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

CRIMINAL BAIL APPLICATION NO. 945 OF 2024

Irish Hmingchullo Varte

.. Applicant

Versus

The State of Maharashtra & Anr.

.. Respondents

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- Mr. Aniket Nikam a/w. Mr. Dushyant Digamber i./by Mr. Amit Icham, Advocates for Applicant.
 - Ms. Rajeshree V. Newton, APP for Respondent No.1 - State.
 - Mr. Vishwatej Jadhav i./by Mr. Chetan Damre, Advocate for Respondent No.2.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 08, 2025.

P.C.:

1. Heard Mr. Nikam, learned Advocate for Applicant, Ms. Newton, learned APP for Respondent No.1 – State and Mr. Jadhav, learned Advocate for Respondent No.2.

2. Present Bail Application is filed under Section 439 of the Code of Criminal Procedure, 1973 in connection with C.R. No. 340 of 2023 registered with Vakola Police Station for offences under Sections 376-AB of the Indian Penal Code, 1860 and Sections 4, 5(l) and 6 of the Protection of Children from Sexual Offences Act, 2012 (for short “POCSO Act”).

3. Case of the prosecution is that Applicant molested 3 year old daughter of the first informant. Nexus of Applicant with family of first informant is close. Applicant, first informant, husband of first informant are acquaintances and all hail from Manipur. Applicant was residing with first informant and her husband in the same house namely a studio apartment for the past few years. He is considered to be a part of their family. According to prosecution after birth of first informant's daughter – victim 3 years ago Applicant, first informant and her husband brought her up together until the alleged incident. First informant and her husband both have a day job and go to work leaving behind their daughter with the Applicant. The daughter used to be dropped by him at a day creche for children everyday in the morning and used to be brought back once again by him in the evening. According to prosecution bonding of the daughter with Applicant was such that she used to call him as "पापा आय" (papa - I) meaning father. The first informant neither her husband ever objected rather they left their daughter in the care of Applicant.

4. FIR is lodged on 13.06.2023. It is alleged in the FIR that on 12.06.2023 at about 11:00 p.m. the daughter in their local language / dialect 'Maar' told first informant that she had some pain while urinating. First informant stated that in the morning of 13.06.2023 she had a closer look at the time of her bath and observed a little

redness in the area and when asked the daughter communicated with the word “papa - I”. She uttered these two words namely “papa – I” and got frightened. First informant has alleged that because of this action she apprehended that Applicant may have molested the daughter and therefore she took her to hospital for treatment and thereafter filed the FIR.

5. Mr. Nikam learned Advocate for Applicant would persuade me to consider that age of the daughter is barely three years. He would submit that Applicant has all along taken care of the daughter since birth rather she has been in his foster care and used to call him “papa - I” signifying the bonding between them. In this background he would persuade the Court to consider the Medico Legal Examination Report which states in its clinical finding in item No.22 that there is redness observed near her private part. He would then draw my attention to item No.25 namely final opinion which is incidentally left blank in the said Report. He would submit that at page No.44 is the statement recorded of the Applicant wherein he has stated that on the night of 12.06.2023 the daughter was sleeping next to him and she urinated in the night, due to which he was helping her in changing her clothes when suddenly the first informant saw him changing her clothes and suddenly took her away. He would submit that Applicant is a hair-stylist, educated upto graduation, very well acquainted with first informant and her husband and the alleged complaint was filed due to

a complete misunderstanding which occurred. Hence in this regard he would draw my attention to page No.90 of the Application wherein first informant herself has stated in her written application that when she made inquiry with her daughter she informed her that Applicant had not done any illicit act and that she had fallen down and suffered injury while playing and she had scratched her private part. I have perused the said application.

6. Learned APP would persuade the Court to consider the gravity of the crime and would submit that considering age of the daughter *prima facie* it would appear that an assault has been made on her. Hence it is submitted that Application be rejected.

7. Mr. Jadhav, learned Advocate appearing for Respondent No.2 would adopt and support the submissions advanced by learned APP and would submit that Applicant being a fatherly figure to the daughter having committed such gruesome act would be factor which needs to be considered by the Court while deciding the Bail Application. He would submit that if the Applicant is enlarged on bail there is every possibility that he would influence the witnesses and hence would urge for rejection of the Application.

8. I have heard the learned Advocates for the respective parties and perused the record of the case.

9. It is settled law that at the stage of granting bail, the Court is not required to enter into a detailed analysis of the evidence in the case. Such an exercise may be undertaken at the stage of trial. However, the Court is required to see the evidence only for the purpose of ascertaining *prima facie* involvement of Accused in the commission of the offence.

10. *Prima facie* it is seen that even according to first informant and prosecution case, Applicant was baby sitting the said daughter from the time she was barely one year old and she used to spend her entire time with him in view of the confidence reposed in him by first informant and her husband. *Prima facie* it is seen that the daughter also had a strong bonding with Applicant. The age of the daughter as borne out from the record is barely three years old. From reading of the FIR what was conveyed by her is not decipherable save and except it is stated by first informant that she pointed her finger to the affected part and when on the next morning the first informant examined her she observed redness at that place and she took the name of Applicant (papa - I). The Medico Legal Report incidentally in item No.22 also records redness as observed. The said Medico Legal Report while recording the statement of first informant records she having stated that she suspected an assault. That apart considering the admitted fact that for more than two years Applicant was virtually associated with the said daughter and he used to take her everyday to the day creche

and get her back, as also the episode of the said daughter urinating at night and he changing her clothes which may have *prima facie* led to suspicion of the first informant which she has rather admitted in her written application needs to be considered *prima facie* from the record made available for considering the Bail Application.

11. Considering the above *prima facie* facts and observations and totality of preceding circumstances as also first informant herself stating that she suspected an assault on the daughter but thereafter she herself redacting her own statement and stating that on enquiry with her daughter she had scratched herself, in such *prima facie* circumstances the Application deserves consideration.

12. As per the settled legal position, in order to sustain conviction, the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused only and none else. The circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

13. Though this Court is aware about the presumption under Section 29 of the POCSO Act but the presumption is not absolute and Courts have to consider the totality of circumstances. Court is of the

opinion that presumption would come into play only when prosecution is able to bring on record facts that would form the foundation for the presumption. Otherwise, all that the prosecution would be required to do is to raise some allegation against the accused and to claim that the case projected by it is true. The Court will have to be on guard to see that the application of presumption without adverting to the essential facts shall not lead to injustice. The presumption under Section 29 of the POCSO Act is not absolute. Attention in this regard is invited to the decision of High Court of Kerala in the case of ***Joy Vs. State of Kerala Represented through the Public Prosecutor***¹. The relevant paragraph Nos.10 and 11 are reproduced below:-

“10. This court is not oblivious to Section 29 of the Act which contains a legislative mandate that the court shall presume commission of the offences by the accused unless the contrary is proved. Section 29 of the Act states that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. The court shall take into consideration the presumption under Section 29 of the Act while dealing with an application for bail filed by a person who is accused of the aforesaid offences under the Act (See State of Bihar v. Rajballav Prasad, (2017) 2 SCC 178 : AIR 2017 SC 630).

11. However, the statutory presumption under Section 29 of the Act does not mean that the prosecution version has to be accepted as gospel truth in every case. The presumption does not mean that the court cannot take into consideration the special features of a particular case. Patent absurdities or inherent infirmities or improbabilities in the prosecution version may lead to an irresistible inference of falsehood in the prosecution case. The presumption would come into play only when the prosecution is able to bring on record facts that would form the foundation for the presumption. Otherwise, all that the prosecution would be required to do is to raise some allegations

¹ 2019 SCC OnLine 783.

against the accused and to claim that the case projected by it is true. The courts must be on guard to see that the application of the presumption, without advertent to essential facts, shall not lead to any injustice. The presumption under Section 29 of the Act is not absolute. The statutory presumption would get activated or triggered only if the prosecution proves the essential basic facts. If the accused is able to create serious doubt on the veracity of the prosecution case or the accused brings on record materials which would render the prosecution version highly improbable, the presumption would get weakened. As held by the Apex Court in Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 : AIR 2011 SC 312, frivolity in prosecution should always be considered and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of anticipatory bail. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. It should necessarily depend on facts and circumstances of each case in consonance with the legislative intention."

14. In view of my aforesaid *prima facie* observations and considering the circumstances in the matter, Applicant can be released on bail subject to the following conditions:-

- (i) Applicant is directed to be released on bail on furnishing P.R. Bond in the sum of Rs.25,000/- with one or two sureties in the like amount;
- (ii) Before his actual release from jail, Applicant shall furnish his address where he proposes to reside after his release from jail to the concerned Police Station and also to the trial Court;
- (iii) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;

- (iv) Applicant shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Tuesday of the said month falls on a holiday and / or non Court working day, the Applicant shall mark presence on the next working day;
- (v) Applicant shall not make any attempts to re-associate with the prosecutrix in any manner either through a device or in-person and shall not reside in the jurisdiction of the Police Station wherein the prosecutrix is residing until the trial is concluded. Investigating Officer shall specifically ensure that this condition is followed;
- (vi) Applicant shall co-operate with the conduct of trial and attend the trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if he does so, it will entitle the prosecution to apply for cancellation of this order;
- (vii) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (viii) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner; and

(ix) In case of any infraction of the above conditions and /
or two consecutive defaults in marking his attendance
before trial Court, it shall attract the provisions of
Section 439(2) of Cr.P.C. i.e. for cancellation of bail.

15. It is clarified that the observations made in this order are limited for the purpose of granting Bail only and I have not made any observations on merits of the case. The trial shall be adjudicated on the strength of the evidence led and strictly on its own merits being uninfluenced with any of the *prima facie* observations made herein above in this order.

16. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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