Prasad Rajput

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 3899 OF 2024

Vijay Chand Dubey .. Applicant

Versus

The State of Maharashtra and Anr. .. Respondents

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- Mr. Prem Kumar Pandey a/w Mr. Pavan Kumar Pande, Ms. Sneha Mishra and Ms. Kajal Mishra, Advocates for Applicant.
- Ms. Rajeshree V. Newton, APP for State.
- Ms. Manisha Arjun Devkar, Appointed Advocate from legal aid for Respondent No.2.
- Mr. Vaibhav Khade, DN Nagar Police Station, Mumbai.

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CORAM : MILIND N. JADHAV, J.

DATE : FEBRUARY 17, 2025

P. C.:

1. Heard Mr. Prem Kumar, learned Advocate for Applicant, Ms. Rajeshree V. Newton, learned APP for State and Ms. Devkar, learned appointed Advocate for Respondent No.2.

2. Applicant - accused has filed the present Application for regular bail in connection with Crime No. 551 of 2019 registered with D.N. Nagar Police Station for the offences punishable under Sections 363, 376 of IPC[1] r/w Sections 4 and 8 of the POCSO[2]. First Informant is the father of victim. Date of occurrence / incident is from 19.11.2019 to 25.11.2019. Applicant is arrested on 25.11.2019 and is incarceration for 5 years 2 months and 23 days.

1 Indian Penal Code, 1860

2 Protection of Children from Sexual Offences Act, 2012

3. It is stated in the FIR that victim who is daughter of first informant aged 14 years old informed the First Informant that she was visiting her married sister staying at Andheri. Victim at that time was residing in Malad. Since the First Informant did not hear anything from victim for the next 4 days he asked his younger daughter to enquire about her whereabouts at that time. Younger daughter came back and informed the First Informant that victim had on the first day visited her elder sister's house but immediately after sometime left the said house and thereafter never returned there. First Informant states that he found the victim alongwith the applicant roaming near Juhu Chowpatti 4 days later and get her back home persuant to which FIR is lodged.

4. Statement of victim is appended at page No.60, reading of which *prima facie* it is seen that there is a clear variance with respect to the statement made in the FIR by victim's father. That apart the statement given by the victim during her medical examination also throws light on the nexus of the victim with the Applicant though the victim was 14 years of age and Applicant was 19 years at that time.

4.1. According to victim both of them known to each other for the past 2 years prior to the incident and had developed a love relation with each other. Insofar as the incident is concerned all that is stated in the statements as per record is that for three days and three nights

the victim wandered along with the Applicant and on the 3rd night Applicant ravished her modesty and committed assault on her. *Prima facie* the statement appears to be suspect.

4.2. The Medical report of the victim is appended at Page No.100 wherein the victim has given a detailed statement of her encounter in which she categorically narrates that she and Applicant in fact had a consensual relationship as also the incident in respect of which complaint has been filed.

4.3. It is seen that victim had also changed her statement with respect to the precise date of which the alleged incident took place. That apart it is seen that victim was clearly known to Applicant as the Applicant used to work in the same hotel where victim's father was working and in fact on reading the statements of witnesses which have been recorded out of which one witness statement is of the hotel owner it is seen that he had also warned the Applicant during one of the three days during which the victim was missing by calling and informing him that if he continued with his relationship with the daughter of First Informant, he shall be fired from the job. Therefore on reading of the FIR it is *prima facie* seen is that the father of victim was aware about her love relationship with the Applicant.

5. Though Ms. Devkar, learned appointed Advocate on behalf of Respondent No.2 – victim would submit that the age of the victim being 14 years, her consent in any other way would not matter. However, from the victim's own statement it is seen that she was quite aware about her actions and she has stayed with the Applicant for more than 3 days and 3 nights and most importantly has stated that they had a consensual encounter.

6. Assistance is drawn from the decision of the Supreme Court in the case of ***S. Varadarajan v. State of Madras***[3] 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 guarding 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 immediately prior to the minor leaving her father protection or at some earlier stage."*

7. Insofar 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.

3 AIR 1965 942

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 and also stayed with Applicant for 4 days. No doubt that the prosexutrix 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 4 days.

8. Attention is also drawn to the decision of this Court (*Coram: Ms. Mridula Bhatkar, J.*) in the case of ***Sunil Mahadev Patil Vs. the State of Maharashtra***[4] 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 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*

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

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 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 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 sets 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 Act or not.

(v) Whether there is likelihood of threats or intimidation, if at all the boy is released.

(vi) Whether any chance of tempering 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."

9. Insofar as the present case is concerned, it is seen that victim has left her parents' house without informing the parents and has stayed with Applicant for 3 days and 3 nights as also she has confessed that she was in love with the Applicant and travelled alongwith him to different places and had a consensual encounter.

10. 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.

11. Multiple decisions of the Hon'ble Supreme Court and various other 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.

12. 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 5 years 2 months and 23 days therefore persuade me to consider Applicant's case.

13. In view of the above observations and facts delineated herein above the Applicant before me is entitled for 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. 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 am to 12:00 pm for the first three months and thereafter as and when called;

(iii) 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 revocation of this order;

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

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

(vi) Applicant shall keep the Investigating Officer informed of his current address and mobile contact number and / or charge of residence or mobile details, if any, from time to time;

(vii) Any infraction of the above conditions shall entail revocation of this order.

14. 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.

15. Fees of learned Advocates Mr. Pandey and Ms. Devkar, both appointed through Legal aid to represent and espouse the cause of Applicant and 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.

16. Bail Application is allowed and disposed.

P.R. Rajput

[MILIND N. JADHAV, J.]