

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2705 OF 2024

Pravin Vinayak Nakhava

.. Applicant

Versus

The State of Maharashtra and Anr.

.. Respondent

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- Mr. Silvin Kale, Advocate for Applicant.
- Ms. Savita M. Yadav, APP for Respondent No.1.
- Mr. Saurish S. Shetye, Advocate for Respondent No.2.

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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 10, 2025

P.C.:

1. Heard Mr. Kale, learned Advocate for Applicant and Ms. Yadav, learned APP for Respondent No.1 and Mr. Sheye, 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.750 of 2023 registered with Versova Police Station for offences punishable under Sections 376, 376(2)(n) and 506 of Indian Penal Code, 1860 (for short '**IPC**') and Sections 6, 8 and 12 of Protection of Children from Sexual Offences Act, 2012 (for short '**POCSO Act**').

3. Age of Applicant is 27 years whereas age of prosecutrix – victim is 15 years. The First Information Report (for short '**FIR**') dated 20.12.2023 is appended at page No.20 of the Application. According

to the prosecution case and prosecutrix she saw the Applicant for the first time in December – 2022 in her neighbourhood during the satyanarayan pooja celebration as he was operating a DJ Console and playing some instruments. Thereafter prosecutrix states that after sometime, Applicant approached her and informed her about his name and sought for her consent to be her friend. Thereafter the prosecutrix has stated that since she liked the behaviour of Applicant, she befriended him, exchanged her mobile phone number which belonged to her grandmother and regularly conversed with him when he used to give her a phone call.

4. In so far the incidents are concerned, prosecutrix states that in October – 2023 (date of which is not recalled by her) and on 19.12.2023, i.e. on these two dates Applicant gave her a phone call and asked her to come to his house to which the prosecutrix obliged. Prosecutrix went to meet him but she states that she did not go to his house but to a hut which is the incident spot about which a spot panchnama is appended at page No.30 of the Application and that incident spot which is alleged by the prosecutrix that Applicant outraged her modesty and assaulted her. Therefore the FIR was lodged by the prosecutrix on 20.12.2023.

5. At the outset, Mr. Shetye would persuade me to consider that since the age of prosecutrix was below 18 years of age her consent

would be irrelevant and immaterial and what she has stated needs to be presumed to be true in view of presumption envisaged under Section 29 of the POCSO Act. He would also in his usual fairness submit that the facts which are unearthed by the prosecution during course of investigation may be seen by the Court.

6. Mr. Shetye relies on those very chats which are appended from page No.115 to 148 to the charge-sheet and Application which are placed on record. When these *Whatsapp* and *Instagram* chat messages are seen by the Court, it is seen that what the prosecution has been able to unearth are the chats between the prosecutrix and Applicant between 14.06.2022 to 28.08.2022. There is no reason given for investigating and placing on record the chats between the parties upto December – 2023.

7. 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***¹ 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

¹ Bail Application No.1036 of 2015 decided on 03.08.2015.

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 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. The offence of rape can be distinguished on the basis of the intention of the accused. There are incidents of rapes committed by gang like the case of Nirbhaya or Maya Thagi or Mathura which cannot be forgotten by Indian Society. So also rape committed in a savage manner or repeatedly by a single accused. There are some instances of rape which take place as a man wants to satisfy his lust and animal within him overpowers his reason. There are instances of rape where a man and a woman both are in love with each other and get involved into sexual relationship due to either physical or psychological need and in such type of rape, there is no violence which exists in other types of rape.

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.*

8. It is settled law that a Court while deciding a Bail Application has to keep in mind the principal rule of bail which is to ascertain whether the Accused is likely to appear before the Court for trial. There are other broad parameters also like gravity of offence, likelihood of Accused repeating the offence while on bail, whether he would influence the witnesses and tamper with the evidence, his antecedents are required to be considered in such cases.

9. Multiple decisions of the Hon'ble Supreme Court and various other High Courts have favoured the release of young offenders on bail pending trial so that the regressive influences of jail environment can be avoided and keeping in mind the principle of best interest in the aforesaid circumstances.

10. In the present case medical evidence is *prima facie* incomprehensive as it is left blank and therefore inconclusive. *Prima facie*, when the chats as delineated above are seen, it is derived and derivated from the said chats that prosecutrix and Applicant knew each other very well much before and prior in point of time before the first incident or even before the date claimed by the prosecutrix in her FIR. Rather it is seen the case of prosecutrix in FIR that she saw Applicant for the first time in December – 2022 which is *prima facie* proven false on the basis of *Whatsapp* and *Instagram* chats which are placed on record by the prosecution and which are fairly not denied by the learned Advocate for the prosecutrix.

11. What is more incriminating further are the contents of the said chats. However considering that this is an Application for Bail going into the said chats would probably entail dissection of evidence which I would refrain myself from doing but *prima facie* after going through the chats and messages which are replied and sent by the prosecutrix to the Applicant if seen, there is no *prima facie* doubt in my

mind that there was an existing relationship between the parties. However the extent to which the said relationship existed has come to the fore only in the FIR which has been filed in December - 2023. In view of my above *prima facie* observations, Prosecution case cannot be accepted for bail. Applicant has made out a case for 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) 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;
- (iii) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (iv) 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;
- (v) Applicant shall not stay in the jurisdiction of the Police

Station where the prosecutrix is residing until the completion of the trial. He shall be permitted to enter the jurisdiction of the said Police Station and the said Trial Court to mark his attendance as directed;

- (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.

12. 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.

13. Bail Application No.2705 of 2024 is allowed and disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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