

Soparkar

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

CRIMINAL BAIL APPLICATION NO. 5462 OF 2024

Fahim Jafar Shaikh

.. Applicant

Versus

The State of Maharashtra and Anr.

.. Respondents

WITH

CRIMINAL BAIL APPLICATION NO. 5327 OF 2024

Fahim Jafar Shaikh

.. Applicant

Versus

The State of Maharashtra and Anr.

.. Respondents

-
- Mr. Husen Shaikh with Mr. Bilar Shaikh, Advocates for Applicant.
 - Ms. Priyanka Brahmdev Chavan, appointed Advocate for Respondent No.2.
 - Mr. H. J. Dedhia, APP for the State.
 - Mr. Gavali, PI and Mr. Chavan, PSI, Kandivali Police Station are present.
 - Mr. S. S. Ghag, PSI, Pairvi Adhikari, Malavani Police Station are present.
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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 25, 2025.

P.C.:

- 1.** Heard Mr. Shaikh, learned Advocate for Applicant, Mr. Dedhia, learned APP for State and Ms. Chavan, learned appointed Advocate for Respondent No.2 in both matters.
- 2.** Present two Bail Applications are filed by the same Applicant and hence they are disposed by this common order.

3. Bail Application No.5462 of 2024 is filed in connection with C.R. No.808 of 2023 registered with Kandivali Police Station for offences punishable under Sections 363 and 376(2)(n) of the Indian Penal Code, 1860 (for short “**IPC**”) readwith Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (for short “**POCSO Act**”). Applicant is the sole Accused in the crime incarcerated since 05.12.2023 i.e. 1 year, 4 months and 21 days.

4. Bail Application No.5327 of 2024 is filed in connection with C.R. No.1357 of 2023 registered with Malvani Police Station for offences punishable under Sections 363, 366-A, 368, 376, 376(2)(n), 376(3) of the IPC readwith Sections 4, 5(l), 6, 8 and 12 of the POCSO Act. There are total two Accused persons in this crime and Applicant before me is indicted as Accused No.2 incarcerated since 10.11.2023 i.e. 1 year, 5 months and 16 days.

5. Initially, on 17.10.2023 a missing C.R. No.1357 of 2023 was filed with Malvani Police Station by First Informant - mother when the prosecutrix - victim went missing from her house on 16.10.2023. She was traced back and herself returned on 21.10.2023 but was sent to the Rescue Foundation Home for rehabilitation. During the interregnum in her statement, the prosecutrix has stated that she met the Applicant and went alongwith him to a lodge in Bhiwandi and stayed with him initially for a period of three days and thereafter the

remaining two days a friend of the Applicant who is arrayed as Accused No.1 in C.R. No.1357 of 2023 came over and she spent two days with him.

6. On 21.10.2023 charge under Section 376 of IPC and Sections under the POCSO Act were added. Prosecutrix received medical treatment through Rescue Foundation but while doing so she once again went missing from Shatabdi Hospital on 8.11.2023. She was traced back once again after a period of 4 days on 11.11.2023 and recorded her statement, *inter-alia*, stating that she stayed with the Applicant at the same lodge in Bhiwandi. Her statements recorded by the police are appended at page Nos.23 and 34 respectively of the twin Bail Applications before me. I have perused the same. Statement of the Lodge Manager appended at page No.45 of the Bail Application No.5327 of 2024 has also been recorded.

7. Learned appointed Advocate Ms. Chavan who has been appointed to espouse and represent the cause of victim in both Applications as also the learned Prosecutor Mr. Dedhia have fairly argued the aforesaid facts and would contend that in view of the presumption enshrined in Section 29 of the POCSO Act and the circumstances in which the prosecutrix has found herself, these facts be considered by the Court as according to the medical evidence placed on record, possibility of Applicant having sexually assaulted the

prosecutrix is not ruled out.

8. With the able assistance of the learned Advocates at the bar, I have perused the record of the case.

9. *Prima facie* it is seen that the prosecutrix is a victim of her family circumstances which is emanating from her own statements recorded in the twin Bail Applications. In one of her statement at page No.34 of Bail Application No.5327 of 2024, prosecutrix has stated that she has been abused by her own family members two and half years ago. In the same statement she has stated that in so far as present Applicant is concerned, her physical relationship with him was consensual without any violence or force. That apart, she has stated that Applicant was her boyfriend and she befriended him and knew him from past one year and during that tenure she spent a lot of time with him. Perusal of the record emanating from prosecution case and various statements recorded *prima facie* show that the prosecutrix befriended the Applicant more than a year ago. She states that in unusual circumstances, she left her house due to disagreement with her parents and spent the entire day on the railway station, where she sought applicant's help who was a bystander. Applicant at that time called up her family and spoke to her father and at their request took her back and left her with her family. The prosecutrix however, thereafter kept in regular touch with Applicant through social media

but it is seen that she also went to trace him and his household. She was ultimately successful in tracing him and both of them thereafter used to spend time together. *Prima facie*, from the aforesaid material which is seen from the various statements recorded and placed in the charge-sheet, it is seen that relationship between Applicant and prosecutrix was consensual.

10. In this regard, assistance is drawn from the decision of the Supreme Court in the case of *S. Varadarajan v. State of Madras*¹ 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 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.

¹ AIR 1965 942

12. In this regard 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***² 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 herein below 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 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

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

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."*

13. Next the decision of this Court (Coram: Sandeep K. Shinde, J.) in the case of *Anirudha Radheshyam Yadav Vs. The State of Maharashtra*³ 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).”

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

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

without adverting 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 Vs. State of Kerala Represented through the Public Prosecutor*⁴. The relevant paragraphs are reproduced thus:-

"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 adverting 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,

4 2019 SCC OnLine 783.

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. Attention is drawn to the decision of High Court of Kerala in the case of *XXXXXX Vs. State of Kerala Represented through the Public Prosecutor and Ors*⁵. The relevant paragraphs are reproduced thus:-

"19. Before parting with the judgment, we will also deal with the appellant's contention based on Section 29 of the POCSO Act. Section 29 is extracted herein below:

"29. Presumption as to certain offences.— Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this 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."

20. It is the submission of the learned counsel for the appellant based on Section 29 of the Act that reverse burden is cast on the accused to prove that they have not committed the offences under Sections 3, 5, 7 and 9 of the Act, the only precondition being that the accused is prosecuted for committing or abetting or attempting to commit any of the offences above referred. According to the learned counsel, the accused persons herein failed to discharge the reverse burden and therefore, they are liable to be convicted for the offences alleged. We cannot accept the above contention of the learned counsel. The argument, if accepted on its face value, is pregnant with the peril of accepting every prosecution charge, where offences under Sections 3, 5, 7 and 9 of the Act are canvassed, irrespective of its merits. Section 29 only creates an exception to the ordinary rule of innocence available to the accused in a criminal trial and puts the onus on the accused to rebut the presumption and establish his innocence. However, this presumption will operate only if the foundation to the prosecution case is laid by leading legally admissible evidence. The statutory presumption under Section 29 cannot be understood to mean that in every case when a person is prosecuted for the specified offences, the prosecution version should be taken as gospel truth. The presumption will not mitigate the primary duty of the prosecution to establish the

⁵ CRA(V) No. 19 of 2020 decided on 24.02.2022.

foundational facts constituting the offence, which duty is static on the shoulders of the prosecution. Once the same is done, the burden shifts to the accused by virtue of Section 29 of the Act to prove that he had not committed or abetted or attempted to commit the offence, as the case may be. Our conclusions afore referred are in accord with the following judgments of the Hon'ble Supreme Court, where presumption under various statutes have been analysed and interpreted: (1) **K.Veerawami v. Union of India** [(1991) 3 SCC 655], (2) **State of Maharashtra v. Wasudeo Ramachandra Kaidalwar** [(1981) 3 SCC 199], (3) **Noor Aga v. State of Punjab** [(2008) 16 SCC 417], (4) **Kumar Exports v. Sharma Carpets** [(2009) 2 SCC 513], (5) **Abdul Rashid Ibrahim Mansuri v. State of Gujarat** [(2000) 2 SCC 513], (6) **Chandran & Others v. State of Kerala and Others** [AIR 2011 SC 1594], (7) **Naresh Kumar v. State of Himachal Pradesh** [AIR 2017 SC 3859] and (8) **Gangadhar @ Gangaram v. State of Madhya Pradesh** [AIR 2020 SC 3656]. These decisions were taken note of and discussed by a learned Single Judge of this Court in **Justin @ Renjith & Another v. Union of India** [ILR 2020 (4) Ker 679]. To the same effect is the judgment of another learned Single Judge of this Court in **David v. State of Kerala** [2020 (4) KHC 717 : 2020 CrLJ 3995]. We, therefore, reject the said contention of the appellant on the legal premise. On factual premise also, we find that the accused persons have rebutted the presumption under Section 29 by virtue of the evidence and circumstances already discussed, which were given due weightage in confirming the impugned judgment.”

17. *Prima facie* from the case of the prosecution, it is seen that relationship between the Applicant and prosecutrix was consensual. In view of the *prima facie* admission of the above fact by the prosecutrix herself, Applicant deserves to be released on bail.

18. Needless to state that complicity of Applicant in the crime can be proved by prosecution at the trial.

19. Hence, both Bail Applications are allowed subject to the following terms and conditions:-

- (i) Applicant is directed to be released on bail in both FIRs on furnishing P.R. Bond in the sum of Rs.10,000/- in

each FIR 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.

20. 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.

21. This Court appreciates the assistance rendered by Ms. Chavan, learned Advocate appointed through the Legal Aid to espouse the cause of Respondent No. 2. Her fees be paid by the High Court Legal Aid Services Authority as per rules on production of a server copy of this order and other compliances.

22. Both Bail Applications are allowed and disposed.

[MILIND N. JADHAV, J.]

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