

Amberkar

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

BAIL APPLICATION NO. 1961 OF 2024

Arif Femuddin Shaikh

.. Applicant

Versus

State of Maharashtra

.. Respondent

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- Mr. Raviraj Paramane (Advocate appointed through legal aid and appearing through Video Conferencing) a/w. Mr. Deva H. Shinde, Advocate for Applicant
- Mr. Balraj Kulkarni, APP for Respondent – State.
- Ms. Aafreen Shaikh, Advocate for Respondent No.2 – Victim.
- Mr. Rajesh Tanwade, ASI, Kandivali Police Station is present

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CORAM : MILIND N. JADHAV, J.

DATE : FEBRUARY 17, 2025

P. C.:

1. This is an Application under Section 439 of CrPC¹ seeking Regular Bail in connection with C.R. No. 61/2019 registered with Kandivali Police Station, Mumbai for offences punishable under Sections 363, 328, 376(D) and 34 of IPC² along with Sections 4, 6, 8, 10 and 12 of POCSO³.

2. At the outset Ms. Shaikh points out the fact that though this Court has appointed her to represent and espouse the cause of victim by order dated 05.02.2025, in view of the fact that Application was received through jail directly by Court and amendment to that

1 Code of Criminal Procedure, 1973

2 Indian Penal Code, 1860

3 Protection of Children from Sexual offences Act, 2012

effect has not been granted and carried out, the Legal Aid Department has refused to give her appointment letter to represent and espouse cause of victim. This fact was not brought to my notice on 05.02.2025 when the matter was first argued before me by Mr. Kulkarni and Mr. Paramane. Be that as it may, Ms. Shaikh has been appointed on 05.02.2025 and thereafter she has taken cognizance of the orders passed by this Court and interacted and taken instructions from the victim pursuant to directions contained in various orders passed by this Court. She shall be entitled for her fees for the work done by her in the present matter. Today, I have heard Ms. Shaikh fully. I have permitted Advocate for Applicant to immediately amend the Application which has been received from jail. The Application is amended in my presence. Amendment is permitted to be carried out in the Court and is endorsed by the Court itself. Legal Aid Department shall ensure that fees of Mr. Paramane and Ms. Shaikh, both Advocates appointed by Court through legal aid shall be duly paid for the work done by them and assistance rendered by both of them to the Court for disposing of the present Application.

3. Since this Application was received from jail, Mr. Raviraj Paramane was appointed to espouse the cause of Applicant by the High Court Legal Aid Committee in pursuance of order dated 03.05.2024. Ms. Aafreen Shaikh is appointed to espouse the cause of

the Respondent No.2 - prosecutrix by the High Court Legal Aid Committee in pursuance of order dated 05.02.2025 since the matter pertains to POCSO. Learned APP was, in the meanwhile, directed to submit a copy of the chargesheet. He tendered the chargesheet across the bar on the last date of hearing, the same was taken on record. Bail Application was heard on 12.02.2025 and today. I have heard the arguments advanced by the learned Advocates at the bar and with their able assistance perused the handwritten Bail Application and the chargesheet.

4. Prosecution case in brief is that the Applicant forced himself on the prosecutrix when they both along with a friend were on an excursion for 4 days. The case of prosecution, which is primarily based on the statement of the victim in the FIR⁴ also *inter alia* alleges that Applicant and his friend forcibly made the prosecutrix consume alcohol on the third day of their excursion to commit the alleged act. The age of the Applicant was 19 years and that of prosecutrix was 14 years old at the time of the alleged incident. Applicant is in custody since 28.01.2019.

5. Mr. Paramane, learned Advocate for the Applicant would primarily address me on the ground of long incarceration of the Applicant as also critical discrepancies in the statements of the victim

4 First Information Report under Section 154 of CrPC

which are recorded. He would point out that Applicant has been incarcerated for more than six years and as of today only 3 out of the total 14 witnesses named in the chargesheet have been examined. He would state that the pace at which the trial is moving would make its completion in the foreseeable future highly unlikely. Apart from the ground of long incarceration, he would submit that Applicant and prosecutrix, both teenagers knew each other since long as they lived in the same area and were friends and had common friends. He would submit that they both had in the past engaged in consensual physical relationship as they were in a love relationship. He would submit that as opposed to the allegation of victim of being deceived to accompany the Applicant under the guise of attending the birthday party, statement of the prosecutrix in the FIR, along with statement of witness No.8 appended at page No. 27 of the charge sheet makes it amply clear that she voluntarily accompanied him and his friends and enjoyed herself throughout the period of excursion until the alleged incident and thus would harp on the point of the said dichotomy in the FIR to submit that the parties were indeed in a consensual relationship and the element of force alleged is *prima facie* incorrect. He would vehemently submit that the prosecutrix went for the excursion without intimating her parents or anybody in the house and on her own returned back after spending 4 days and 4 nights and then lodged FIR.

The FIR was lodged by her mother. He would conclude his submissions by stating that guilt of Applicant would be determined in trial in due course but subjecting him to any further incarceration in the above facts is detrimental, especially due to his long incarceration.

6. Both Mr. Kulkarni, learned APP and Ms. Shaikh, learned appointed Advocate for Respondent No.2 would submit that the age of the prosecutrix (Respondent No.2) was merely 14 years at the time of the incident and Applicant being major took advantage of her vulnerability, enticed and induced her to accompany them (him) on 24.01.2019 and lured her away. Mr. Kulkarni would persuade me to consider the age of the prosecutrix and submit that her consent was immaterial even if she had accompanied the Applicant. He would submit that if released on bail, there is every likelihood of Applicant re-offending and tampering with evidence. On the length of trial he would fairly submit that it is pending.

7. Ms. Shaikh would persuade me to consider the decision of the Supreme Court in the case of *State of Jharkhand Vs. Anil Ganju*⁵ and *X. Vs. State of Rajasthan and Anr.*⁶ to argue that since the gravity of crime is heinous in nature, trial is underway, Applicant is disentitled for bail in such circumstances. She would at the outset draw my attention to statements of victim which are recorded and appended

5 2024 SCC OnLine SC 3321

6 Order dated 27.11.2024 in SLP (Crl.) No.13378 of 2024

to Application. She would persuade the Court to consider the fact that the assault on the victim has taken place on the 4th night only after she was under the influence of liquor which was brought by one of the co-accused. She would however submit that statements given by victim to the police as also to the medical counselor during her medico legal examination are in consonance with each other with respect to the fact that it was only Applicant arraigned as Accused No.1 who carried out the assault on her on the 4th night of they being together. She would submit that contraceptive used by Applicant was also recovered by the Investigating Agency from the incident spot. She would submit that the issue relating to victim leaving her house repeatedly has been highlighted by her own mother in her statement given subsequently and in that regard the victim was also referred to the Psychiatry department. She would refer to and rely upon a decision of the Delhi High Court in the case of *X Vs. State of NCT of Delhi (Acting through its Secretary) and Anr.*⁷ and contend that in the present case after what has happened and sufferance of the victim, she has indeed suffered at the micro level with the after effects of the assault in question. She would submit that when she took instructions from the victim to argue the present case, she gathered that victim is still suffering the after-effect of the present crime in as much as today when she is 22 years old, she is finding it difficult to settle in life. She would submit that

⁷ CRL.A.63/2022 decided on 20.10.2022.

principle of compensation to victim of crime has long been recognised by law but it needs to be seen to be done rather than it remaining as a token relief or to that extent whether an appropriate sentence can be determined by the Trial Court to support the victim. Submissions made by Ms. Shaikh are undoubtedly touching the merits of the present matter but that would ultimately be decided in the trial before the Trial Court.

8. I have heard the learned appointed Advocate for the Applicant and Respondent No.2 - prosecutrix alongwith learned APP.

9. *Prima facie* it is seen that the Respondent No.2 accompanied the Applicant on 24.01.2019 on his motorcycle at 07:30 p.m. in the evening alongwith another friend called Rajesh to attend a birthday party of one of their friends called Sachin without informing any person in her house or even her parents. However when they reached Rose garden they decided not to attend the birthday party but headed towards Aksa beach on Rajesh's motorcycle at that time they were joined by 3 other persons namely Kalia and his two friends on their motorcycle.

10. The prosecutrix in her statement states that after roaming on Aksa beach while returning the six of them headed towards Killeswar Temple and when they found the said temple to be closed

they sat on the road leading to Aksa beach chatting with each other. The prosecutrix states that after chatting they all got tired and felt sleepy therefore they all went into the jungle and went to sleep near the roadside. The prosecutrix then states that they all woke up the next day and by 12:00 noon returned back to Laljipada in Kandivali area and she alone went to her friend Nirjala Gupta's house where she was fed by her friend's mother. The prosecutrix then states that after she left from there she once again met the Applicant and his friend Rajesh and on their insistence she accompanied them to Aksa and Danapani beach.

11. Then the prosecutrix states that in the night when they felt hungry they had Chinese food and thereafter they all spent the entire night sleeping inside the jungle near the road side. The prosecutrix then states that on the following day i.e. on 26.01.2019 they once again spent the entire day roaming together and at nightfall after having some food spent the night inside the jungle near the roadside. Then the prosecutrix states that on the 4th day i.e. on 27.01.2019 she alongwith Applicant and Rajesh spent the entire day drinking and eating and once again spent the entire night inside the jungle near the roadside. However the prosecutrix alleges that on the 4th night she was forced to drink liquor and Applicant outraged her modesty by assaulting her despite her reluctance.

12. She has also stated that Applicant used a condom while committing the act with her. Thereafter prosecutrix states that Rajesh came over and she put on all her clothes and all three of them left together and while on their way late in the night they were intercepted by a Police patrolling jeep but the Applicant had a word with the police party and then they were allowed to proceed further and Applicant dropped the prosecutrix near her house. Thereafter the mother of prosecutrix found her at 12:00 o'clock in the midnight and took her to the Police Station, but since she was completely drunk she was not in a position to record her statement. The statement of prosecutrix was recorded on the following day i.e. 28.01.2019 delineating the above facts.

13. As opposed to this statement given to the police on 28.01.2019, Respondent No. 2 – prosecutrix has also narrated the details of the entire incident in the Medico Legal case to the treating doctor on duty in the Municipal Hospital. In that narration prosecutrix states that she was waylaid by Applicant and his friend Rajesh and they were joined by 4 other friends i.e. 3 boys and 1 other girl on 24.01.2019 and they all went to different places for 3 days but on the 4th day she was assaulted by the Applicant.

14. However the statement appended at page No. 39 of the chargesheet records the statement of the prosecutrix. This is recorded

by the Department of Psychiatry of Dr. R.N. Cooper Municipal Hospital on 01.02.2019 4 days later. In this statement she records that she had developed the habit of going away from the house without informing anyone in the past 2-3 months. It is ironical that the prosecutrix was missing for 4 days from 24.01.2019 to 28.01.2019 and her parents did not file any missing compliant which normally any prudent parent will do.

15. Further in the statement recorded by the prosecutrix before the Doctor in the Psychiatry Department which is appended at page No. 50 of chargesheet, she has categorically stated that apart from Applicant his friend Rajesh (Takkal) also tried to have forcible intercourse with her but she managed to release herself from his clutches. This version is absent in the FIR.

16. From the reading of the aforesaid statements *prima facie* some discrepancy is seen. As noted above if the prosecutrix was missing from her house for 4 days and 4 nights continuously there is nothing placed on record to show that her family members namely her mother or father approached the Police Station for filing a missing complaint. There is nothing placed on record *prima facie* to show as to why the missing complaint was not filed.

17. Secondly, the prosecutrix has repeatedly stated that she spent 4 nights inside the jungle on the roadside alongwith the Applicant and his friends – Rajesh, the first three nights were spent alongwith three other friends also. In her statement recorded by the Medical Officer she has stated that there were 4 other friends - 3 boys and 1 other girl who joined them on 24.01.2019 then she states that all friends spent 3 nights together sleeping inside the jungle on the roadside, but she was assaulted only on the 4th night by the Applicant. The prosecution has not recorded the statements of any of the so called alleged friends who were with the Applicant neither identified them who were with the prosecutrix for 3 days and 3 nights. Their statements would have been material. Therefore *prima facie* prosecution case on the basis of the FIR and available material is inadequate and a suspect to sustain further incarceration of Applicant.

18. The above *prima facie* observations, coupled with the fact that prosecutrix was acquainted with the Applicant since long and most importantly the long incarceration of Applicant for more than 6 years pending trial entitles the Applicant to be released on bail.

19. In view of the above *prima facie* observations, 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. 15,000/- with one or two sureties in the like amount;
- (ii) Applicant shall report to the Investigating Officer of concerned Police Station once every month on the third Saturday between 10:00 a.m. to 12:00 noon for three months or as and when called;
- (iii) 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;
- (iv) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (v) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner; Applicant shall not make any attempts to re-associate with the Complainant / prosecutrix in any manner either through a device or in-person. Applicant is directed not to enter the jurisdiction of the Police Station where the prosecutrix is

residing until the completion of trial, save and except to attend the Police Station as directed herein;

- (vi) Applicant shall keep the Investigating Officer informed of his current address and mobile contact number and / or change of residence or mobile details, if any, from time to time;
- (vii) Any infraction of the above conditions shall entail cancellation of this order.

20. It is clarified that the observations in this order are limited for the purpose of granting Bail only and I have not made any observations on merits of the case.

21. Fees of the learned Advocates Mr. Paramane, appointed to represent and espouse the cause of Applicant through jail and Ms. Shaikh appointed to represent and espouse the cause of the prosecutrix i.e. 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 and on requisite compliance.

22. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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Digitally signed
by RAVINDRA
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2025.02.17
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