

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO. 972 OF 2024

Saddam Lalmohammad Shaikh @ Saddam
Hussain Lalmohammad Khan
@ Shaikh .. Applicant

Versus

The State of Maharashtra and Anr. .. Respondents

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- Mr. Kamar Ali Shaikh a/w Mr. Rahman B. Khan, Ms. Sandhya Kori, Advocates for Applicant.
 - Mr. Sukanta A. Karmakar, APP for Respondent No. 1 – State.
 - Ms. Mallika Sharma, Advocate for Respondent No. 2.
 - Mr. Shrikant Korewar, PSI, Malwani Police Station.
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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 17, 2025.

P. C.:

1. This is an Application under Section 439 of CrPC¹ seeking Regular Bail in connection with F.I.R.² No. 490 of 2023 registered with Malwani Police Station, Mumbai on 17.06.2023 for offences punishable under Sections 363, 366A, 368, 376, 376(2)(n), 376(3) and 377 of IPC³ read with 4, 5 (I), 6, 8 and 12 of POCSO⁴. Applicant is arrested on 17.06.2023 and he is incarcerated for 1 year 9 months.

2. Gist of prosecution case is that First-informant mother filed a missing complaint dated 11.06.2023. Prosecutrix went missing on 10.06.2023 at about 10:30 p.m. when she went to the local toilet

¹ Code of Criminal Procedure, 1973

² First Information Report under Section 154 of CrPC

³ Indian Penal Code, 1860

⁴ Protection of Children from Sexual Offences Act, 2012

and did not return back home. Prosecutrix and Applicant were brought back to the Police Station on 17.06.2023 by Applicant's father. Prosecutrix recorded her statement on the same day. Prosecutrix aged 13 years 7 months stated that she was well acquainted with the Applicant for the past 7-8 months prior to the filing of the FIR. She stated that Applicant was 19 years old. She stated that he left the vicinity and moved to Kandivali but they were still in contact with each other and chatted on a daily basis. She stated that on 10.06.2023 prosecutrix had a fight with her sister pursuant to which she left the house and contacted the Applicant and informed him about her location. Applicant met prosecutrix near Ambojwadi rickshaw stand and they both decided to proceed to proceed his village in Uttar Pradesh. They both travelled to Jhansi by train and on that night itself and from there on 13.06.2023 they travelled to Beninagar, Uttar Pradesh to Applicant's village. Upon reaching the Applicant informed his father about the prosecutrix and their idea to get married. Applicant's father inquired about her age to which she lied and informed him that she was 15 years old. Applicant's father immediately asked him to drop her back home to which Applicant and prosecutrix denied to return. She has stated that her mother contacted the Applicant on the phone and she spoke to her mother and informed her that they were together and would be travelling to Nepal. She has

stated that during their stay together, Applicant forcibly committed sexual intercourse with her on two occasions i.e. on 13.06.2023 and 14.06.2023.

3. Mr. Shaikh, learned Advocate for Applicant would submit that prosecutrix and Applicant were acquainted with each other from the past 7 to 8 months prior to the incident in question as Applicant used to live in the same vicinity. He would submit that prosecutrix willingly on her volition without any lure or force accompanied him for 7 days and travelled and stayed with him at Jhansi and thereafter at his village in Uttar Pradesh. He would submit that prosecutrix herself contacted the Applicant on the night of 10.06.2023 and called him to her location after leaving her house without informing her parents which itself shows no sign of force and she being clearly aware of her own actions.

3.1. He would submit that she has admitted in her statement that even when Applicant's father objected and asked him to drop her back to her house due to her age, prosecutrix denied and on her volition stayed back with Applicant during which time she also informed her mother about her intentions. He would submit that it is necessary to consider that prosecutrix concealed her age from Applicant's father and informed him that she was 15 years old. He would further submit that even when her mother contacted them

prosecutrix informed her that they were travelling to Nepal. Hence he would submit that prosecutrix was well aware of her actions and consequences and on her volition stayed together with the Applicant and hence no sign of coercion of force is *prima facie* seen.

3.2. He would submit that there is a clear dichotomy in the prosecutrix's statement recorded in the FIR on 17.06.2023 on page No. 25 and her statement recorded during her Medical Examination appended on page No. 49 read at page No. 50 of the Application. He would submit that prosecutrix has not made any allegation regarding any forceful act or coercion against Applicant but during her Medical Examination has mentioned only one incident between them. Prosecution case therefore becomes highly questionable. He would submit that Medical Examination Report of prosecutrix does not record any injury on the prosecutrix which itself shows and reflects that there was no sign of coercion or force by Applicant. Hence prosecution story falls to the ground. He has referred to and relied upon two decisions of this Court in the case of ***Sunil Mahadev Patil Vs. The State of Maharashtra***⁵ and ***Vijay Chand Dubey Vs. The State of Maharashtra and Anr.***⁶ to support his submissions for seeking bail.

3.3. He would submit that Applicant is a 19 year old boy who is the sole breadwinner of his family and also does not have any

5 2015 SCC OnLine Bom 6204

6 Cri. Bail Application No. 3899 of 2024

criminal antecedents. He would submit that Applicant is not named in the FIR as it was initially lodged against an unknown person. He would submit that Applicant is arrested on 17.06.2023 and has been incarcerated for the past 1 year 9 months. He would submit that investigation is completed, charge-sheet is filed, charge is not framed, however trial has not yet commenced. Hence he would urge the Court to allow the present Application in the above facts.

4. Mr. Karmakar, learned APP would persuade me to consider the age of prosecutrix since she was a minor at the time of incident and therefore her consent would not matter. He would submit that prosecutrix was 13 years and 7 months old at the time of incident. He would fairly argue that in so far as maturity of the person is concerned, it would be directly proportional to the age of the person in today's times. He would submit that facts of the case as delineated will have to be examined by the Court for consideration as placed on record in the present case. He would submit that there is every likelihood of the Applicant exploiting the vulnerability of the prosecutrix in the facts of the present case and inducing her to elope with him without the consent of her parents. Hence he would submit that the Application be rejected.

5. Ms. Sharma, learned appointed Advocate for Respondent No. 2 through the legal aid would persuade me to consider the age of

the prosecutrix and argue that considering that facet it would be possible that prosecutrix was lured into a relationship by Applicant considering her immature age of understanding. She would submit that Applicant took a chance of the fight that occurred at prosecutrix's house after which she left her house and may have induced her to accompany him to his village by giving her the hope of getting married. She would therefore request that the Application be rejected.

6. I have heard the learned Advocates at the bar and perused the record with the able assistance of the learned Advocates.

7. It is *prima facie* seen that Applicant and prosecutrix were well known to each other and were regularly in touch with each other. It is seen that prosecutrix on her own volition due to an argument with her sister in the fit of anger left her house without informing her parents and contacted the Applicant. It is *prima facie* seen that she explicitly stated that she did not want to return back home and alongwith Applicant travelled to Jhansi and further to his village in Uttar Pradesh and also stayed with him for 7 days. During this time on the 2nd day itself when her mother spoke to her on the Applicant's phone, prosecutrix informed her that she was with him and both of them planned to travel to Nepal. This this was a lie stated by her to her own mother. This itself shows that prosecutrix was well aware of all her actions.

8. What is *prima facie* seen is that there is a clear dichotomy in the statement of prosecutrix recorded in the FIR on 17.06.2023 appended at page No. 25 and her statement recorded during Medico - Legal Examination on 17.06.2023 appended at page No. 49 when read at page No. 50. Her Medical Examination Report at page No.49 *prima facie* shows no evidence of injury on her body. In view of the statements of the prosecutrix herself both before the police and during her Medico- Legal Examination *prima facie* it is seen that no overt act as alleged can be attributable to the Applicant. Applicant was 19 years old and prosecutrix was 14 years old. They at this age had a love relationship is *prima facie* evident from the record of the case. Prosecutrix on her own volition eloped with Applicant and infact was the one who insisted to the Applicant as admitted by her and denied to return back home when Applicant's father asked him to take her back to Mumbai. This clearly shows that she was clear about her actions and decisions though she was below 18 years of age.

9. In such circumstances assistance is drawn from the decision of the Supreme Court in the case of ***S. Varadarajan v. State of Madras***⁷ wherein the Court in paragraph No.2 has held thus:-

“2. Where a minor girl alleged to be taken away by the accused person, had left her father's protection knowing and having capacity to know the full import of what she was doing and voluntarily joined the accused, it could not be said that the

7 AIR 1965 942

accused had taken her away from the keeping of her lawful guardian within the meaning of section 361 of the Penal Code, 1860 ("IPC" for short). Something more had to be done in a case of that kind, such as an inducement held out by the accused person or an active participation by him in the formation of the intention either immediately prior to the minor leaving her father protection or at some earlier stage."

10. Though this case was decided well before POCSO Act was enacted, this Court is conscious of the presumption ingrained in the said Act and that argument on her consent is irrelevant but *prima facie* if the statements recorded of the prosecutrix are seen, she has been consenting to her actions is what can be gathered from the record of the case.

11. In so far as offences punishable under Sections 4,6, and 8 of POCSO Act (special law) are concerned, it may be stated that the provisions of this law are, though, stringent in nature, but in the given facts rather *prima facie* facts of the present case, it would not deter the Court to grant or refuse bail in order to secure the ends of justice. The conduct of the prosecutrix in this case is indicative of the fact that she left her home without informing her parents on her own will, thereafter contacted the Applicant and informed him about her location, travelled with him to Jhansi and thereafter to his village Uttar Pradesh and stayed with him together for 7 days. No doubt that prosecutrix under the purview of POCSO Act is a minor, however facts of the present case indicate that she had sufficient knowledge and

capacity to know the full import of her actions and what she was doing and had only thereafter voluntarily stayed with the Applicant for 7 days.

12. In this regard attention is drawn to the decision of this Court (*Coram: Ms. Mridula Bhatkar, J.*) in the case of ***Sunil Mahadev Patil Vs. The State of Maharashtra***⁸ to contend that consensus of the prosecutrix who is below the age of 18 years is a mitigating circumstance for Trial Court to consider. In furtherance to the above Court has laid down certain specific guidelines after taking into consideration relevant cases as also the ethos and development of the age of young offenders in the Indian Society in general. Court in paragraph Nos.8, 9, 11 and 12 of this decision laid down certain principles which I find it apt to reproduced hereinbelow for consideration of bail in such situations. Paragraph Nos. 8, 9, 11 and 12 read thus:-

“8. It is to be noted that the case of S. Varadarajan was decided in the year 1967 when the women were not enjoying the freedom which today the women have. Albeit the Hon'ble Supreme Court then has taken a pragmatic view and has acquitted Varadarajan. Now we come across such cases everyday. If a girl is a minor between the age group of 15 to 18 years and if it can be safely inferred that her consent was obvious, then it is a mitigating circumstance. Some trial Courts dealing with such Bail Applications, especially after Nirbhaya case, started taking a strict approach and the accused are denied

⁸ Bail Application No. 1036 of 2015, decided on 03.08.2015.

the bail only on the ground that the prosecutrix being minor below 18 years, her consent is immaterial, therefore, in the case of rape on such minor, no bail can be granted. This is a matter of concern.

9. In view of the increasing offences against the women especially of rape, the legislature and judiciary both found it obligatory to deal these offences with severe punishment and women can be protected if the laws are made rigorous. Therefore, report of Justice Verma Committee was accepted and necessary and significant amendments were made in these two sections. A wrong doer is to be punished, guilty is to be convicted. However, at the stage of bail, the Court has to consider prima facie under what circumstances the offence is committed by the accused. In the Criminal law, the Court cannot ignore the intention or motive behind the act and that is an important factor in the commission of offence so also to decide the quantum of sentence at the end of trial, so in the case of bail.

10. ...

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 so far as the present case is concerned, it is seen that victim – prosecutrix was 14 years old whereas Applicant was 19 years old at the time of the incident when they stayed together for 7 days in Uttar Pradesh and it clearly appears from the record namely statement of prosecutrix herself that she was in love with Applicant and therefore she herself went with him from her house without the consent of her parents. It is crucial to consider the age of Applicant who was 19 years

old at the time of the incident and he is not a hardened criminal, neither he has any antecedents . The key question before me is whether further incarceration of Applicant, given his young age is warranted in the present facts and circumstances?

14. It is settled law that a Court while deciding a Bail Application has to keep in mind the principal rule of bail which is to ascertain whether the Accused is likely to appear before the Court for trial. There are other broad parameters also like gravity of offence, likelihood of Accused repeating the offence while on bail, whether he would influence the witnesses and tamper with the evidence, his antecedents are required to be considered in such cases.

15. Multiple decisions of the Hon'ble Supreme Court and various other High Courts have favoured the release of young offenders on bail pending trial so that the regressive influences of jail environment can be avoided and keeping in mind the principle of best interest in the aforesaid circumstances.

16. In the present case before me it is crucial to consider whether the act between the parties is violent or otherwise and in the present case it is not. Another mitigating factor is whether there are any criminal antecedents of the Applicant which in the present case are none. The aforesaid mitigating facts and Applicant's incarceration

for more than 1 year 9 months therefore persuade me to consider Applicant's case.

17. In view of the above *prima facie* observations Applicant before me is granted bail. Bail Application is allowed on the following terms and conditions:-

- i. Applicant is directed to be released on bail in CR No. 490 of 2023 registered with Malwani Police Station, on furnishing P.R. Bond in the sum of Rs. 15,000/- with one or two sureties in the like amount;
- ii. After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- iii. Applicant shall attend the trial Court on the first Monday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Monday of the said month falls on a holiday and / or non Court working day, the Applicant shall mark presence on the next working day;
- iv. 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;
- v. Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;

- vi.** Applicant shall not influence any of the witnesses or tamper with the evidence in any manner; Applicant shall not make any attempts to re-associate with the prosecutrix in any manner either through a device or in-person until the present case is disposed of;
- vii.** 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;
- viii.** In case of any infraction of the above conditions and / or two consecutive defaults in marking his attendance before the trial Court, it shall attract the provisions of Section 439(2) of Cr.PC. i.e. for cancellation of bail.

18. It is clarified that the above observations in this order are limited for the purpose of granting bail only and I have not made any observations on the merits of the case and the trial shall be adjudicated on the basis of the evidence led by parties uninfluenced by the present order and strictly in accordance with law.

19. This Court acknowledges the assistance rendered to the Court by the learned appointed Advocate Ms. Sharma to represent and espouse the cause of the prosecutrix i.e. Respondent No.2. Her fees shall be released by the Registry of this Court within a period of one

week from the date of presentation of a server copy of this order on requisite compliance.

20. Bail Application is allowed and disposed.

Amberkar

[MILIND N. JADHAV, J.]

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