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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 1119 OF 2024

Dilip Shrimukeshwar Sharma .. Applicant
Versus
The State of Maharashtra and Anr. .. Respondent

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- Ms. Shaila Zende a/w Mr. Dilip Sharma, Advocates for Applicant.
- Ms. Mahalakshmi Ganapathy, APP for Respondent – State.
- Mr. Tushar Kochale (appointed) Advocate a/w Mr. Ajay Jankar and Ms. Revati Alhat, Advocates for Respondent No. 2.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 28, 2025.

P.C.:

1. This is an Application under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 seeking Regular Bail in connection with C.R.No. 412 of 2022 registered with Malvani Police Station for offences punishable under Sections 354 and 509 of the Indian Penal Code, 1860 read with Sections 8 and 12 of the Protection of Children against Sexual Offences Act, 2012 (for short 'POCSO Act'). Applicant is arrested on 20.04.2022 and he is incarcerated for 3 years 8 days pending trial.

2. Applicant is the step-father of victim. First – Informant is mother of victim. She is a beggar by profession. It is prosecution case that in first week of April, 2022 at about 1:00 p.m. in the afternoon when First – Informant returned home she saw the Applicant – her husband touching her daughter inappropriately as she was asleep. Then on 19.04.2022 when First Informant was returning home from work a neighbour called her and informed her that she saw Applicant touching the victim inappropriately. These two are the allegations. Hence the present FIR was registered.

3. Ms. Zende, learned appointed Advocate representing and espousing the cause of Applicant would submit that Applicant is step father of victim and he is falsely implicated / framed in the present case as he did not like his wife – First Informant taking their 17 year old daughter alongwith her for begging and he scolded both of them. She would submit that prosecution has not recorded victim's brother's statement for reasons best known to them who is also part of their family.

3.1. She would submit that Applicant is an auto-rickshaw driver, has no criminal antecedents. She would submit that Applicant is arrested on 20.04.2022 and is incarcerated for 3 years 8 days pending trial, investigation is completed, chargesheet is filed, charge has not been framed till date, commencement and completion of the trial in the near foreseeable future is doubtful. Hence she would urge the Court to allow the present Application.

4. Ms. Ganapathy, learned APP for Respondent No. 1 – State and Mr. Kochale, learned appointed Advocate for Respondent No. 2

both would vehemently oppose the submission made by Ms. Zende. They would persuade the Court to consider age of victim who was 17 years and 6 months old minor at the time of incident. They would submit that Applicant not once but on two occasions committed an overt act of touching the victim inappropriately and outraging her modesty. They would submit that Applicant took undue advantage of First – Informant's absence and committed the said act. They would submit that there is an eye witness to the crime in question which is the neighbour. They would submit that if Applicant is released on bail, possibility of Applicant re-offending himself, absconding, influencing the victim, First – Informant and witnesses cannot be ruled out. Hence they would urge the Court to reject the Application.

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

6. It is *prima facie* seen that victim's younger brother's statement is not recorded as he was present at home during both the alleged incidents. Case of First – Informant is that on two occasions Applicant committed the act of touching the victim inappropriately in her absence. However what intrigues the Court is whether further incarceration of Applicant is required or justified overriding his right to liberty and speedy trial? The only reason which impels me to consider present Application is long incarceration of Applicant in prison which is for the past 3 years 8 days pending trial. Case of prosecution is based on circumstantial evidence. Needless to state that complicity of the Applicant can be proved in trial.

7. 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.

8. The prosecution side namely the learned appointed Advocate has persuaded the Court to consider the presumption under Section 29 of the POCSO Act to contend that unless the contrary is proved, the said presumption will have to be accepted by the Court even at the bail stage.

9. This Court is not oblivious of the fact that there is a statutory presumption under Section 29 of the POCSO Act. However it does not mean that the prosecution version has to be accepted as gospel truth in every case. Presumption does not mean that the Court cannot take into consideration *prima facie* facts of the particular case which are evident from the face of record.

10. 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 paragraphs are reproduced thus:-

> *"**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.*
>
> ***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*

1 2019 SCC OnLine 783.

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 adverting 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."

11. Attention is drawn to the decision of High Court of Kerala in the case of ***XXXXXX Vs. State of Kerala Represented through the Public Prosecutor and Ors***[2]. The relevant paragraphs are reproduced thus:-

*"**19**. Before parting with the judgment, we will also deal with the appellant's contention based on Section 29 of the POCSO Act. Section 29 is extracted herein below:*

> *"29. Presumption as to certain offences.— Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has*

2 CRA(V) No. 19 of 2020 decided on 24.02.2022.

committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

20. *It is the submission of the learned counsel for the appellant based on Section 29 of the Act that reverse burden is cast on the accused to prove that they have not committed the offences under Sections 3, 5, 7 and 9 of the Act, the only precondition being that the accused is prosecuted for committing or abetting or attempting to commit any of the offences above referred. According to the learned counsel, the accused persons herein failed to discharge the reverse burden and therefore, they are liable to be convicted for the offences alleged. We cannot accept the above contention of the learned counsel. The argument, if accepted on its face value, is pregnant with the peril of accepting every prosecution charge, where offences under Sections 3, 5, 7 and 9 of the Act are canvassed, irrespective of its merits. Section 29 only creates an exception to the ordinary rule of innocence available to the accused in a criminal trial and puts the onus on the accused to rebut the presumption and establish his innocence. However, this presumption will operate only if the foundation to the prosecution case is laid by leading legally admissible evidence.* ***The statutory presumption under Section 29 cannot be understood to mean that in every case when a person is prosecuted for the specified offences, the prosecution version should be taken as gospel truth. The presumption will not mitigate the primary duty of the prosecution to establish the foundational facts constituting the offence, which duty is static on the shoulders of the prosecution. Once the same is done, the burden shifts to the accused by virtue of Section 29 of the Act to prove that he had not committed or abetted or attempted to commit the offence, as the case may be.*** *Our conclusions afore referred are in accord with the following judgments of the Hon'ble Supreme Court, where presumption under various statutes have been analysed and interpreted: (1)* ***K.Veeraswami v. Union of India*** *[(1991) 3 SCC 655], (2)* ***State of Maharashtra v. Wasudeo Ramachandra Kaidalwar*** *[(1981) 3 SCC 199], (3)* ***Noor Aga v. State of Punjab*** *[(2008) 16 SCC 417], (4)* ***Kumar Exports v. Sharma Carpets*** *[(2009) 2 SCC 513], (5)* ***Abdul Rashid Ibrahim Mansuri v. State of Gujarat*** *[(2000) 2 SCC 513], (6)* ***Chandran & Others v. State of Kerala and Others*** *[AIR 2011 SC 1594], (7)* ***Naresh Kumar v. State of Himachal Pradesh*** *[AIR 2017 SC 3859] and (8)* ***Gangadhar @ Gangaram v. State of Madhya Pradesh*** *[AIR 2020 SC 3656]. These decisions were taken note of and discussed by a learned Single Judge of this Court in* ***Justin @ Renjith & Another v. Union of India*** *[ILR 2020 (4) Ker 679]. To the same effect is the judgment of another learned Single Judge of this Court in* ***David v. State of Kerala*** *[2020 (4) KHC 717 : 2020 Crl.LJ 3995]. We, therefore, reject the said contention of the appellant on the legal premise. On factual premise also, we find that the accused persons have rebutted the presumption*

> *under Section 29 by virtue of the evidence and circumstances already discussed, which were given due weightage in confirming the impugned judgment.*

12. In so far as offences punishable under Sections 8 and 12 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 more than 3 years.

13. Applicant in present case has been in custody for 3 years 8 days. There is no possibility of the trial commencing in the near future. Detaining an under-trial prisoner for such an extended period further violates his fundamental right to speedy trial flowing from Article 21 of the Constitution. At this juncture I deem it appropriate to list certain observations of the Supreme Court shedding light on concerns underlying the "Right to speedy trial" from the point of view of an accused in custody whose liberty is affected. In the case of ***Abdul Rehman Antulay & Ors. Vs R.S. Nayak & Anr.***[3] the Supreme Court held as under:-

> *"86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:*

3 1992 (1) SCC 225

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the societal interest also, does not make it any-the-less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to Speedy Trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the Right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

(4) – (11) -------x-------" *(emphasis supplied)*

14. The Supreme Court has also held in a series of judgements and orders that in situations where the under-trial-prisoner / accused persons have suffered incarceration rather long incarceration for a considerable period of time and there is no possibility of the trial being completed within the foreseeable future, Constitutional Courts can exercise power to release the accused under-trial on bail, as bail is the rule and jail is the exception.

15. Considering the overall facts of the case *vis-a-vis* the above judicial pronouncements, absence of criminal antecedents and the facet of long incarceration of Applicant for 3 years 8 days pending trial, investigation is completed, chargesheet is filed, charge not been framed till date as also no possibility of the trial commencing and concluding in the near foreseeable future, I am of the opinion that Applicant can be released on 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.10,000/- 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 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;

(vi) Applicant shall not make any attempts to re-associate with the victim in any manner either through a device or in-person and shall not reside in the jurisdiction of the Police Station wherein the victim is residing till the trial is concluded;

(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.

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 Advocates Ms. Zende, learned Advocate appointed through Legal Aid to represent and espouse the cause of Applicant and Mr. Kochale, 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 is allowed and disposed.

[MILIND N. JADHAV, J.]

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Digitally signed by AJAY TRAMBAK UGALMUGALE Date: 2025.04.30 11:15:38 +0530