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

CRIMINAL BAIL APPLICATION NO. 4186 OF 2024

Ramji Hardev Majhi

.. Applicant

Versus

‘X’ Victim and Anr.

.. Respondents

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- Mr. Shyamrishi Pathak, Advocate for Applicant.
 - Ms. Chaitrali Deshmukh, Advocate for Respondent No.1 appointed through Legal Aid.
 - Ms. Megha S. Bajoria, APP for Respondent No.2 – State.
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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 01, 2025.

P.C.:

1. Heard Mr. Pathak, learned Advocate for Applicant; Ms. Deshmukh, learned Advocate for Respondent appointed through Legal Aid and Ms. Bajoria, learned APP for Respondent No. 2 – State.

2. The Applicant is arrested in C.R. No.248 of 2021 registered with Bhiwandi Shahar Police Station for the offences punishable under Sections 363, 376, 376-I, 376(2)(I) of the Indian Penal Code, 1860 and Sections 4, 6, 9(k) and 10 of the Protection of Children From Sexual Offences Act, 2012 (for short ‘**POCSO**’).

3. First Informant is mother of prosecutrix. Age of prosecutrix is 15 years on the date of the incident. Age of Applicant is 36 years.

Prosecution case is that admittedly Applicant was residing in the immediate neighborhood of prosecutrix's family and he was well known to the First Informant's family as well as prosecutrix for the past few years. Applicant is a married person. First Informant approached Bhiwandi Police Station for lodging FIR and stated therein that prosecutrix went missing from their house since 06:30 p.m. on 20.07.2021. Search was launched by her family, but she was nowhere to be found.

4. Statement in FIR stated that prosecutrix left the house without informing any person in the house including her parents and returned back on her own after two days and recorded her statement on 22.07.2021 which is appended at page No.28 of the Application. She has stated in her statement that on the afternoon of 20.07.2021 she left her house to visit the tailor but since the shop was closed while on her way back she met the Applicant and he asked her to accompany him to outstation which she readily agreed. She has stated that initially she told Applicant that she will inform her mother but he gifted her new clothes which she accepted and chose to go along with him in a rickshaw. She has stated that though initially she was reluctant to go with Applicant but he persuaded her to which she agreed. She has stated that they proceeded to Kalyan Station from where at 05:00 p.m. in the evening they both boarded a railway train to go to Nanded and reached Nanded in the morning at 05:30 a.m. on

21.07.2021. She has stated that they both stayed there together in the rented room belonging to Applicant as he was working over there on some site. She has stated that after having breakfast, Applicant left for his work for the day at the site and only returned back at 11:00 p.m. in the night. She has stated that on the night of 21.07.2021, Applicant established forceful physical relationship with her and outraged her modesty. She has stated that on 22.07.2021 she stayed at Nanded and in the evening at about 05:30 p.m. Applicant booked a railway ticket for her, boarded her in the train alone and asked her to return back to Mumbai and told her not to disclose the incident to any person.

5. Mr. Pathak, learned Advocate for Applicant has persuaded me to consider the fact that relationship between the Applicant and the prosecutrix was consensual in nature. To buttress this submission and persuade the Court to consider Applicant's *prima facie* case for grant of bail, he has heavily relied upon the Section 164 statement recorded by the prosecutrix on 23.09.2021 before the Magistrate. A copy of the said statement is placed before me. On perusal of that statement, it is *prima facie* seen that Applicant has categorically confirmed before the Magistrate that she was in a love relationship with the Applicant and Applicant established physical relationship with her consent (माझे त्याच्या सोबत प्रेमसंबंध होते. त्याने माझ्या मर्जीने माझ्याशी संबंध ठेवले). He would submit that *prima facie* force or violence is absent. Hence he

would persuade the Court for grant of bail considering his long incarceration pending trial.

5.1. In support of his submissions, he has referred to and relied upon the decision of this Court (Coram: Sandeep K. Shinde, J.) in the case of *Anirudha Radheshyam Yadav Vs. The State of Maharashtra*¹.

6. Ms. Bajoria, learned APP would vehemently oppose the Bail Application and persuade me to consider two aspects. She would submit that age of prosecutrix is below 18 years and therefore her consent would be immaterial or irrelevant even otherwise. Secondly she would submit that age difference between the prosecutrix and the Applicant is about 20 years and this is an important fact for the Court to take cognizance of at this *prima facie* stage as it would probably lead to an inference that Applicant may have lured and induced the prosecutrix into accompanying him and submission. She would argue that when prosecutrix agreed to go with Applicant she was handed over new clothes by Applicant and this act was only to lure her into submission and follow him. She would submit that prosecutrix is a minor and hence presumption under Section 29 of the POCSO Act would squarely apply to her statement. Hence she would submit that Application for bail filed by Applicant be dismissed.

7. Ms. Deshmukh, learned Advocate for Respondent No.1

¹ Criminal Bail Application No.2632 of 2019 decided on 09.01.2020.

appointed through the Legal Aid would adopt the submissions made by Ms. Bajoria, learned APP and would additionally submit that the act of Applicant is a serious act, the gravity of which needs to be considered by the Court before enlarging him on bail. She would submit that Medico Legal Examination in the present case supports case of prosecution and considering age of prosecutrix, it is probable that Applicant may have lured and induced her into accompanying him to Nanded and imposing him on her which cannot be *prima facie* ruled out. Hence, she would submit that Application be dismissed.

8. I have heard the submissions made by the learned Advocates at the bar and perused the record of the case with their able assistance.

9. It is seen that FIR is lodged on 21.07.2021 after the alleged incidents which are stated in the statement of the prosecutrix having occurred at Nanded. At the outset, Section 164 statement which is referred to and relied upon by both the sides heavily if considered, *prima facie* shows that the statement is recorded by prosecutrix before the Magistrate in the presence of the witnesses (family members) and the social worker which is signed by her and she categorically states therein that she was in a love relationship (प्रेम संबंध) with Applicant and she herself consented to having physical relationship with him. Both learned prosecutor and appointed Advocate have on this count submitted that the said statement be discounted due to the minor age

of the prosecutrix.

10. *Prima facie*, at this stage with the limited material placed before the Court the veracity of the statement under Section 164 recorded before the Magistrate will have more substantial evidentiary value than the statement of prosecutrix recorded before the Police Officer. In the Section 164 statement the prosecutrix has specifically admitted the fact that she was having a love relationship with Applicant and she herself consented to having physical relationship with him. The statement recorded under Section 164 which has *prima facie* substantial evidentiary value for consideration. Record further shows that during the Medico Legal Examination of prosecutrix she has once again reiterated that she knew the Applicant for the past two years as he was a family acquaintance. That statement is recorded on 22.07.2021 during her Medico Legal Examination and appended at page No.61 of the Application. The same stand was taken by her on 21.07.2021 in her statement which was recorded by the same hospital on the previous day wherein she stated that she knew Applicant for the past two years. In that statement she has stated that she went with Applicant and stayed with him together for two days and Applicant had physical relationship with her while she was asleep. The above inconsistency is *prima facie* noticed by the Court as against the statement of Applicant recorded two days after filing of FIR and her own statement recorded under Section 164.

11. From the above, *prima facie* inconsistency in the statements of the Applicant are noted by the Court. There is no doubt the age of the prosecutrix is of 15 years on the date of the incident. However it is clearly borne out from the record that she left her house without informing any person in the house and travelled with the Applicant to Nanded. They stayed there for two days and returned back thereafter. The witness statement of Applicant's friend from Nanded states that he saw them roaming in the market together during the day while in Nanded. So far as the description of the facts in the present case are concerned, they do not remotely suggest that Applicant induced and / or forced the prosecutrix to leave her parent's house. Rather she agreed to go with him without informing her parents. Some of her statements in the FIR are inconsistent with the witness statements when she was in Nanded.

12. Next the decision of this Court (Coram: Sandeep K. Shinde, J.) in the case of *Anirudha Radheshyam Yadav Vs. The State of Maharashtra*² is also relevant in the facts of the present case. Relevant paragraph Nos.2 and 4 of the said decision are reproduced below for reference and they read thus:-

“2. In the case of S. Varadarajan Vs. State of Madras AIR 1965 942. The Apex Court has held thus : “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

2 Criminal Bail Application No.2632 of 2019 decided on 09.01.2020.

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 Indian 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.

3.

4. *So far as the offences punishable under Section 4, 6, 8 of POCSO Act (special law) is 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. 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)."*

13. Further *prima facie* inconsistencies are seen in the statements of prosecutrix which are delineated herein above.

14. 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.

15. 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 V.S. V/s State of Kerela Represented through the Public Prosecutor***³. The relevant paragraphs are reproduced thus:-

"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

³ 2019 SCC OnLine 783.

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 view of my above *prima facie* observations in the peculiar facts of the present case and *prima facie* admission by the prosecutrix about her love relationship with Applicant and her consent for having physical relationship, Applicant's incarceration for 3 years 8 months 2 days and the trial not having commenced and would not be completed in the near foreseeable future, the Applicant's presence can be secured by imposing conditions, Applicant can be released on bail subject to the following 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 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 until the trial is concluded. Investigating Officer shall specifically ensure that this condition is followed;
- (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 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.

17. 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.

18. Fees of the learned Advocate Ms. Deshmukh appointed through legal aid to represent and espouse the cause of Respondent No.1 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.

19. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

Ajay

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