

Ajay

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

CRIMINAL BAIL APPLICATION NO. 4426 OF 2024

Vasim Majali @ Vashim

.. Applicant

Versus

The State of Maharashtra

.. Respondent

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- Mr. Mateen Qureshi, Advocate for Applicant.
- Mr. Rajeshree V. Newton, APP for Respondent – State.
- Ms. Aafreen S. Shaikh, Advocate appointed through Legal Aid a/w Adv. Shezaad Shaikh, Advocate for Respondent No. 2.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 09, 2025.

P.C.:

1. Heard Mr. Qureshi, learned Advocate for Applicant, Ms. Newton, learned APP for Respondent No.1 – State and Ms. Shaikh, Advocate appointed through Legal Aid for Respondent No. 2.

2. This is an Application under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 seeking Regular Bail in connection with C.R.No. 212 of 2020 registered with Nerul Police Station for offences punishable under Sections 363 and 376 (i) (n) of the Indian Penal Code, 1860 read with Sections 4, 5 (j) (ii) and 6 of the Protection of Children against Sexual Offences Act, 2012 (for short 'POCSO Act'). Applicant is arrested on 13.05.2021 and he is incarcerated for 3 years 10 months and 27 days.

3. FIR was filed on 04.08.2020 under Section 363 IPC regarding an incident dated 25.07.2020. According to First – Informant father, prosecutrix left the house at about 8:30 p.m. and did not return back. Suspecting her association with the Applicant, First – Informant father visited Applicant's rented house in Nerul but did not find him there. Initially, First – Informant's phone calls to Applicant went unanswered. However later Applicant answered the phone call and denied any knowledge about prosecutrix's whereabouts. However two days later prosecutrix informed her father that she was with Applicant at his native village in Uttar Pradesh.

4. After 10 months i.e. on 08.05.2021, prosecutrix informed her father of her pregnancy and Applicant's failure to marry her. She requested her father for assistance to be brought back to Nerul. Pursuant to which First – Informant alongwith Nerul Police reached Uttar Pradesh. Prosecutrix and Applicant were brought back to Nerul Police Station. Prosecutrix recorded her statement on 13.05.2021. Prosecutrix aged 15 years 3 months stated that she was well acquainted with the Applicant since the year 2019. She stated that in September 2019 Applicant expressed his feelings for her to which she responded affirmatively. She has stated that since then they met regularly to which her parents disapproved of and admonished her for doing so. She has stated a precursor incident dating back to 15.03.2020 when Applicant had forceful sexual relations with her

however due to Covid - 19 lockdown Applicant returned back to his village in Uttar Pradesh. However on 25.07.2020 at about 8:30 p.m. Applicant returned back to Nerul to take prosecutrix with him to his native village. She stated that on 26.07.2020 they travelled to Delhi and from there they reached his village in Uttar Pradesh. She stated that during their stay together they developed physical relations leading to her pregnancy.

5. Mr. Qureshi, learned Advocate for the Applicant would submit that prosecutrix and Applicant were well acquainted with each other since 2019 i.e. prior to the incident in question as Applicant had a vadapav stall in the same vicinity. He would submit that prosecutrix in her statement has admitted that they were in a love relationship since 2019. He would submit that prosecutrix willingly on her volition without any lure or force left her house without informing her parents and accompanied him and travelled with him to Delhi and subsequently to his village in Uttar Pradesh and stayed with him for 10 months which itself shows no sign of force and she being clearly aware of her own actions.

5.1. He would submit that it is surprising that First - Informant father even after prosecutrix - daughter went missing did not file a missing complaint. He would submit that after two days prosecutrix informed him that she was with Applicant at his village in Uttar

Pradesh. He would submit that despite being aware of she accompanying the Applicant, First - Informant did not file any complaint. However only after a delay of 10 days he filed a complaint against the Applicant. This clearly establishes that First - Informant father was not disoriented even when prosecutrix - daughter did not return back. He would submit that it is interesting to note that First - Informant despite being aware of prosecutrix's location did not take any measures to secure her custody which makes the prosecution case highly questionable.

5.2. He would submit that prosecutrix on her own volition stayed with Applicant for 10 months until 08.05.2021 when they both were brought back to Nerul. He would submit that in the interregnum prosecutrix has not made any allegation regarding any forceful act or coercion against Applicant. He would submit that prosecutrix has not stated anything incriminating or adverse against the Applicant in any of her statements. He would submit that prosecutrix in her statement recorded in the FIR dated 13.05.2021 appended at page No. 32 and her statement recorded during her Medical Examination recorded on 13.05.2021 appended at page No.56 when read does not display any forceful or violent act on the part of Applicant. He would submit that Medical Examination Report of prosecutrix does not record any injury on the prosecutrix which itself shows and reflects that there was no sign of coercion or force by Applicant and the same is inconclusive. He

would submit that prosecutrix willingly consented to consensual physical relationship over a long period of time between them which eventually led to her pregnancy. Hence prosecution story falls to the ground. Hence he would submit that the aforementioned incidents are *prima facie* consensual in nature.

5.3. He would submit that Applicant is 25 years old who is the sole breadwinner of his family and also does not have any criminal antecedents. He would submit that Applicant is arrested on 13.05.2021 and he is incarcerated for 3 years 10 months and 27 days. He would submit that investigation is completed, charge-sheet is filed, charge is not framed, hence trial has not yet commenced. Hence he would urge the Court to allow the present Application in the above facts.

6. Ms. Newton, 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 submit that prosecutrix was 15 years 3 months at the time of incident. 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 facts of the case as delineated will have to be examined by the Court for *prima facie* consideration in the present case. She would submit that there is every likelihood of Applicant exploiting the vulnerability of the prosecutrix in the facts of

the present case and inducing her to elope with him without the consent of her parents and commit forceful acts. Hence she would submit that the Application be rejected.

7. Ms. Shaikh would however persuade the Court to consider the case of prosecutrix in a different perspective. She would submit that victim being 15 years old was a minor and therefore vulnerable at the time of the first incident when she was asked or rather induced by Applicant to travel with him to Delhi, hence her consent would be irrelevant. She has relied heavily on Section 29 of the POCSO Act stating that there is an inherent presumption under the said provision and in that view of the matter, even if the victim has consented, her consent cannot be considered as a mitigating factor for consideration of bail. She would submit that *prima facie* facts of the present case would show that Applicant had in fact kidnapped her and taken her to Delhi and then to Uttar Pradesh and kidnapping being an offence of strict liability even if the minor would go voluntary with the Applicant, the role of Applicant would have to be screened under the realm of the provisions of the act of kidnapping. That apart she would submit that the statement recorded by prosecutrix *prima facie* would show that there were repeated forced encounters at multiple times when she was with the Applicant and therefore such an offence would have to fall under the provisions of an aggravated assault considering the fact that she had also become pregnant in due course thereafter. She would

refer to the decision of the Supreme Court in this regard in support of her submissions in the case of *State of Haryana v. Raja Ram*¹, *Ganesan v. State*² and *Independent Thought v. Union of India*³ and would persuade the Court to consider that the defence taken by Applicant of involvement of prosecutrix in a romantic relationship with him cannot be sustained by Court in view of the admitted fact that she was a minor. She would rely upon the decision of the Supreme Court in the case of *Vinod Kumar v. State of Kerala*⁴ which holds that having a love affair with the minor is not a defence under the said Act. She would therefore persuade the Court to consider the aforesaid circumstances and accordingly reject the Application.

8. With the able assistance of the learned Advocates at the bar I have perused the record of the case. In the present case it is *prima facie* seen that admittedly prosecutrix and Applicant were both well known to each other and infact prosecutrix's own recorded statement endorses that they both were in a consensual physical relationship with each other due to a love relationship between them.

9. *Prima facie* it is seen that FIR in the present case is filed on 04.08.2020. At the time of incident, Applicant was 22 years old and prosecutrix was 15 years old. *Prima facie* reading of the FIR and the witness statements appended to the Application show that the victim

1 1973 AIR (SC) 819
 2 2020 SCC OnLine SC 543
 3 (2017) 10 SCC 800
 4 2014 (5) SCC 678

herself had confessed her love for the Applicant as far back as in September 2019. Prosecutrix's own statement appended along with the FIR in fact states so. It is *prima facie* seen that Applicant and prosecutrix were well known to each other and were regularly in touch with each other since the year 2019. The statement appended at page No. 32 of the Application. It is further seen that prosecutrix without the knowledge, consent and without informing her parents or family members went along with Applicant to Delhi on 26.07.2020 and thereafter from there they went Applicant's village in Uttar Pradesh to visit the Applicant's family home. It is also seen that Applicant herself called her parents from Uttar Pradesh and what is intriguing is that the family of the prosecutrix had full knowledge about the association of Applicant and prosecutrix even much prior to the date of filing of the FIR. This is *prima facie* borne out from the witness statement of the father of prosecutrix appended to the Application. It also stands corroborated by the statement of the prosecutrix herself.

10. It is *prima facie* seen from her statement recorded during Medico - Legal Examination on 13.05.2021 appended at page No. 56 when read at page No. 57 that no overt act as alleged can be attributable to the Applicant. Her Medical Examination Report at page No.56 *prima facie* shows no evidence of injury on her body. In view of the statements of the prosecutrix herself both before the police and during her Medico- Legal Examination *prima facie* it is seen that there

is no dichotomy in the said statements. They at this age had a love relationship is *prima facie* evident from the record of the case. Prosecutrix on her own volition eloped with Applicant and stayed with him for 10 months which shows that she was clear about her actions and decisions though she was below 18 years of age.

11. In so far as offences punishable under Sections 4, 5, and 6 of POCSO Act (special law) are concerned, it may be stated that the provisions of this law are, though, stringent in nature, however it would not deter the Court to grant or refuse bail in order to secure the ends of justice more so when the trial has not commenced despite a long hiatus and the case has been pending trial before the trial Court for close to 4 years.

12. Assistance is drawn from the decision of the Supreme Court in the case of *S. Varadarajan v. State of Madras*⁵ 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.”

⁵ AIR 1965 942

13. Though the above referred case was decided well before the POCSO Act was enacted, this Court is well conscious of the presumption ingrained in Section 29 of the said Act and that argument on prosecutrix's consent is irrelevant but *prima facie* if the statements of prosecutrix recorded are read, it is clearly borne out that she has been consenting to the actions which is gathered from the record of the case.

14. In the facts of the present case, attention is drawn to the decision of this Court (Coram: Mridula Bhatkar, J.) in the case of ***Sunil Mahadev Patil Vs. The State of Maharashtra***⁶ 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 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

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

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."

15. Next the decision of this Court (Coram: Sandeep K. Shinde, J.) in the case of *Anirudha Radheshyam Yadav Vs. The State of Maharashtra*⁷ is also relevant in the facts of the present case. Relevant 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)."

16. 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

⁷ Criminal Bail Application No.2632 of 2019 decided on 09.01.2020

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 Kerela Represented through the Public Prosecutor***⁸ 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:-

“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

8 2019 SCC OnLine 783.

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.”

17. In so far as present case is concerned, it is *prima facie* borne out from the record that prosecutrix was 15 years old whereas Applicant was 21 years old, that her family was well aware about her relationship with Applicant, that her own endorsement is that she was in love with the Applicant and therefore she herself alone eloped from her own house without the consent of her parents, that absence of any force on her are facts required to be considered. Facts of the present case indicate that prosecutrix had sufficient knowledge and capacity to know full import of what she was doing and had only thereafter voluntarily joined the Applicant. Considering the overall facts of the

case *vis-a-vis* the above judicial pronouncements and the facet of long incarceration of Applicant for 3 years 10 months and 27 days pending trial as also no possibility of the trial commencing / concluding in the near foreseeable future, this Court is of the opinion that Applicant can be released on bail.

18. 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) 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 furnish his address where he proposes to reside after his release from jail 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 wither 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;
- (ix) Applicant shall not influence 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.

19. 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.

20. Fees of the learned Advocate Ms. Shaikh, 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.

21. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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