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

BAIL APPLICATION NO. 2346 OF 2024

Sanjay Babu Rokde

.. Applicant

Versus

State of Maharashtra & Anr.

.. Respondents

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- Ms. Twinkle Khemka a/w. Ms. Vidhi Dugad, Advocates i/by Khemka and Assocaites for Applicant.
- Mr. Dinesh Haldankar, APP for Respondent No.1 – State.
- Ms. Gayatri Pinkyar, Advocate for Respondent No.2.

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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.1604 of 2020 registered with Dahisar Police Station, Mumbai for the offences punishable under Sections 363 and 376 of IPC² alongwith Sections 4, 8 and 12 of POCSO³.

2. Age of the Applicant at the time of commission of alleged crime was 23 years, age of the prosecutrix was 17 years. Applicant is arrested and is in Judicial Custody from 30.12.2020 i.e. for 4 years, 1 month and 17 days.

1 Code of Criminal Procedure, 1973

2 Indian Penal Code, 1860

3 Protection of Children from Sexual offences Act, 2012

3. First Informant – mother of prosecutrix lodged missing complaint on 12.12.2020 about her daughter from the house since the previous evening. Complaint was lodged against unknown person for having kidnapped the prosecutrix as she was a minor.

4. Prosecutrix and Applicant reached Dahisar Railway Station on 22.12.2020 i.e. 10 days after lodging of the complaint. It is stated that when they both reached Dahisar, they were apprehended for investigation. On 22.12.2020, prosecutrix recorded her statement, it is appended on page No.57 of the Application. She has stated that on 11.12.2020 she visited her friend Gita's house and Applicant resided opposite her house. She has stated that since long she and Applicant were very good friends and their friendship had blossomed into a love relationship with each other. She has stated that they both started regularly meeting each other thereafter. She stated that on 11.12.2020, she met Applicant in his house at about 06:00 p.m. and he offered to take her out for a stroll and she agreed to that. She has stated that they both went to Dahisar Railway Station at 06:30 p.m. and boarded a local train to proceed to Thane to visit Applicant's sister, Anita Jaiswal who lived in Thane. She has stated that she agreed to go with Applicant however because it got late to return from Thane, she agreed to stay with the Applicant in his sister's house at night. She has stated that on the following day, Applicant persuaded her to stay with

him at his sister's house forever with him and that out of love for him she also felt that she should stay there with him and hence she continued staying there for the next 10 days. Then she has stated that on 22.12.2020 she and Applicant visited Dahisar Railway Station for some work when some acquaintance told them about her missing complaint and they both were called to the Police Station after which her statement was recorded and Applicant was arrested. The aforesaid are the prosecution facts.

5. Ms. Khemka, learned Advocate for the Applicant would submit that though prosecutrix was between the age of 16 and 17 years at the time of incident, she has admitted to be in a relationship since 2 years with Applicant who was three to four years older than her. She would refer to prosecutrix's statement recorded on 23.12.2020 appended at page No.115 as informed to the doctor on duty during her Medico Legal Examination wherein she had admitted that she was in a relationship with the Applicant, she eloped with him 10 days ago prior to being brought back and had sexual intercourse with him which was consensual. She would therefore submit that though prosecutrix was below 18 years old both she and Applicant were in a love relationship and she was fully aware about the import of all her actions. Hence she would submit that consent of prosecutrix would be irrelevant in view of her admitted acts and statement

recorded by her which are referred to herein above. She would submit that therefore Applicant deserves to be released on bail.

6. *PER CONTRA*, Mr. Haldankar, learned APP appearing for the State would submit that Applicant is guilty of kidnapping the prosecutrix and subjecting her to assault for 10 days and therefore his crime is grievous and heinous in nature. He would therefore submit that Applicant is not entitled to be released on bail.

7. Ms. Pinkyar, learned appointed Advocate for the prosecutrix has taken instructions from Respondent No.2 – prosecutrix and would make the following submissions:-

- (i) That prosecutrix is a minor victim and Applicant has lured her and enticed her to accompany him and kidnapped her and kept her in custody for 10 days and assaulted her during that time;
- (ii) That prosecutrix blindly trusted Applicant that they would return back from Thane on the same date i.e. 11.12.2020 but against her wish confined her in Thane and on the next day when she wanted to return back, he induced a false promise of marriage to her and threatened her;
- (iii) That when prosecutrix was in Applicant's custody for 10 days he destroyed her SIM card to ensure that none of her family members could reach out to her;

- (iv) That during that period Applicant had forceful sexual intercourse with prosecutrix which is confirmed by the Medico Legal Report appended at page No.118 of the chargesheet;
- (v) That the act of offensive sexual violence is *prima facie* proven by the Medico-Legal Report;
- (vi) That if Applicant is released on bail, then he may re-offend and tamper with evidence;
- (vii) That Applicant is not a permanent resident of Mumbai and therefore considering the gravity of his crime and he could flee away if released on bail;
- (viii) That charge has been framed on 17.11.2022 by the Trial Court and the statement of victim has also been recorded and the trial should be allowed to be completed;
- (ix) That offense committed by Applicant, if convicted, attracts imprisonment for a term which shall not be less than 20 years but may extend to imprisonment for life; and
- (x) Since *prima facie* case is made out, considering the gravity of crime, this Court should reject the Application.

7.1. In support of her above submissions, Ms. Pinkyar has referred to and relied upon the following decisions:-

- (i) *State of Bihar v. Raj Ballav Prasad*⁴;
- (ii) *X (Minor) v. The State of Jharkhand & Anr*⁵;
- (iii) *Talab Haji Hussain v. Madhukar Purshottam Mondkar*⁶;
- (iv) *Masroor v. State of U.P.*⁷;
- (v) *Shahzad Hasan Khan v. Istiaq Hasan Khan*⁸;
- (vi) *Nawabuddin v. State of Uttarakhand*⁹; and
- (vii) *Alakh Alok Shrivastava vs Union of India & Ors.*¹⁰

7.2. On the basis of the above decisions, she would contend that if crime is heinous, then there is every possibility that if accused is released on bail, he will tamper with evidence. She would submit that contending that parties were having a love affair is an irrelevant ground for grant of bail when victim is admittedly a minor girl as in the present case. She would submit that collective interest of the Society / community in such a crime would outweigh the right of personal liberty of the accused since the crime has shaken public confidence in the criminal justice delivery system. She would submit that Applicant in this case is also guilty of kidnapping the prosecutrix and then assaulting her. She would submit that merely because Trial Court would take time to conclude the trial, it gives no right to

4 (2017) 2 SCC 178

5 (2022) LiveLaw SC 194

6 AIR 1958 SC 376

7 (2009) 14 SCC 286

8 (1987) 2 SCC 684

9 2022 SCC OnLine SC 161

10 (2018) 17 SCC 291

Applicant to seek bail on the ground of long incarceration as justice delivery system does not in anyway contribute to the trauma, mental disturbance and anxiety of prosecutrix which she has suffered in the present case.

8. I have heard the learned Advocates at the bar, considered their submissions and citations and perused the record and chargesheet. *Prima facie* it is seen that, in the facts of the present case, the question of consent is pivotal. From the victim's own statement and her medical reports, it is her own case that she was in love with Applicant and eloped with him on her own free will since she was fearing parental disapproval of her relationship with Applicant. Though it is argued that she was a minor, from her own statements, it is seen that she was fully capable of understanding the import of her actions considering her age and her actions. The most important criteria *prima facie* for consideration is that during her 10 day stay with Applicant she has not alleged use of any physical force or violence by Applicant on her.

9. Further from the record, there appears to be an inconsistency regarding the age of the Applicant. It is seen that age of Applicant is shown as 22 years in the chargesheet at page No.41 of Application, but in the Arrest / Court Surrender Form at page No.83 the age of Applicant is shown as 20 years and on the Medical Form at

page No.22 it is shown as 20 years. This shows that both Applicant and prosecutrix were having a minor age difference between them and according to the prosecutrix they were in a love relationship. Applicant has no antecedents, prosecutrix went with the Applicant without the consent and permission of her parents and also without informing them which is an important fact to be considered.

10. Assistance is drawn from the decision of the Supreme Court in the case of *S. Varadarajan v. State of Madras*¹¹ 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 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. In so far as the offences punishable under Sections 4,6, and 8 of POCSO Act (special law) are concerned, it may be stated that the provisions of this law are, though, stringent in nature, would not deter the Court to grant or refuse bail in order to secure the ends of justice. The conduct of the prosecution in this case is indicative of the fact that she left her home without informing her parents by her own will surrendered to the physical desires of the Applicant out of her love

¹¹ AIR 1965 942

and affection for him for 10 days when both of them stayed together. No doubt that the prosecutrix under the purview of POCSO Act is a minor, however the facts of the present case indicate that she had sufficient knowledge and capacity to know the full import of her actions and what she was doing and had only thereafter voluntarily joined and stayed with the Applicant for 10 days.

12. Attention is drawn to the decision of this Court (*Coram: Ms. Mridula Bhatkar, J.*) in the case of ***Sunil Mahadev Patil Vs. The State of Maharashtra***¹² 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 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

¹² Bail Application No. 1036 of 2015, decided on 03.08.2015.

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. From the record and more particularly the statements it is seen that when the prosecutrix went with the Applicant on 11.12.2021 she and Applicant went to Thane and stayed at a friend's place for 2 days. Thereafter they hired a room to stay on their own for the next 8

days and then visited Applicant's sister on the 10th day. This version emanating from the record is contrary to the statement of prosecutrix and prosecution case that they both stayed at Applicant's sister's place for 10 days. From the record it is seen that the name of Applicant's friend is Aakash and he is a resident of Gandhinagar, Thane. It is seen that on 13.12.2020 both went to Applicant's brother's house in Thane and stayed along with his sister-in-law, Lata for 5 days, thereafter 18.12.2020 they both went to Applicant's sister's place in Thane and when they were doing some marketing in Thane on 22.12.2020 the police picked them up in Thane, apprehended them and brought them to Dahisar Police Station from Thane. The aforesaid discrepancies are noted in the prosecution case *prima facie*. That apart, long incarceration of the Applicant of 4 years and 1 month and 17 days and delay in completion of trial also persuades me to allow the Applicant on bail. Needless to state that apprehension of the prosecutrix regarding tampering of evidence by Applicant can be taken care of by passing appropriate conditions.

14. In view of my above *prima facie* observations, present Application is allowed in 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) He shall not enter the jurisdiction of Dahisar Police Station wherein prosecutrix is residing during the pendency of trial and shall not make any attempt to contact her physically or through any electronic device or means; he is permitted to enter the jurisdiction of the said Police Station only to mark his attendance and attend to the I.O on the designated day or as an when called for as directed;
- (iv) 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;
- (v) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (vi) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner;

(vii) 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; and

(viii) Any infraction of the above conditions shall entail cancellation of this order.

15. 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. The trial shall proceed and conclude on its own merits and evidence and shall not be influenced by any of the observations herein above as they are *prima facie* only.

16. Fees be paid by the High Court Legal Aid Services Authority of this Court to the learned appointed Advocate for Respondent No.2 as per rules.

17. In view of the above directions, Bail Application stands allowed and disposed.

[MILIND N. JADHAV, J.]

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