the victim in her home. The allegations of sexual intercourse without the consent of the victim, therefore, do not hold the ground.

6) The learned Counsel for the applicant would further urge that the material on record indicates that at the time of the alleged sexual intercourse without the consent of the victim, the victim had already attained the age of 18 years. Therefore, the offences punishable under Sections 4, 8 and 12 of the POCSO Act are not at all attracted.

7) The learned APP resisted the prayer for bail. It was submitted that taking undue advantage of the situation of the victim, the applicant had repetitively sexually exploited the victim. In such circumstances, the applicant does not deserve the exercise of the discretion.

8) The learned Counsel for the respondent No. 2 also resisted the prayer for bail. It was submitted that the applicant made the victim to give consent for the sexual intercourse by making a false promise of marriage.

9) I have carefully perused the allegations in the FIR and the documents on record.

10) First and foremost, birth certificate of the victim indicates that she was born on 18th July, 2000. In the FIR, there is a specific allegation that in the month of September, 2018, the

applicant had forcible sexual intercourse with the victim. Prima facie, the victim had attained the age of majority on the date of the alleged occurrence. The applicability of the provisions contained in Sections 4, 8 and 12 of the POSCO Act, therefore, appears to be prima facie, in the arena of uncertainty.

11) Even otherwise, there is material to indicate that the applicant and the victim were in a relationship. The family of the victim had also approved their relationship and the applicant was allowed to stay with the victim. The first informant specifically alleges in the FIR that when she had disclosed their relationship and intention to marry, the mother of the first informant had permitted the applicant to reside with them. In the circumstances, whether the consent of the victim for sexual intercourse was obtained under misconception of fact would be a matter for trial.

12) In any event, the applicant has been in custody since 2nd July, 2019. The Court is informed that the trial has not yet commenced. It is very unlikely that the trial can be concluded in the near future. Therefore, having regard to the period of incarceration as well as the peculiar facts of the case, I am inclined to exercise the discretion in favour of the applicant.

13) Hence, the following order.

: O R D E R :

- (i) The application stands allowed.
- (ii) The applicant Mohammad Khurshid Abdul Bakki Malik be released on bail in CR No. 131 of 2019, registered with Powai Police Station, for the offences punishable under Sections 376 and 506 of the Indian Penal Code, 1860 and Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012, on furnishing a P.R. Bond in the sum of Rs.30,000/- with one or two sureties in the like amount, to the satisfaction of the learned Sessions Judge.
- (iii) The applicant shall mark his presence at the concerned Police Station on the first Monday of every month between 10.00 am to 12.00 noon for a period of two years or till conclusion of trial, whichever is earlier.
- (iv) The applicant shall not tamper with the prosecution evidence and/or give threat or inducement to the first informant and any of the persons acquainted with the facts of the case.

(v) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial court shall not be influenced by any of the observations made hereinabove.

[N. J. JAMADAR, J.]