

Ajay

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

**CRIMINAL BAIL APPLICATION NO. 2976 OF 2024**

|                                   |               |
|-----------------------------------|---------------|
| Babalu Urfa Kibriya Sahidu Mollya | .. Applicant  |
| <b>Versus</b>                     |               |
| The State of Maharashtra and Anr. | .. Respondent |

- .....
- Mr. B.J. Shaikh, Advocate for Applicant.
  - Ms. Mahalaxmi Ganapathy, APP for Respondent No. 1 – State.
  - Ms. Aneesa Cheema, Advocate for Respondent No. 2.
- .....

**CORAM : MILIND N. JADHAV, J.**

**DATE : APRIL 01, 2025.**

**P.C.:**

**1.** This is an Application under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 seeking Regular Bail in connection with C.R.No. 583 of 2023 registered with Rabale Police Station registered with Sections 363, 376, 376 (2) (n) of the Indian Penal Code 1860 (for short 'IPC') read with Sections 6, 8 and 12 of the Protection of Children from Sexual Offences Act (for short 'POCSO'). Applicant is arrested on 25.09.2023 and he is incarcerated for 1 year 6 months 7 days

**2.** Gist of prosecution case is that First-Informant father filed a missing complaint dated 22.09.2023 at 22:59 hours in the night after learning from his son that the prosecutrix had been missing from the house since morning. As she did not return, a complaint was lodged

against unknown persons. On 24.09.2023 police located prosecutrix at the Applicant's house and brought them to the police station. Prosecutrix recorded her statement on the same day. Prosecutrix stated that she was well acquainted with the Applicant for the past 1 month prior to filing of the FIR. She stated that Applicant worked as a plumber at a nearby construction site. She stated that they used to talk to each other on a daily basis. She stated that on 22.09.2023 at around 10:30 a.m. she contacted Applicant using her aunt's mobile phone and informed him that only her younger brother was at home as her parents were visiting a relative in the hospital. Applicant then asked her to meet him near Shivaji Talav, Ghansoli after which he took her to his house where they had spent the entire day and she stayed over for the night. She has stated that during their stay together, Applicant forcibly committed sexual intercourse with her on three occasions i.e. twice on 23.09.2023 and once in the morning on 24.09.2023.

**3.** Mr. Shaikh, learned Advocate for the Applicant would submit that prosecutrix and Applicant were well acquainted with each other and she went with him without informing any person in her house on her own volition by calling the Applicant. He would submit that prosecutrix herself contacted Applicant and informed him that only her younger brother being at home. He would submit that prosecutrix willingly on her own volition without any lure, inducement or force met Applicant near Shivaji Talav without informing her parents which

itself shows no sign of force and she being clearly aware of her own actions.

**3.1.** Further he would submit that on 24.09.2023, prosecutrix refused to undergo medical examination, as reflected on page No. 57 casting a doubt on the prosecution case and her mother supported her decision. He would submit that despite refusal, her statement was recorded on the same day which when read at page No. 58 stated that Applicant forcibly committed sexual intercourse with her on three occasions i.e. on 23.09.2023 which is contrary to her statement recorded in the FIR which clearly shows and reflects the dichotomy on the face of record making prosecution case highly questionable

**3.2.** He would submit that although prosecutrix initially refused a Medico – Legal Examination however it was conducted on 25.09.2023. He would submit that in the statement recorded during her Medico-Legal Examination appended at page No. 70 when read at page No. 71 once again there is a clear dichotomy and variance in the story narrated by the prosecutrix wherein it is stated that Applicant forcibly took her from her house to a construction site and committed the alleged act which is *prima facie* inconsistent with her two prior statements which make the prosecution case highly questionable.

**3.3.** He would draw my attention to the Medical

Examination Report appended at page No. 70 and would submit that it does not record any evidence of intercourse and also does not record any injury on the prosecutrix which itself shows and reflects that there was no sign of coercion or force by Applicant. Hence prosecution story falls to the ground. He would submit that even if prosecution case is to be accepted, her stay with the Applicant for 2 days without informing her parents pursuant to his alleged forceful acts raises a doubt on the prosecution case.

**3.4.** He would submit that there is a further dichotomy on the face of record as in Section 164 statement recorded on 30.09.2023 prosecutrix has stated that Applicant had locked her in his house and at 4:30 p.m. police alongwith Applicant arrived and brought them to the police station. However in her statement in the FIR recorded on 24.09.2023 she has stated that while they both were at home police arrived at Applicant's house and brought them to the police station. He would submit that this contradiction demonstrates a clear improvisation in her statements which makes the prosecution case once again highly questionable.

**3.5.** He would submit that Applicant is a plumber having deep roots in Society and has no criminal antecedents. He would submit that Applicant is not named in the FIR as it was initially lodged against an unknown person. He would submit that Applicant is

arrested on 25.09.2023 and he is incarcerated for 1 year 6 months and 7 days. He would submit that even if the prosecution facts are taken as a whole it would show that the relationship of the parties was *prima facie* consensual.

**4.** Ms. Ganapathy, learned APP would persuade me to consider the age of prosecutrix since she was a minor at the time of incident and therefore her consent would not matter. She would fairly argue that in so far as maturity of the person is concerned, it would be directly proportional to the age of the person in today's times. She would submit that the offence is of a serious nature. She would submit that facts of the case as delineated will have to be examined by the Court for consideration as placed on record in the present case. She would submit that there is every likelihood of the Applicant exploiting the vulnerability of the prosecutrix in the facts of the present case and inducing her to elope and stay with him without the consent of her parents. She would also submit that Applicant is a flight risk as he is a permanent resident of West Bengal. Hence she would submit that the Application be rejected.

**5.** Ms. Cheema, learned appointed Advocate for Respondent No. 2 through the legal aid would adopt the submissions advanced by Ms. Ganapathy. Additionally she would persuade me to consider the age of prosecutrix and argue that considering that facet it is likely that

prosecutrix was lured into a relationship by Applicant considering her immature age of understanding. She would submit that Applicant took a chance in her parents' absence from home and induced her to join him and stay with him and forcibly committed the alleged act. She would therefore request that the Application be rejected.

**6.** I have heard the learned Advocates at the bar and perused the record with the able assistance of the learned Advocates.

**7.** *Prima facie* it is seen that prosecutrix and Applicant were well known to each other and were regularly in touch with each other prior to the alleged incident. It is seen that on the day she went missing prosecutrix on her own volition contacted the Applicant from her aunt's mobile phone and informed him that only her younger brother was at home pursuant to which she went to meet Applicant. *Prima facie* it is seen that she herself accompanied Applicant to his house without informing her parents and most importantly stayed there for 2 days. It is seen that prosecutrix even after the alleged forceful acts continued to stay with the Applicant for 2 days.

**8.** According to prosecution case Applicant coerced, threatened and forcefully kept her at his house however the same is contradicted by the prosecutrix herself as there was no sign of force or violence involved. It is seen that prosecutrix's in her own statement stated that only when police reached his home and brought them to the police

station is when she stated about the alleged forceful acts. *Prima facie* it is seen that prosecutrix also did not try to contact her parents to seek their assistance which shows and reflects that she was aware of her actions and its consequences even though she was a minor.

**9.** *Prima facie* the refusal of prosecutrix and her mother for Medico - Legal Examination in the first instance needs to be considered. Further it is *prima facie* seen is that there is a clear dichotomy in the various statements of the prosecutrix recorded in the FIR on 24.09.2023 appended at page No. 43 and her statements recorded during her Medico - Legal Examination on 24.09.2023 and 25.09.2023 appended at page No. 57 and 70. Her Medical Examination Report at page No.70 *prima facie* shows no evidence of injury on her body. This also needs consideration at the *prima facie* stage. In view of the factual discrepancies in the statements of the prosecutrix both before the police and during her Medico- Legal Examination *prima facie* it is seen that no overt act as alleged can be attributed to the Applicant. A *prima facie* reading of Section 164 statement of prosecutrix clearly demonstrates improvisation, however the case of prosecution can be proved in trial. *Prima facie* as admitted by her, she on her own volition eloped and stayed with the Applicant without informing her parents. This clearly shows that she was aware and clear about her actions and decisions though she was below 18 years of age.

**10.** In such circumstances assistance is drawn from the decision of the Supreme Court in the case of *S. Varadarajan v. State of Madras*<sup>1</sup> 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.** Though this case was decided well before POCSO Act was enacted, this Court is equally conscious of the presumption ingrained in the said Act and that argument on her consent is irrelevant but *prima facie* if the statements recorded of the prosecutrix are seen, she has been consenting to her actions is what can be clearly gathered from the record of the case. However the said presumption is not absolute.

**12.** In so far as 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, but in the given facts rather *prima facie* facts of the present case, it would not deter the Court to grant or refuse bail in order to secure the ends of justice. The

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<sup>1</sup> AIR 1965 942

conduct of the prosecutrix in this case is indicative of the fact that she contacted Applicant and informed him about her parents' absence and subsequently left her home without informing her parents on her own will, and stayed with him together for 2 days. No doubt that prosecutrix under the purview of POCSO Act is a minor, however 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 stayed with the Applicant for 2 days.

**13.** In this regard 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***<sup>2</sup> 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 young offenders in the Indian Society in general. Court in paragraph Nos.8, 9, 11 and 12 of this decision laid down certain principles which I find it apt to reproduced hereinbelow for consideration of bail in such situations. 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*

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<sup>2</sup> Bail Application No. 1036 of 2015, decided on 03.08.2015.

*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. ...*

*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.”*

**14.** Next the decision of this Court (Coram: Sandeep K. Shinde, J.) in the case of ***Anirudha Radheshyam Yadav Vs. The State of Maharashtra***<sup>3</sup> is also relevant in the facts of the present case. Relevant

<sup>3</sup> Criminal Bail Application No.2632 of 2019 decided on 09.01.2020

paragraph No.4 is reproduced below for reference and reads thus:-

“4. ....The conduct of the victim is indicative of the fact that she had left the home of her parents by her own will and that she had surrendered to the physical desires of the applicant out of her love and affection for him. It is not the case of the prosecution that the applicant had promised to marry her. Additionally, it is also not a case where under the misconception of the fact, she had served herself to the desire of the applicant for physical relations. No doubt, that the applicant, under the preview of POCSO Act, is a minor; however, the facts of the present case indicate that she had sufficient knowledge and capacity to know full import of what she was doing and had only thereafter voluntarily joined the complainant (applicant).”

**15.** There is no doubt that presumption under Section 29 exists but it is not an absolute presumption. This Court is of the opinion that presumption would come into play only when prosecution is able to bring on record facts that would *prima facie* form the foundation for the presumption. Otherwise, all that the prosecution would be required to do is to raise some allegation against the accused person and claim that the case projected by it is true. Court will have to be on guard to see that application of presumption without adverting to the essential facts shall not lead to injustice since we are at a *prima facie* stage and trial has not even begun. 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 Kerala Represented through the Public Prosecutor*<sup>4</sup> in a similar case where age of prosecutrix as below 18 years and a similar argument was made. The relevant paragraph Nos.9 to 11 are reproduced below:-

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4 2019 SCC OnLine 783.

*“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 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.”*

**16.** In so far as the present case is concerned, it is seen that prosecutrix was 14 years and 9 months old at the time of the incident when she stayed together with Applicant for 2 days at his house and it clearly appears from the record namely statements of prosecutrix that she on her own her volition accompanied him to his house without the consent of her parents. However it is crucial to consider that Applicant is not a hardened criminal, neither does he have any antecedents. Neither any element of force or violence is involved. The key question before me is whether further incarceration of Applicant is warranted in the present facts and circumstances?

**17.** 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.

**18.** 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.

**19.** In the present case before me it is crucial to consider whether the act between the parties is violent or otherwise and in the present case it is not. Another mitigating factor is whether there are any criminal antecedents of the Applicant which in the present case are none. The aforesaid mitigating facts and Applicant's incarceration for more than 1 year 6 months 7 days therefore persuade me to consider Applicant's case.

**20.** In view of the above *prima facie* observations in the facts of the present case, Applicant before me is granted bail. 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.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 file an undertaking on Affidavit and furnish his address where he proposes to reside after his release from jail until completion of trial 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 either 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. He shall deposit his passport if any, with the trial Court within 2 weeks of his release from prison;
- (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.

**21.** 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.

**22.** 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.

**23.** Bail Application is allowed and disposed.

[ MILIND N. JADHAV, J. ]

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