

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.2170 OF 2024

Kurban @ Shabir Abdul Kadir Pathan ... Applicant
Vs.
State of Maharashtra and another ... Respondents

Mr. Hemant P. Ingle a/w. Mr. Pratik P. Ingle i/b. Mr. Vedang S. Deshpande for Applicant.

Ms. Megha Bajoria, APP for Respondent - State.

None for Respondent No.2.

Mr. Sanjay Gaonkar, PSI, Mankhurd Police Station.

CORAM : MANISH PITALE, J.

DATE : OCTOBER 08, 2024

P.C. :

. Heard Mr. Ingle, learned counsel for the applicant and Ms.Bajoria, learned APP for the respondent-State.

2. Since offences under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) were also registered in the present case, the victim was added as party respondent No.2 and notice was issued to her. She put in appearance through an advocate but the advocate and the respondent No.2 have chosen not to appear before this Court when the application is taken up for consideration.

3. The applicant was arrested on 10.03.2023 in connection with FIR No.0163 of 2023 dated 05.03.2023 registered with Mankhurd Police Station, Brihanmumbai, initially for an offence under Section 363 of the Indian Penal Code, 1860 (IPC). The FIR was registered on a statement given by the mother of the victim, who stated that her daughter aged 17 years, 2 months and 4 days had gone missing. She suspected that her

daughter had been taken away by some unknown individual. Hence, initially, the FIR was registered against an unknown person.

4. Subsequently, on 10.03.2023, when the victim contacted her mother i.e. the informant from Aurangabad and she was brought from Aurangabad, a supplementary statement of the informant was recorded, which was based on the narration given by the victim. On the basis of the aforesaid statement, the applicant was arraigned as an accused and he was arrested on 10.03.2023. Offences under Sections 366 and 376(2) (n) of the IPC along with the provisions of the POCSO Act were added against the applicant (accused).

5. The learned counsel for the applicant submits that in the present case, the applicant and the victim were in a consensual relationship and this would be evident from the material on record. Attention of this Court was invited to the statement of the victim herself recorded on 10.03.2023. The learned APP indicated that the statement of the victim recorded under Section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.) was almost identical to her statement recorded on 10.03.2023 by the police. By placing reliance on the said statement, the learned counsel for the applicant submitted that the victim being more than 17 years old and on the verge of attaining majority, in her full senses, had entered into a consensual relationship with the applicant.

6. This is evident from the history narrated during her medical examination conducted on 10.03.2023. There was no reference made to any sexual or physical assault. It is submitted that the medical examination report did not divulge any hint of forcible sexual activity as was being alleged against the applicant. It is submitted that the applicant was further medically examined on 03.04.2023 and during this round of medical examination also, the victim appeared to be reluctant to undergo detailed medical examination on the allegation of sexual assault against

the applicant.

7. On this basis, it is submitted that although, technically and in law, the victim may not be capable of giving consent for sexual activity, considering the peculiar facts of the present case, this Court may show indulgence to the applicant, who is a young man and who has already suffered incarceration for more than one and half years.

8. On the other hand, the learned APP submits that this is a case where the applicant gave promise of marriage to the victim and lured her into joining his company. There is a reference to a visit to a particular lodge where the applicant, for the first time, forced himself on the victim. It is submitted that the victim acted on the directions given by the applicant to leave her house and to reach Aurangabad, where she stayed in a woman's hostel by using the Aadhar Card of one of her relatives. She waited there for the applicant to fulfill his promise of visiting her and both of them getting married. The applicant did not turn up and eventually, after a couple of days, the victim reached out to her family, leading to registration of the aforesaid offences against the applicant. It is submitted that in such circumstances, when there is ample material to show as to the manner in which the applicant induced and lured the minor victim girl into satisfying his lust, this Court ought not to show any indulgence.

9. This Court has considered the rival submissions in the backdrop of the material placed on record. The supplementary statement of the informant recorded on 10.03.2023 is based completely on the version given by the victim herself i.e. her daughter. On the same day, the statement of the victim was recorded and subsequently, her statement was recorded before the Magistrate on 01.04.2023. In both the statements, the victim has indicated as to the manner in which the applicant and the victim got in touch with each other. The material on

record shows that the applicant was working in a garage located near the house of the victim. She has stated, without giving any specific particulars about the date or month or the year, as to the manner in which the applicant and the victim went to a lodge where the applicant, for the first time, allegedly became physically intimate with the victim. The victim has further stated that when the issue of her marriage was being discussed at home and she informed the applicant about the same, he indicated that the two could elope and get married. It is thereafter that the victim went to Aurangabad and stayed in the woman's hostel by using Aadhar Card of one of her relatives. Eventually, she contacted her family and came back to her house.

10. This Court is of the opinion that at the time when the aforesaid incidents were taking place, the victim was aged more than 17 years and she can be said to be on the verge of attaining majority. The material on record also indicates that the applicant was working in a garage located near the house of the victim, thereby indicating that they did have opportunities to see each other and it cannot be said that the applicant was a completely unknown face for her. In fact the narration of events given by the victim itself indicates that she had joined his company for some period of time before the alleged incident of physical intimacy took place in a lodge, and thereafter, the victim went to Aurangabad on the statement of the applicant that they could elope and get married. This cannot be said to be a case where the victim was just into the teenage phase of her life, not being exposed to the realities of life and that she was lured and induced by promises made by the applicant. The tenor of her statement does not give the aforesaid impression and instead gives a *prima facie* impression of the victim also being interested in the applicant.

11. There can be no doubt about the fact that as a matter of law, at the

relevant time, the victim was not qualified to give consent, and therefore, it could not be said that the relationship was 'consensual'. But, such situations where the victim is on the verge of attaining majority and the accused is in his early 20s, are encountered frequently and this Court has not remained oblivious to the realities of such situations.

12. This Court in the case of *Sunil Mahadev Patil Vs. State of Maharashtra* (order dated **03.08.2015** passed in **Bail Application No.1036 of 2015**) was considering the question of granting bail to an accused in a similar factual scenario when in paragraphs 11 and 12, it was observed as follows:-

“11. Today teenagers are exposed to more sex related issues and lot of material is also available to them to know the sexual relationship between a man and a woman. Because of their impressionable age, girls and boys both may tend to get provoked and there can be a curious and very compelling demand of the body to get into such kind of relationship. Sexual urge differs from person to person and there cannot be any mathematical formula in respect of sexual behavioral pattern of teenagers, as biologically whenever the child turns into puberty, the child starts understanding his or her sexual needs. The nature of response depends on the upbringing, peer pressure, how civilized the environment is etc. Sex requires proper physical and emotional preparation, as it results in many physical and emotional consequences. This is all considered as a sexual maturation. Therefore, some sects with view to regularize sexual behaviour of the community have acknowledged this biological factor and therefore, the early age marriages are performed in some religions or communities. Taking into consideration this social and biological factors, the law makers have considered the age of 15 as a age of consent when the marriage is performed. Taking into consideration this background, the trial Judge has to pass an order of bail in such cases.

12. The overall considerations while deciding such applications can be summed up as -

When a boy and a minor girl are in love with each other and chose to live together without consent of their parents, then the following factors are to be considered:

- (i) What is the age of the prosecutrix, who is minor.

- (ii) Whether the act is violent or not.
- (iii) Whether there are antecedents or not.
- (iv) Whether the offender is capable of repeating the Act or not.
- (v) Whether there is likelihood of threats or intimidation, if at all the boy is released.
- (vi) Whether any chance of tampering with the material witnesses when their statements are recorded.
- (vii) It is also to be taken into account in such cases that a boy in his early 20's deserves to get employment and to plan, stabilize and secure his future.”

13. In the said case, the victim was only 15 years old and the accused was about 20 years old. In the present case, the statement of the informant leading to registration of the FIR itself shows that the victim was 17 years, 2 months and 4 days, while the applicant appears to have been in his early 20s. The above-quoted portion of the aforesaid order indicating the approach to be adopted by the Court in such cases applies on all fours to the facts of the present case. It is to be noted that in the said case, after taking note of the special circumstances, this Court indeed granted bail to the accused.

14. In the present case, apart from the *prima facie* conclusion reached hereinabove by this Court that the victim appears to have had an inclination to be in the company of the applicant, her reluctance to undergo medical examination and absence of any allegation of sexual or physical assault during the recording of history at the time of medical examination, are also factors that need to be taken into consideration. After the aforesaid factors are also taken into consideration, this Court finds that in the facts of the present case, bail can be granted to the applicant. The material on record *prima facie* indicates that the applicant cannot be blamed for physically assaulting the victim or being involved in her forcible subjugation to satisfy his sexual lust. *Prima facie*, the attraction between the two appears to be mutual and in that sense, the

relationship can be said to be consensual.

15. The learned APP is justified in expressing apprehension that releasing the applicant on bail may adversely affect the smooth conduct of the trial. The same can be addressed by imposing appropriate stringent conditions on the applicant. Even otherwise, this Court is satisfied that the factors, indicated in the above-quoted paragraph 12 of the order in the case of **Sunil Mahadev Patil Vs. State of Maharashtra** (*supra*), are indeed satisfied in favour of the applicant in the facts and circumstances of the present case.

16. In view of the above, the application is allowed in the following terms:-

- (A) The applicant shall be released on bail in connection with in connection with FIR No.0163 of 2023 dated 05.03.2023 registered with Mankhurd Police Station, Brihanmumbai, on furnishing P.R. Bond of Rs.25,000/- with one or two sureties in the like amount to the satisfaction of the trial Court;
- (B) The applicant shall stay outside the jurisdiction of Mankhurd Police Station during the pendency of the trial;
- (C) The applicant shall report to Trombay Police Station on first Monday of every month during the pendency of the trial;
- (D) The applicant shall cooperate with the trial Court for expeditious disposal of the trial;
- (E) The applicant shall not tamper with the evidence of the prosecution. He shall not influence the informant, witnesses or any other person concerned with the case;
- (F) Upon being released on bail, the applicant shall immediately, and in any case within a week, furnish the details of his active mobile number and residential address

to the trial Court and update about the same, if there is any change.

17. Needless to say, violation of any of the aforesaid conditions would make the applicant liable to face proceedings for cancellation of bail. It is also clarified that the observations made in this order are limited to the question of grant of bail to the applicant in the present application and that the trial Court shall proceed further, without being influenced by the observations made in this order.

18. The bail application stands disposed of accordingly.

(MANISH PITALE, J.)

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