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

CRIMINAL BAIL APPLICATION NO. 1101 OF 2024

Sajid Mehendi Hasan Khan

.. Applicant

Versus

The State of Maharashtra & Anr.

.. Respondents

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- Mr. Sajid Khan i./by Ms. Feroza Shaikh, Advocate for Applicant.
 - Ms. Shilpa Gajare-Dhumal, APP for Respondent – State.
 - Mr. Kartik Rajasekhar, appointed Advocate for Respondent No.2.
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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 27, 2025.

P.C.:

1. Heard Mr. Khan, learned Advocate for Applicant; Ms. Gajare - Dhumal, learned APP for Respondent No.1– State and Mr. Rajasekhar, learned Advocate for Respondent No.2.

2. This is an Application under Section 439 of the Code of Criminal Procedure, 1973 seeking Regular Bail in connection with C.R. No.1589 of 2020 registered with Malwani Police Station for offences under Sections 363, 366-A, 368, 376, 376(2)(n) and 376(3) of the Indian Penal Code, 1860 and Section 4, 5(l) and 6 of the Protection of Children from Sexual Offences Act, 2012 (for short “**POCSO Act**”). Applicant is incarcerated since 10.01.2021 i.e. 4 years 2 months and 18 days.

3. Briefly stated on 19.12.2020, First Informant – mother of prosecutrix lodged FIR against unknown person under Section 363 of IPC as her daughter aged 14 years went missing since the night of 18.12.2020. On 22.12.2020 younger daughter of first informant received a phone call from an unknown woman who disclosed the location of prosecutrix and on 23.12.2020 first informant gave the said information received to the police and they reached the said location. Prosecutrix was intercepted but she informed that she and Applicant were friends and their relationship bloomed into a love affair. However prosecutrix recorded her statement before the police that Applicant established forcefully physical relations with her on several occasions. She stated that she was therefore taken by her mother to reside with her elder sister but there she established contact with Applicant through a stranger's mobile phone and they decided to meet at Mankhurd Railway Station and she left her sister's residence without informing any person in the house on the night of 18.12.2020.

4. Prosecutrix was 14 years old and Applicant was 23 years old at the time of alleged incident/s. Tenure of incident/s is alleged to be from February 2020 to December 2020. FIR is filed on 19.12.2020. Applicant is incarcerated for 4 years 2 months and 18 days pending trial.

5. Mr. Khan, learned Advocate for Applicant would submit that Applicant has been falsely implicated in the present crime as first informant did not approve of his relationship with the prosecutrix. He would submit that perusal of record would show that relationship between prosecutrix and Applicant was known to her entire family and it was consensual in nature. He has drawn my attention to history narrated by the prosecutrix at the time of her Medico – Legal examination on page No.47 of the Application wherein she has categorically confirmed that she was in a consensual relationship with Applicant but since her mother did not approve of their relationship and marriage to Applicant she left her home. He would submit that in the said statement prosecutrix has mentioned that both had consensual physical relations on several occasions at her own residence. Hence he would submit that in such facts wherein relationship between Applicant and prosecutrix was admitted to be consensual in nature, Applicant's prolonged incarceration is unwarranted pending trial despite the rigours of presumption under Section 29 of the POCSO Act.

5.1. He would submit that investigation is completed and charge-sheet has been filed however trial has not yet commenced. Charge has been framed only on 03.03.2025. He would submit that prosecution has cited a probable 20 witnesses in the charge-sheet to be examined during trial and hence possibility of the trial being completed in the near foreseeable future is bleak. He would submit that this Court may

therefore consider the facet of long incarceration of Applicant of 4 years 2 months and 18 days for grant of bail and urge the Court to allow the Bail Application.

6. Ms. Gajare – Dhumal, learned APP for State has vehemently opposed the Bail Application and would submit that there is sufficient material on record to corroborate the prosecution case about indictment of Applicant in the crime. She would persuade me to consider the age of prosecutrix since she was a minor at the time of the incidents and therefore submit that her consent, if any, be irrelevant. She would submit that prosecutrix was 14 years old at the time of the incidents and would submit that considering her age there is every likelihood of Applicant having exploited her vulnerability in the facts of the present case and lured her to elope with him and established physical relationship leading to her pregnancy. Hence she would submit that the Application be rejected despite the facet of long incarceration.

7. Mr. Rajasekhar, learned Advocate appointed to espouse the cause of Respondent No.2 would adopt and support the submissions of the learned APP and would additionally submit that in cases where accused is indicted under the provisions of POCSO Act, Courts should be cautious while granting bail to offenders considering the intent of the legislation behind enactment of the POCSO Act which is to provide

protection to children like the prosecutrix herein who could not understand the repercussions of her actions owing to her tender age. He would therefore urge the Court to reject the Bail Application considering his above submission and allow the trial to be completed.

8. With the able assistance of the learned Advocates at the bar I have perused the record of the case. In the present case it is *prima facie* seen that admittedly prosecutrix and Applicant were both well known to each other and infact prosecutrix's own recorded statement endorses that they both were in a consensual physical relationship with each other due to a love relationship between them.

9. In so far as offences punishable under Sections 4, 5, and 6 of POCSO Act (special law) are concerned, it may be stated that the provisions of this law are, though, stringent in nature, however it would not deter the Court to grant or refuse bail in order to secure the ends of justice more so when the trial has not commenced despite a long hiatus and the case has been pending trial before the trial Court for close to 5 years.

10. Assistance is drawn from the decision of the Supreme Court in the case of *S. Varadarajan v. State of Madras*¹ 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

¹ AIR 1965 942

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 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."

11. Though the above referred case was decided well before the POCSO Act was enacted, this Court is well conscious of the presumption ingrained in Section 29 of the said Act and that argument on prosecutrix's consent is irrelevant but *prima facie* if the statements of prosecutrix recorded are read, it is clearly borne out that she has been consenting to the actions which is gathered from the record of the case.

12. In the facts of the present case, attention is drawn to the decision of this Court (Coram: Mridula Bhatkar, J.) in the case of ***Sunil Mahadev Patil Vs. The State of Maharashtra***² 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 the young offenders in the Indian Society in general. Court in paragraph Nos.8, 9,11 and 12 has laid down certain principles which I

² Bail Application No. 1036 of 2015, decided on 03.08.2015.

find it apt to be reproduced hereinbelow for consideration of bail in such Applications. 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 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. Next the decision of this Court (Coram: Sandeep K. Shinde, J.) in the case of ***Anirudha Radheshyam Yadav Vs. The State of Maharashtra***³ is also relevant in the facts of the present case. Relevant paragraph No.4 is reproduced below for reference and reads thus:-

"4.The conduct of the victim is indicative of the fact that she had left the home of her parents by her own will and that she had surrendered to the physical desires of the applicant out of her love and affection for him. It is not the case of the prosecution that the applicant had promised to marry her. Additionally, it is also not a case where under the misconception of the fact, she had served herself to the desire of the applicant for physical relations. No doubt, that the applicant, under the preview of POCSO Act, is a minor, however, the facts of the present case indicate that she had sufficient knowledge and capacity to know full import of what she was doing and had only thereafter voluntarily joined the complainant (applicant)."

³ Criminal Bail Application No.2632 of 2019 decided on 09.01.2020

14. There is no doubt that presumption under Section 29 exists but it is not an absolute presumption. This Court is of the opinion that presumption would come into play only when prosecution is able to bring on record facts that would *prima facie* form the foundation for the presumption. Otherwise, all that the prosecution would be required to do is to raise some allegation against the accused person and claim that the case projected by it is true. Court will have to be on guard to see that application of presumption without adverting to the essential facts shall not lead to injustice since we are at a *prima facie* stage and trial has not even begun. 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 Kerela Represented through the Public Prosecutor***⁴ in a similar case where age of prosecutrix as below 18 years and a similar argument was made.

The relevant paragraph Nos.9 to 11 are reproduced below:-

“9. Mere delay in reporting the matter to the authorities concerned, especially sexual assault on a minor girl, is immaterial and it would not be fatal to the prosecution case. However, in the instant case, it is not the delay alone that is significant. The significant fact is that the complaint was given to the authorities concerned only two weeks after the mother received the lawyer notice from the petitioner claiming a huge amount as professional fees. This raises suspicion on the prosecution case against the petitioner. When the victim had disclosed the matter to her mother in July, 2018, one would have expected the mother to report the matter to the authorities concerned much earlier than 22.09.2018. The fact that she reported the matter only after receiving a lawyer notice from the petitioner assumes significance.

4 2019 SCC OnLine 783.

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 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.”

15. In so far as present case is concerned, it is prima facie borne out from the record that prosecutrix was 14 years old whereas Applicant was 23 years old, that her family was well aware about her

relationship with Applicant, that her own endorsement is that she was in love with the Applicant and therefore she herself alone eloped from her own house without the consent of her mother, that absence of any force on her are facts required to be considered. Facts of the present case indicate that prosecutrix had sufficient knowledge and capacity to know full import of what she was doing and had only thereafter voluntarily joined the Applicant. Considering the overall facts of the case *vis-a-vis* the above judicial pronouncements and the facet of long incarceration of Applicant pending trial as also no possibility of the trial commencing / concluding in the near foreseeable future, this Court is of the opinion that Applicant has made out a case for grant of bail.

16. Hence, Bail Application is allowed subject to the following terms and 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) Applicant is permitted to furnish provisional cash bail of Rs.25,000/- for his release immediately and file undertaking that he will provide one or two sureties in the like amount of Rs.25,000/- within a period of four weeks after his release which shall be accepted by the

Trial Court. Applicant shall provide sureties as directed;

- (iii) 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;
- (iv) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (v) 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;
- (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 make any attempts to re-associate with the prosecutrix in any manner wither through a device or in-person and shall not reside in the jurisdiction of the Police Station wherein the prosecutrix is residing till the trial is concluded;

(viii) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;

(ix) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner; and

(x) 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.

17. 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.

18. Fees of the learned Advocate Mr. Rajasekhar, learned Advocate appointed through Legal Aid to represent and espouse the cause of Respondent No.2 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 compliance.

19. Bail Application No.1101 of 2024 is allowed and disposed.

[MILIND N. JADHAV, J.]

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