

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 2398 OF 2024

Mohd. Basid Sakil Ahmed Khan

.. Applicant

Versus

The State of Maharashtra & Anr.

.. Respondents

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- Mr. Hrishikesh Mundargi a/w. Mr. Meghdeep Oak i./by Mr. A. K. Upadhyay, Advocates for Applicant.
- Ms. Rajeshree V. Newton, APP for State.
- Ms. Aneesa Cheema, Appointed Advocate for Respondent No.2.

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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 27, 2025

P.C.:

1. Heard Mr. Mundargi, learned Advocate for Applicant, Ms. Newton, learned APP for Respondent No.1 – State and Ms. Cheema, learned Advocate appointed for Respondent No.2.

2. This is an Application under Section 439 of the Code of Criminal Procedure, 1973 seeking Regular bail in connection with C.R. No.896 of 2022 registered with Dindoshi Police Station for offences under Sections 363, 376, 376(2)(n) readwith 34 of the Indian Penal Code, 1860 (for short “**IPC**”) and Section 6 and 10 of the Protection of Children from Sexual Offences Act, 2012 (for short “**POCSO Act**”). There are total two accused persons indicted in the crime. Applicant is Accused No.1 and is incarcerated since 14.08.2022.

3. Briefly stated prosecution case is that the prosecutrix aged 16 years got acquainted with Applicant in January 2022 through an online social networking Application namely 'Snapchat'. Thereafter it is alleged that in April 2022, Applicant invited her to his sister-in-law's house and forcibly established physical relations with her, after which she went back home. It is alleged that in August 2022, when her father took her to their family doctor, it came to light that prosecutrix was 27 weeks pregnant. Hence on 08.08.2022 FIR was registered against the present Applicant for offences under IPC and POCSO Act. Prosecutrix herself is the First Informant. Her age is 17 years.

3.1. In her supplementary statement recorded at Cooper Hospital on 15.08.2022, prosecutrix has stated that in February 2022 Accused No.2 invited her to his house and forcibly established physical relations with her on two occasions.

3.2. As per prosecution case, on arrest Applicant's phone was seized by the police to extract the chats between Applicant and prosecutrix and it was found that there were chats between Applicant and prosecutrix who was operating the said account under another name.

4. Mr. Mundargi, learned Advocate for Applicant would submit that Applicant has been falsely indicted in the present case. He would submit that there are material contradictions in the statement of the

prosecutrix recorded by the police and her Section 164 statement recorded before the Magistrate. He would submit that the relationship between the Applicant and prosecutrix was consensual in nature which is seen from perusal of the statements of First Informant. He would submit that Applicant is incarcerated since the past 2 years 7 months and 16 days and likelihood of the trial commencing in the near future is bleak. He would submit that prosecution has given a list of probable 20 witnesses to be examined before the trial Court. He would submit that considering the consensual nature of relationship and *prima facie* discrepancies in the statements of the prosecutrix this Court may be pleased to enlarge the Applicant on bail.

5. Ms. Newton, learned APP for Respondent No.1 – State has vehemently opposed the bail application and would submit that considering the gravity of the offence, Applicant's complicity in the crime is clearly established. She would submit that Applicant who is a married man has taken undue advantage of the tender age of the prosecutrix and impregnated her. She would submit that the DNA report of the fetus (femur) has also come positive and hence there is *prima facie* material on record to establish the guilt of Applicant and would therefore urge the Court to reject the Bail Application.

6. Ms. Cheema, learned Advocate appointed by this Court to represent and espouse the cause of Respondent No.2 has adopted and

supported the arguments of Ms. Newton, learned APP. She has additionally urged the Court to reject the bail Application and has referred to and relied upon the decisions of the Supreme Court in the case of *Nawabuddin Vs. State of Uttarakhand*¹ to submit that considering the objective behind the enactment of the POCSO Act of providing protection to children no leniency should be shown to the Applicant – Accused in view of the presumption contained in the said Act. Next she has placed reliance on the decision of the Delhi High Court in the case of *Saiful Khan Vs. State & Anr.*² wherein the Delhi High Court rejected pre-arrest bail of the accused therein indicted for offences under the POCSO Act. Hence considering the above decisions, she would urge the Court to reject the bail application.

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

8. *Prima facie* from perusal of the record it is seen that prosecution case is full of dichotomy and contradictions. In the history narrated during Medico-Legal Examination on 09.08.2022 which is appended at page No.76 of the Application, first informant – prosecutrix has stated that she first met Applicant in January 2022 and in April 2022 Applicant invited her to his sister-in-law's residence and asked her consent for establishing physical relation which was refused

¹ (2022) 5 SCC 419

² Bail Application No.4440/2024 decided on 03.12.2024

by her and thereafter again after 8 to 10 days Applicant and first informant – prosecutrix met and established physical relations. All these details do not find mention in the statement of first informant – prosecutrix which creates a shadow of doubt on the case of prosecutrix.

9. Next, if the statement of first informant – prosecutrix recorded under Section 164 of the CrPC before the Magistrate is perused it is seen therefrom that prosecutrix has stated that she met Applicant in February 2022 at his sister-in-law's house when his sister-in-law and her two children were present. She has stated that they all had food after which she fell unconscious and does not remember what transpired thereafter. She has stated that thereafter when she met Applicant, he proposed her for marriage. Next she has stated that her aunt persuade her to take the pregnancy test which came positive.

10. Juxtaposing the statement of prosecutrix recorded before the police with the Section 164 statement and the history narrated / recorded by her during her Medico – Legal Examination, it is *prima facie* seen that prosecutrix's version is full of contradictions and dichotomy and the same *prima facie* creates a shadow of doubt on the veracity her story. From perusal of her above noted statements, it is also *prima facie* gathered that prosecutrix who was aged around 17 years and Applicant were in a consensual relationship and there is no

element of threat, force or violence involved in the present case. It is seen that prosecutrix maintained a stoic silence for more than 5 months about the aforesaid alleged incidents till her pregnancy was detected and only thereafter registered the FIR. Though delay in registering the FIR may not be fatal to the prosecution case in such matters considering the object of enactment of the legislation and the trauma the prosecutrix may face considering her age below 18 years.

11. 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.

12. 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 advertent 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 Kerela Represented through the*

Public Prosecutor³. 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

³ 2019 SCC OnLine 783.

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.”

13. In so far as the affidavit dated 06.07.2023 filed by the prosecutrix before the Session Court giving no objection to the grant of bail of present Applicant is concerned, as provisions of POCSO Act are invoked in the present case, the said Affidavit is of no persuasive value to the Court.

14. However considering the above dichotomies and contradictions on *prima facie* facts which have been alluded to herein above, Applicant before me has made out a case for grant of bail. 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.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 make any attempts to re-associate

with the prosecutrix in any manner wither through a device or in-person and shall not reside in the jurisdiction of the Police Station wherein the prosecutrix is residing till the trial is concluded;

(viii) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;

(ix) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner; and

(x) 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. 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.

16. Fees of the learned Advocate Ms. Cheema, 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.

17. Bail Application No.2398 of 2024 is allowed and disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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