

Ajay

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

CRIMINAL BAIL APPLICATION NO. 2595 OF 2024

Zora Pravin Asif Malik

.. Applicant

Versus

The State of Maharashtra

.. Respondent

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- Mr. Gaurav Chaubey a/w Ms. Kavita Prakash and Rajshree Vikhe Patil i/b Dharmesh Gogri, Advocate for Applicant.
- Mr. Rishikesh M. Pethe, APP for Respondent No.1 – State.
- Mr. Abdul Rab Shaikh, Advocate for Respondent No. 2.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 01, 2025

P.C.:

1. Heard Mr. Chaubey, learned Advocate for Applicant, Mr. Shaikh, Advocate for Respondent No. 2 and Mr. Pethe, learned APP for Respondent No.1 State.

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.135 of 2023 registered with NRI Sagri Police Station for the offenses punishable under Sections 109, 328, 376, 376(2)(n), 376(l) of Indian Penal Code (for short '**I.P.C.**') read with Section 34 of I.P.C and under Section 4 and 5 of the Immoral Traffic (Prevention) Act, 1956 (for short "**ITP** Act") and under Sections 4, 6, 8, 12, 17 of Protection of Children from Sexual Offences Act, 2012 (for short

‘POCSO Act’).

3. First Information Report dated 30.04.2023 is filed by the paternal aunt of prosecutrix. The date and tenure of the incidents alleged in the FIR are alleged from 14.04.2021 to 31.05.2022. Age of prosecutrix at the time of incident is 15 and half years on the date of first incident. Record shows that First Informant and her brother (father of prosecutrix) are on inimical terms with the Applicant and mother of prosecutrix. From the FIR it is seen that husband of Applicant is arraigned as Accused No.1. Applicant is arraigned as Accused No.2, mother of prosecutrix is Arraigned as Accused No.3 and son of Applicant is arraigned as Accused No.4. There is one Ashraf who is absconding and arraigned as Accused No. 5

4. First informant in the FIR states that prosecutrix informed her that during the aforesaid tenure she was forced into compromising incidents and situations by her own mother and Applicant (paternal aunt) which were facilitated by the other co-accused persons namely husband and son of Applicant. It is stated in FIR that since July 2020, prosecutrix, her brother and mother separated from her father and were staying separately in Belapur where they were helped and assisted by the Applicant in finding a residence to stay near her residence. Record shows that Applicant and her husband were running a SPA business in Belapur. Record shows that First Informant is a

therapist. It is stated in the FIR that on 14.12.2021, Applicant and mother of prosecutrix (co-accused) called one Ashraf at Applicant's residence and left the prosecutrix with him and both went out. It is then alleged that the said Ashraf forcibly molested and outraged her modesty and before leaving gave her Rs.2500/-. According to the prosecutrix's statement, she was told by her mother that since the family was facing financial constraint, she will have to become a bread earner of the family and shoulder its responsibilities. It is then alleged that a week after the above incident, prosecutrix accompanied the said Ashraf to several places and locations in Lonavala, Panvel etc and had physical relations with him on all occasions for over a period of 6 months. It is stated that on every occasion the said Ashraf would give her Rs.2,500 and after she returned home, on every occasion she was asked to consume ORAL-L contraceptive tablet by Applicant which she did.

5. Though prosecutrix alleges that one of the incident spot was near the farmhouse of a Bollywood actor, however when she was taken to the said incident spot for spot panchanama she was unable to identify the same.

6. *Prima facie*, apart from word of prosecutrix there is no other material or incriminating evidence placed on record by prosecution to corroborate the prosecution case. Regarding any incidents or any of the

places / locations she has alleged to have visited with Accused No.5.

7. Learned Advocate for the Applicant would vehemently submit that prosecutrix has contradicted her own case because she has alleged the first incident to have taken place in Applicant's house on 14.12.2021 but that is not possible because Applicant did not stay in that house at that time and had vacated the said house seven months ago since the leave and licensee agreement tenure of that house / flat expired on 31.05.2021. He would submit that as alleged by the prosecutrix, it was not Applicant's house and she did not stay there after 31.05.2021. He would submit that at page No. 185 of the Application the leave and licensee agreement is appended to support this submission and prosecution has investigated the same. He would submit that Applicant, her husband and her two sons are all well settled, they file ITR returns and own property in their names. He has taken me through "Exhibit-C" collectively of the Application which adduces relevant documentary evidence in this regard to support this submission. He would submit that Applicant is incarcerated for more than 2 years in the present offence and she had to leave her 5 year old daughter behind in the care and custody of her relative to take care of her. He would submit that Applicant has no antecedents and she was running a successful SPA business before the present crime was lodged

against her out of jealousy and inimical terms when prosecutrix went to live with her estranged father due to she having helped her sister(prosecutrix's mother) when she separated from her husband and chose to live separately from him due to their matrimonial disputes. He would submit that it is unimaginable to think of the allegation made by the prosecutrix against her own mother and her maternal aunt (Applicant herein) of forcing her to undertake such alleged compromising situations especially when she resided with her own mother and siblings at that time. He would persuade me to consider the FIR and statement of prosecutrix which states that she used to visit several hotels, locations in Lonavala and Panvel over a period of 6 months but never ever disclosed the same until filing of the FIR on 30.04.2023 without giving any details. He would submit that due to Applicant having helped the mother of prosecutrix with finding a residence near her house to stay separately from her husband (brother of First Informant), First Informant (paternal aunt of prosecutrix) filed a false complaint to implicate the mother of prosecutrix and entire family of Applicant out of vengeance. Hence he would persuade the Court to release the Applicant on Bail.

8. Learned APP for the Respondent No.1 – State has vehemently opposed the submission of Applicant and would submit that the offence is extremely serious. He would submit that the said Ashraf has been arraigned as Accused No.5 in the present case who has

repeatedly forced himself on the prosecutrix. He would fairly agree that there is substantial delay in filling the complaint but would submit that the delay cannot be held against the prosecutrix and it is not fatal to her case because of the circumstances. He would submit that Applicant's family and mother of prosecutrix forced her and have abused her and compelled her to go with Accused No.5 repeatedly over a period of 6 months as stated in the FIR by the aunt of prosecutrix and this has affected her. He would submit that forcing the prosecutrix in the above manner was without her consent and even otherwise considering her age, her consent would be irrelevant in view of the presumption under Section 29 of the POCSO Act. Hence considering the gravity of the situation, the Application be rejected.

9. Mr. Shaikh, learned appointed Advocate for the prosecutrix / First Informant would adopt the submissions made by the Learned APP and persuade the court to consider the seriousness of the offence, the age of the Applicant that she being a minor and reject the Application.

10. With the able assistance of the learned Advocates at the Bar, I have perused the record of the case and considered their submissions.

11. It is *prima facie* seen from the record that no corroborative evidence or material is placed on record to support the prosecution's case. The alleged place of crime of the first alleged instance has admittedly been vacated on 31.05.2021 by Applicant's family

according to the copy of Leave and License Agreement dtd. 26.06.2020. Hence charge of First Informant – Prosecutrix *prima facie* of the alleged place of first incident stands unsubstantiated by documentary evidence. In addition to that charge or prosecutrix *prima facie*, that she was solicited by the Applicant for money is also *prima facie* incomprehensible as there is no incriminating material placed on record either of numerous places / hotels visited by prosecutrix along with the absconding Accused No. 5 by giving any specifics or details to corroborate the prosecution case. It is a *prima facie* a bald statement. Prosecution has not investigated in that direction at all.

12. It is seen that investigation is completed and chargesheet is filed. *Prima facie* several inconsistencies exist in the statement of the witnesses and prosecution case which differ from the statement in the FIR filed by paternal aunt of Prosecutrix. Furthermore, Accused No. 5 is absconding and is untraceable till date. None of his details are known, neither placed on record. Considering alleged role of Applicant (maternal aunt of prosecutrix) in the present case, there is no *prima facie* incriminating material which corroborates her nexus or involvement in the alleged offenses except for the statement of prosecutrix which is recorded, making it difficult for Court to justify her continued detention. The Applicant is incarcerated for a little over 2 years. Medical report of the prosecutrix is completely silent of any injuries either. Possibility of disputes between the families on the

paternal and maternal sides cannot be ruled out either if the facts of the case are garnered from the witness statements *prima facie*. Complicity of Applicant in the crime can be proved by the prosecution by relying on evidence at trial.

13. This Court is not oblivious of the fact that there is a statutory presumption under Section 29 of the POCSO Act. However it does not mean that the 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 from the face of record, unless it is *prima facie* believable.

14. 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

¹ 2019 SCC OnLine 783.

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 adverting 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."

15. The Supreme Court has held in a series of judgments that in situations where the under trial prisoner / accused persons have suffered incarceration for a considerable period of time, in present case 1 year 10 months and 13 days with nothing but circumstantial evidence i.e. the prosecutrix's statement, and that there is no possibility of the trial being completed in the foreseeable future with the Accused No. 5 (Ashraf) still on the run, the constitutional court can exercise its power to release the Applicant on bail and jail would be the exception.

16. It is a well-established principle of law that while adjudicating a bail application, the primary consideration for the Court is to determine whether the accused is likely to appear before the Court to face trial. Learned Advocate of the Applicant has pleaded that Applicant's permanent residence has been the same since years and now with a young girl child to provide care and support for there is no way of her trying to runaway or not attend the proceedings. Additionally, the Court must assess several other broad factors, including the gravity of the offense, the likelihood of the accused repeating the offense if released on bail, the possibility of the accused influencing witnesses or tampering with evidence, and the Accused's

antecedents. It is submitted by Mr. Chaubey that Applicant has no antecedents. Considering these parameters and supplementing it with the *prima facie* facts of the present case before me, it persuades me to consider Applicant's case. Concerns expressed by learned Advocates of the prosecutrix and State can undoubtedly be taken care of by imposing conditions.

17. In view of the above *prima facie* observations and facts Applicant can be released on bail. Bail Application is allowed on the following terms and conditions:-

- (i) Applicant – Zora Pravin Asif Malik in connection with C.R. No.135 of 2023 is directed to be released on bail on furnishing P.R. Bond of Rs.15,000/- with one or two surties of the like amount;
- (ii) Applicant is permitted to furnish provisional cash bail of Rs.15,000/- for her release immediately and file undertaking that she will provide one or two sureties in the like amount of Rs.15,000/- within a period of four weeks after her release which shall be accepted by the Trial Court. Applicant shall provide sureties as directed;
- (iii) Applicant shall report to the Investigating Officer at the concerned Police Station as and when called by the Investigating Officer;

- (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 she 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 any of the witnesses or tamper with the evidence in any manner;
- (vii) Applicant shall keep the Investigating Officer informed of her current address and mobile contact number and / or change of residence or mobile details, if any, from time to time, as applicable;
- (viii) Any infraction of the conditions shall entail prosecution to apply for cancellation of bail granted to the Applicant.

18. It is clarified that the above observations in this order are limited for the purpose of granting bail only and I have not made any observations on the merits of the case and the trial shall be adjudicated and proceed uninfluenced by the present order on the basis of evidence and strictly in accordance with law.

19. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

Ajay

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