

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 1938 OF 2024

Asif Hamid Khan

.. Applicant

Versus

The State of Maharashtra and Anr.

.. Respondents

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- Mr. Charanjit Penthalia a/w Ms. Nishita Khairmode, Advocates for Applicant.
 - Mr. Balraj B. Kulkarni, APP for Respondent No. 1 – State.
 - Ms. Aafreen S. Shaikh a/w Mr. Shezaad A. Shaikh, Advocates for Respondent No. 2

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CORAM : MILIND N. JADHAV, J.
DATE : APRIL 01, 2025

P.C.:

1. Heard Mr. Penthalia alongwith Ms. Khairmode, learned Advocates for Applicant, Mr. Kulkarni, learned APP for Respondent No.1 and Ms. Shaikh, learned Advocate for Respondent No. 2.

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. 319/2022 dated 07.07.2022 registered with Kalyan Taluka Police Station for offences punishable under Sections 376(3)(F), 354, 506 of Indian Penal Code, 1860 and Sections 4, 8, and 10 of Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO'). Applicant herein is arrested and is incarcerated since 08.07.2022 pending trial.

3. Statement of prosecutrix is recorded on 07.07.2022, it is

at page No.19. She has stated that on 03.07.2022, she had come to stay with her mother and her step father and that she was molested on the night of 05.07.2022. Thereafter on 06.07.2022, she was alone at home throughout the day and when her step father went to sleep in the afternoon, she along with her mother at about 02:30 p.m. proceeded to go to the Police Station to lodge the Complaint. She has also stated that her mother informed her that her step father would harm her younger sister also. Based on this complaint of the prosecutrix having been molested by Applicant, the Applicant is arrested on 08.07.2022 and is in jail since then pending trial. Investigation is completed and chargesheet is filed.

4. Mr. Penthalia, learned Advocate for Applicant would submit that the Applicant is falsely implicated in the present crime by the prosecutrix and her mother due to their ulterior motives which is evident from the investigation carried out by the prosecution itself. He would submit that no such incident of molestation whatsoever has occurred, rather it cannot be assumed to have occurred because the prosecutrix has stated that she was sleeping along with her father and mother next to her on the night of 05.07.2022. He would submit that even this version of prosecutrix is *prima facie* false on the face of record. He would submit that the present FIR is a counterblast against a precursor incident which took place on 27.04.2022 i.e. two and half

months prior to the present alleged incident. He would submit that Applicant along with his two accomplices had assaulted the biological father of the prosecutrix with an iron rod and injured him with whom she was residing alongwith her younger sister. The FIR copy is appended at page No. 139. In that FIR, the biological father of the prosecutrix has stated that he and his wife i.e. the mother of prosecutrix along with the prosecutrix and her younger sister are both residing at Room No.1 Mourya Nagar Titwala (East) and his wife is working along with the Applicant in his bread manufacturing – Bakery business and on that pretext he visited his house at 02:30 a.m. on 27.04.2022 and abused the mother of prosecutrix after which a scuffle broke out between them and Applicant assaulted him with an iron rod. This FIR is lodged on 27.04.2022. He would submit that the present FIR is lodged on 07.07.2022 by the prosecutrix as a counterblast in collusion with her mother.

4.1. He would draw my attention to page No.38 of the Application which is the statement of the mother of prosecutrix wherein she has stated that for the past 6 months prior to 07.06.2022 the prosecutrix has been staying with her and the Applicant who is her second husband. This is also endorsed by the prosecutrix in her statement. However both these statements are contradictory to the FIR filed by the biological father of the prosecutrix on 27.04.2022 rather

the facts stated in both the FIRs are completely contradictory to each other.

4.2. Mr. Penthalia then persuaded me to consider three documents appended to the chargesheet to consider that the case of prosecutrix and her mother is utterly false on the face of record. First document is appended at page No.128, it is deed of divorce dated 08.10.2018 between the first husband and mother of prosecutrix. In that deed of divorce it is categorically stated that they have mutually agreed that both daughters (including prosecutrix) shall reside with the first husband of the mother of prosecutrix. The second document is a joint declaration dated 28.03.2018 appended at page No.132 between the mother of prosecutrix and Applicant stating that they have started living together since February 2018. The third document is the FIR dated 27.04.2022 which states that the prosecutrix, her mother and her sister are living with the first husband. Relying on the above documents which are investigated by the prosecution, he would submit that a false case is foisted on the Applicant due to the precursor incident in question.

4.3. He would submit that none of the facts correlate with each other neither are they coherent. He would submit that as seen from the statement of the mother of prosecutrix when they proceeded to lodge the Complaint from Titwala at 02:30 p.m. on 06.07.2022 they

took more than two and half hours to reach Badlapur Police Station. Further there is a stoic silence about the younger sister of the prosecutrix as to where she is residing because according to the deed of divorce and the FIR filed by the biological father of prosecutrix, they all are residing with him. He would therefore submit that the entire case of prosecution is based on the word of the prosecutrix and nothing more. In that regard he would also persuade me to consider the medical report of the prosecutrix appended at page No.60 which is *prima facie* inconclusive as stated therein. Hence he would urge the Court to grant bail to Applicant pending trial.

5. Mr. Kulkarni, learned APP for Respondent No.1 – State has countered the submissions made by Mr. Penthalia by drawing attention of the Court to the gravity of the offence. He would submit that the offence is serious in nature and holds great weight. He would submit that Applicant is the step father of the prosecutrix and he has committed a heinous crime against his own minor step daughter with whom he was living in the same house since the time when she was a child. He would submit that there are chances of Applicant going back to stay with the family and thereby causing harm, pressurising the prosecutrix or tampering with evidence if he is let out on bail. Hence he would persuade the Court to reject the Bail Application.

6. Ms. Shaikh, learned Advocate for Respondent No.2 would

adopt the submissions made by Mr. Kulkarni and additionally submit that Applicant had an ill intention towards the prosecutrix which resulted in the incident. She would submit that Applicant threatened her that he will cause harm to her younger sister if she would disclose the incident to anyone. Hence she would persuade the Court to reject the Application.

7. I have heard the learned advocates at the bar and with their able assistance perused the record of the case.

8. From a *prima facie* consideration of material placed on record it is seen that the case of prosecution is solely based upon the statement of prosecutrix. *Prima facie* the medical evidence at page No.60 of the Application being inconclusive does not support the prosecution case either.

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 2 years 8 months.

10. In the case of *Emperor vs H.L. Hutchinson*¹ the Allahabad

¹ AIR 1931 ALL 356

High Court, as far back as in the year 1931 held that power of granting bail conferred on High Court is entirely unfettered by any conditions. It held that legislature has given the High Court and the Court of Session discretion unfettered by any limitation other than that which controls all discretionary powers vested in a Judge, viz. that the discretion must be exercised judiciously. The Court has given primacy to the fact that accused person if granted bail will be in a much better position to defend himself. In this very case, it was delineated that grant of Bail is the Rule and refusal is an exception. This was in the famous Meerut Conspiracy case. Justice Mukherjee writing for the Bench in paragraph No.9 held as under:-

“9. Speaking for myself, I think it very unwise to make an attempt to lay down any particular rules for the guidance of the High Court, having regard to the fact that the legislature itself left the discretion of the Court entirely unfettered. The reason for this action on the part of the legislature is not far to seek. The High Court might be safely trusted in this matter and it goes without saying that it would act in the best interests of justice whether it decides in favour of the prosecution or the defence. The variety of cases that may arise from time to time cannot be safely classified and it will be dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes.”

11. 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***² 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.

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.”

12. In so far as the present case is concerned the material on record namely the FIR filed by the biological father of prosecutrix two and half months prior to the present incident narrates a completely different set of facts. The FIR reveals that prosecutrix, her mother and her younger sister were staying with the biological father of prosecutrix. This is contrary to the statement of the prosecutrix and her mother in the FIR. Two different set of facts create a doubt on the prosecution case. Hence the presumption gets weakened. On reading the various statements recorded by the prosecution, it appears that

there is *prima facie* dispute even about the rights of the parties. There is a clear discrepancy observed from the record and the statements even about the house / residence of the prosecutrix. *Prima facie* the Court is not satisfied about the facts that would form the foundation for the presumption of the statement of prosecutrix. That apart, incarceration for 2 years and 8 months of the Applicant pending trial deserves to be considered.

13. On an overall consideration of the peculiar facts and the documents placed on record in the chargesheet *prima facie* dichotomy clearly exists as delineated herein above. Hence the Applicant's case for bail deserves to be considered.

14. Considering the above observations, the Bail Application is allowed on 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 leave the State of Maharashtra without prior permission of the Trial Court;

(viii) Applicant shall not influence with 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. Needless to say, violation of any of the aforesaid conditions would make the Applicants liable to face proceedings for cancellation of bail. It is also clarified that the observation made in this order are limited to the question of grant of bail to the Applicants in the present Application and that the Trial Court shall proceed further without being influenced by the observations made in this order.

16. Fees be paid by the High Court Legal Aid Services Authority of this Court to Ms. Shaikh, learned appointed Advocate for Respondent No 2 in the above Bail Application as per rules.

17. Bail Application is allowed and disposed.

H. H. SAWANT

[MILIND N. JADHAV, J]