

HARSHADA H. SAWANT
(P.A.)

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

BAIL APPLICATION NO.1157 OF 2024

Dilshad Nawab Khan

.. Applicant

Versus

The State of Maharashtra and Ors.

.. Respondents

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- Mr. B. L. Jagtap and Ms. Anushka Jagtap, Advocates i/by Mr. Ashish Jagtap for Applicant.
- Mr. Balraj B. Kulkarni, APP for Respondent Nos.1 and 2.
- Mr. Niranjana Kandade, Advocate for Respondent No.3 appointed through legal aid.

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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 18, 2025

P.C.:

1. Heard Mr. Jagtap, learned Advocate for Applicant; Mr. Kulkarni, learned APP for Respondent Nos.1 and 2 and Mr. Kandade, learned Advocate for Respondent No.3 appointed through legal aid.

2. This is an Application under Section 439 of Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') seeking Bail in connection with C.R. No.904 of 2023 registered with Oshiwara Police Station for offences punishable under Sections 376, 376(2)(f), 376(2)(n) of the Indian Penal Code, 1860 (for short 'IPC') and Sections 4, 6, 8, 10 and 12 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act').

3. The First Informant – Complainant is mother of the victim.

Applicant – victim is the father of the victim. Complaint is filed by the First Informant, *inter alia*, stating that the victim was exploited by her father – Applicant since she was 8 years old as informed by her to the Complainant for the first time before filing the present First Information Report (for short ‘FIR’) on 04.10.2023. The tenure and occurrence of incidents in question are from 04.10.2019 to 02.10.2023.

4. Perusal of the FIR shows that in a singular sentence the First Informant has stated that victim was molested by Applicant from the year 2019. No details whatsoever are stated. That apart, two incidents have been alleged to have happened on 01.10.2023 and 02.10.2023 leading to filing of the FIR in question on 04.10.2023.

5. The victim’s statements are recorded on 04.10.2023 and 07.10.2023 and both statements are appended at page Nos.43 and 45 of the Application. They are detailed statements. What is stated in the victims’ statements is in complete contradiction with the contents of the FIR. Answers given by the victim to various questions therein *prima facie* show substantial contradiction on the face on record. The second statement recorded on 07.10.2023 also shows a similar pattern of *prima facie* contradiction with respect to the alleged incident in question and details of the incident which are stated therein.

6. Mr. Jagtap would draw my attention to page No.114 of the

Application and would submit that First Informant filed FIR against two accused persons for outraging her modesty under Sections 376(2)(n) and 376D of the IPC on 28.04.2023 and the present complaint is nothing but a fall out of the said FIR. He would persuade me to consider the apparent dichotomy in the statements of the victim and arrive at an appropriate conclusion on the basis of *prima facie* contradictions in the same. To consider the submissions, I called upon the learned APP to place on record statement recorded under Section 164 of the Cr.P.C. of the victim and on reading the same what is seen therefrom are further contradictions and improvements than what is submitted either in the FIR or in the victim's statements recorded on 04.10.2023 and 07.10.2023.

7. The acts which are stated in the statement recorded under Section 164 of the Cr.P.C. are *prima facie* not even stated or formed the FIR, as also the two statements of the victim which are recorded. Though there is a statutory presumption under Section 29 of the POCSO Act, it does not mean that 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 on the face of record.

8. What Court finds in the present case is that it is faced with four different statements, 3 of the victim – prosecutrix and one of her

mother – First Informant and there are patent absurdities and inherent infirmities rather improbabilities in the said statements. 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 V.S. V/s State of Kerela 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

¹ 2019 SCC OnLine 783.

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."

Considering the above observations and the aforesaid dichotomy noticed in the four statements, the present case is considered.

9. Mr. Kandade, learned appointed Advocate for the prosecutrix – victim has persuaded me to see the medical report which is appended at page No.56 of the Application. He has taken me through the description and findings stated in the said report. What is

observed in the said report by the victim is that there have been multiple episodes of physical assault and sexual abuse committed with her. What intrigues the Court in the present case is the tenure of the alleged incident from 2019 to 2023. *Prima facie* on the basis of the Prosecution material on record and on due consideration of the same as delineated hereinabove Applicant has made out a case for bail. Applicant is 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.

10. This Court appreciates the assistance rendered by Mr. Kandade, learned appointed Advocate for Respondent No.3. Fees of the learned Advocate Mr. Kandade appointed through legal aid to

represent and espouse the cause of Respondent No.3 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.

11. 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.

12. Bail Application No.1157 of 2024 is allowed and disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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