

Amberkar

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

BAIL APPLICATION NO. 4621 OF 2024

Mohammed Ajaan Khan

.. Applicant

Versus

The State of Maharashtra & Anr.

.. Respondents

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- Mr. Viral Mukte a/w Mr. Bilal A. Motorwala, Advocates for Applicant.
- Ms. M.S. Bajoria, APP for Respondent No.1 – State.
- Ms. Gargi Warunjikar, Advocate for Respondent No.2 – prosecutrix.

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CORAM : MILIND N. JADHAV, J.**DATE : FEBRUARY 13, 2025**

JUDGMENT:

1. This is an Application under Section 439 of CrPC¹ seeking Regular Bail in connection with C.R. No. 300/2024 lodged at Wadala T.T. Police Station, Mumbai for offences punishable under Sections 376, 376(3) and 376(2)(n) of IPC² read with Section 4, 6, 8 and 12 of POCSO³.

2. This Court (Coram: Manish Pitale, J.) by order dated: 13.01.2024 issued notice to Respondent No.2 – prosecutrix and since she was not represented on the next adjourned date, this Court, by order dated 06.02.2025 appointed Ms. Gargi Warunjikar to espouse and represent the cause of the prosecutrix and stood over the matter

1 Code of Criminal Procedure, 1973

2 Indian Penal Code, 1860

3 Protection of Children from Sexual offences Act, 2012

today. Ms. Warunjikar has addressed me today so also learned Advocate for the Applicant, Mr. Mukte and Ms. Bajoria, learned APP

3. Prosecution case in brief is that Applicant committed rape repeatedly on the prosecutrix for over a period of 15 months from January 2023 to April 2024. Applicant was 22 years old and prosecutrix was 16 years old on the date of filing of F.I.R.⁴ which is appended at page No.20 of the Bail Application.

4. Prosecution case finds its basis on the statement of prosecutrix in the FIR filed on 30.04.2024. She states that she knew the Applicant for 4 years prior to filing of FIR and was in a love relationship with him and they both used to visit each other's homes and also venture together to various locations in Mumbai during the course of their two year long relationship prior to filing of FIR. She states that things took an unsavory turn when she was called by Applicant to his home under the guise of going on excursion but was instead forced into establishing sexual relationship with him. She states that she remained silent to the said incident but it was followed by a streak of similar instances eventually leading to her pregnancy (discovered by her, and her mother to be 8 weeks old in November, 2023) and subsequent MTP⁵. She states that her MTP was followed by another episode of grimy incidents where Applicant used to repeatedly

4 First Information Report under Section 154 of CrPC

5 Medical Termination of Pregnancy

call her to his home and compelled her to establish sexual relations and she obliged.

5. FIR reveals that prosecutrix was introduced to a woman who was her mother's acquaintance where she relocated herself for 'her care'. She states that she was subsequently traced by police and sent to Shraddhanand Ashram. She states that her father informed the authorities about her MTP and she was produced before the Child Welfare Committee on 29.04.2024 who ordered her medical examination. Her medical examination revealed that she was 5 weeks pregnant for the second time.

6. Mr. Mukte, learned Advocate for Applicant would submit that the case in hand, at best, is of a consensual love relationship between two individuals which is being attempted to be given a 'criminal flavor' in retrospect. He would vehemently submit that there is a substantial delay of more than one year and three months in filing the FIR after the first incident alleged by the prosecutrix.

6.1. He would submit that prosecutrix and Applicant were known to each other as they were friends since four years prior to filing of FIR and used to visit each other's home regularly as they resided in adjacent buildings at Wadala. Thereafter Applicant moved to Chembur after about 2 years, but they kept in touch with each other

and developed closeness, had a love relationship for almost two years and had physical relationship for more than 15 months. He would draw my attention to the contents of the FIR wherein she has stated that she used to visit Applicant's home. He would submit that contents of the FIR, barring a vague statement, do not clarify the manner in which 'force' or 'coercion' was used by Applicant. He would submit that what transpired behind close doors is unknown to everyone except the ones present but could be reasonably construed based upon the twin incidents of pregnancy and acts of parties involved. He would submit that she maintained a stoic silence for a substantial period of 1 year and 3 months since the first incident alleged in the FIR, this silence becomes amplified a few notches higher when her mother also maintained complete silence about her first MTP and instead chose to send prosecutrix to her acquaintance for her care. He would draw my attention to the contents of the OPD record of the Brihanmumbai Municipal Corporation's Department of Psychiatry appended at page No. 43 of the Application where the prosecutrix has admitted having consensual sexual intercourse with the Applicant on multiple occasions.

6.2. He would submit that her mother was all along aware of her relationship with Applicant. He would submit that her mother's

omission to report her first pregnancy and concealing the MTP thereafter without taking any steps be considered by the Court.

6.3. He would submit that even if case of prosecution is considered to be true to the extent that prosecutrix and Applicant were involved in a physical relationship, the same would not be a case to deny bail to Applicant due to its consensual nature which is *prima facie* established from the record. He would submit that there are no signs or marks indicating towards any forceful sexual act. He would submit that proximity of prosecutrix with Applicant since long and their young age leading to a consensual physical relationship is not something unthinkable and should not be viewed as abuse *per se*.

6.4. He would draw my attention to the dichotomy in the statements of the prosecutrix recorded in the FIR at page No.22 of the Application and before the Medical Officer at page No. 43. He would submit that her statement at page No. 43 is clearly indicative of a consensual relationship over a long period of time whereas FIR alleges force. He would submit that contradiction in the statements therefore point out towards a consensual relationship especially in view of her two MTPs. He would therefore persuade the Court to grant bail to Applicant.

7. Ms. Bajoria, learned APP would persuade me to consider the case of prosecutrix since she was admittedly a minor at the time of the incident and it is highly likely that she was lured into the relationship by Applicant considering her immature age of understanding due to her prior acquaintance with Applicant as a childhood friend. She would submit that her consent would therefore be immaterial. She would submit that prosecutrix did not disclose the forceful actions of Applicant as she was under trauma after having undergone immense mental agony after being subjected to violence and her two MTPs. She would contend that the point of delay in filing of FIR harped by the learned Advocate for Applicant is settled by the decision of this Court in the case of *Ramkrushna S. Kumbhar Vs. State of Maharashtra and Anr.*⁶. She would submit that this Court has observed that delay in lodging FIR in such cases cannot be considered in favour of Accused. She would therefore submit that this argument advanced by Mr. Mukte is flimsy and *sans* reasoning. She would urge the Court to reject the Application.

8. Ms. Warunjikar, learned appointed Advocate on behalf of the Respondent No.2 - prosecutrix would draw my attention to the FIR wherein she has stated that Applicant used force on her on multiple occasions which needs to be considered. She would submit that

⁶ Anticipatory Bail Application No.3000 of 2022 decided on 14.12.2022

Applicant exploited her vulnerability due to her prevailing family situation which was equally traumatic for her as there was no elder in the family to provide care and support to her during that period.

9. I have heard the learned Advocates at the bar and with their able assistance perused the record of the case.

10. It is *prima facie* seen that admittedly age of prosecutrix then was 16 years and Applicant was 22 years. They were known to each other and as per statement of prosecutrix in the FIR and statement recorded before the Medical Officer it is clearly borne out that they both were in a love relationship for the past two years and were in a physical relationship for 15 months prior to filing of FIR despite she being below 18 years of age. This fact gets reinforced due to her categorical admissions and her twin pregnancies and MTPs which followed subsequently. This *prima facie* shows and reflects that the acts between the parties were consensual in nature. From the record it is seen that she was in love with the Applicant and therefore developed physical relations with him as admitted by her.

11. In this regard attention is drawn to the decision of the Supreme Court in the case of *S. Varadarajan Vs. State of Madras*⁷ and other decisions down the line thereafter looking at the evolution of the impressionable age of girls and boys who may tend to get provoked

7 1965 AIR 942

into the compelling demand of a relationship which has laid down the aforesaid principle which needs to be considered.

12. Attention is drawn to the decision of this Court (Coram: Mridula Bhatkar, J.) in the case of ***Sunil Mahadev Patil Vs. State of Maharashtra***⁸ which states that consensus of the prosecutrix who is below the age of 18 years is a mitigating circumstance for trial Court to consider, especially while dealing with bail Applications. The relevant paragraph Nos. 8, 9 and 11 of the said decision 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

8 BA No. 1036 of 2015 decided on 03.08.2015

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.”

13. In cases such as the one before me, to continue further incarceration of Applicant, it is crucial to consider whether the act between the parties is violent or otherwise, which on perusal of record is not so, rather it is consensual. Another mitigating factor is whether

there are any criminal antecedents which in the present case are none. The aforesaid mitigating factors persuade me to consider Applicant's case.

14. 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 factors 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 which are required to be considered in such cases. The material placed before me do not indicate towards any force being engaged by Applicant over the prosecutrix during their relationship. The case appears to be consensual in nature that had come to the knowledge of her mother upon prosecutrix becoming pregnant not once, but twice. Applicant has made out a strong case for grant of bail since a boy and girl of similar age group involved in a long standing love relationship by consensus does not make it an offense of a nature to justify his custody, the Applicant is not a sexual predator but a young person who was involved in a consensual relationship which is admitted by the prosecutrix. Both the parties were of the age to have a reasonable understanding of the import of their conduct and despite that had engaged in the said act over a substantial period of time. It is seen that

multiple decisions of the Supreme Court and High Court have favoured the release of young offenders on bail pending trial especially in consensual relationship so that the regressive influences of jail environment can be avoided and keeping in mind the principle of best interest in the aforesaid circumstances. Thus, in the light of the above observations, I am of the view that the Applicant is entitled to bail.

15. 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. 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 a.m. to 12:00 p.m. for three months or 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 cancellation of this order;

- (iv) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (v) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner nor shall he make attempts to contact the prosecutrix either physically or by any electronic means;
- (vi) Applicant shall keep the Investigating Officer informed of his current address and mobile contact number and / or change of residence or mobile details, if any, from time to time;
- (vii) Any infraction of the above conditions shall entail the prosecution to seek cancellation of this order.

16. It is clarified that the observations made in this order are limited for the purpose of granting Bail only and they may not be construed as an expression of opinion by the Court. The trial Court shall adjudicate the case on its own merits in accordance with law.

17. This Court appreciates the assistance rendered by Ms. Warunjikar, Advocate appointed through Legal Aid to espouse the cause of the prosecutrix. Fees be paid by the High Court Legal Aid Services Authority of this Court to the learned appointed Advocate for

Respondent No.2 - prosecutrix as per rules on production of a server copy of this order.

18. All parties to act on a server copy of this order.

19. Bail Application stands allowed and disposed.

Amberkar

[MILIND N. JADHAV, J.]

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Digitally signed
by RAVINDRA
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