

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.42 of 2025

Arshad Hafijulla Khan .. Applicant
Versus
The State of Maharashtra & Anr. .. Respondent

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- Ms. Anjali Patil a/w. Mr. Tohid Shaikh, Advocates for Applicant.
 - Ms. Savita M. Yadav, APP for Respondent No.1 – State.
 - Ms. Tejashree Kolamkar a/w. Mr. Vishal Padvi, Ms. Shaheen Siddiqui, Mr. Mohnish Kolamkar, Mr. Nikesh Uparpelli, Mr. Abhilash Kurey and Mr. Allwyn D'silva, Advocates for Respondent No.2.
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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 28, 2025

P.C.:

1. Heard Ms. Patil, learned Advocate for Applicant; Ms. Yadav, learned APP for Respondent No.1 – State and Ms. Kolamkar, learned Advocate for Respondent No.2.

2. This is an Application under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 ('BNSS') seeking Bail in connection with C.R. No.654 of 2024 registered with Byculla Police Station for offences under Sections 64(1), 64(2)(i), 65(1), 351(3) and 3(5) of the Bharatiya Nyay Sanhita, 2023 ('BNS') readwith Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act'). There are total three accused in the present crime and Applicant before me is indicted as Accused No.1. He is incarcerated since

23.09.2024.

3. FIR is lodged by First Informant – mother of prosecutrix on 23.09.2024. She has stated that since July 2024 some money was getting stolen from her wardrobe. She enquired about the same to prosecutrix who gave her evasive replies. On 22.09.2024, some of her gold jewellery went missing about which she asked the prosecutrix and prosecutrix aged 15 years old replied stating that she did not take her jewellery however she knew one boy namely Accused No.3 aged 17 years old with whom she got acquainted via Snapchat App and developed friendship which translated into a love relationship. It is further alleged that in May 2024 Accused No.3 called prosecutrix to meet him near the staircase of 11th floor of one building and without her consent established physical relations with her and he repeated the same on two occasions and established physical relations with her by black-mailing her with private photographs which she had sent to him on WhatsApp. It is thereafter alleged that Accused No.3 showed prosecutrix's private photographs to Accused Nos.1 and 2, who in turn, in July 2024 blackmailed prosecutrix into having physical relation with them. FIR came to be lodged by First Informant – mother of prosecutrix in September 2024.

4. Ms. Patil, learned Advocate for Applicant would submit that there is stark variance in the statement of First Informant – mother of

prosecutrix and the prosecutrix herself as also her statement recorded under Section 183 of the BNSS and also other witness statements recorded by prosecution. She has persuaded me to peruse the said statements and would submit that *prima facie* perusal of the statements would cast a shadow of doubt on veracity of the prosecution case. That apart she would submit that there is a delay of 5 months in reporting the crime which may be a mitigating factor to be considered by Court. She would submit that no dates or any other particulars have been mentioned by prosecutrix which further make her case difficult to believe. She would submit that in any event investigation of matter is completed and charge-sheet is already filed. She would submit that there is no possibility of the trial commencing and completing in the near foreseeable future as prosecution is intending to examine 27 probable witnesses in trial and charges not being framed till date would entitle the Applicant for bail. She would submit that there is no recovery or discovery pending at instance of Applicant. She would submit that *prima facie* considering totality of facts in present case and glaring contradictions in witness statements including that of prosecutrix and First Informant, Bail Application be allowed.

5. Ms. Yadav, learned APP and Ms. Kolamkar, learned Advocate for Respondent No.2 both have vehemently opposed the Bail Application. They would submit that crime committed by Applicant is

serious in nature and its gravity cannot be ignored. They would submit that Applicant alongwith other co-accused have taken disadvantage of the tender age of prosecutrix who was not of an understanding age. They would submit that there is sufficient material on record to corroborate prosecution case and prove complicity of Applicant in the crime and hence the Court should be cautious while deciding the Bail Application. They would submit that there is every possibility of Applicant threatening and / or influencing witnesses as he resides in the same locality of prosecutrix. Hence they would urge Court to reject the Bail Application.

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

7. *Prima facie* perusal of the statements recorded reveals that there is stark contradiction in the narration of alleged incidents as stated by First Informant and that by prosecutrix. It is also *prima facie* seen that there is material improvement / contradiction in statements of prosecutrix recorded before the police and before the Magistrate.

8. Though delay is not fatal to the prosecution case in matters arising out of the POCSO Act, in such cases like the present case where *prima facie* there is discrepancy and infirmity observed in the statements of prosecutrix, the same needs to be taken into account at the stage of bail. Furthermore *prima facie* it is seen that it is Accused

No.3 who is the principal accused whom prosecutrix has accused of stealing the cash and gold jewellery from her house. There is no recovery or discovery pending from present Applicant. Though charge-sheet is filed, there is no possibility of trial commencing or for that matter concluding in the near foreseeable future.

9. 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.

10. 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 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*¹. The relevant paragraph Nos.9 to 11 are reproduced

¹ 2019 SCC OnLine 783.

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 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.”

11. Next, 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 Ors²**. 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***

² CRA(V) No. 19 of 2020 decided on 24.02.2022.

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 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.”

12. It is *prima facie* observed that the allegation of all three accused persons exploiting the prosecutrix by extorting different denominations of amounts and the prosecutrix paying those amounts as stated in the Section 183 BNSS statement recorded before the Magistrate is *prima facie* missing and not reflected in the FIR and statement of prosecutrix which is a material addition and improvement and equally an infirmity noted on the face of record.

13. *Prima facie* considering the facts of the present case which are delineated herein above, in my opinion Applicant before me is entitled for bail. Apprehension expressed by learned APP and learned Advocate for Respondent No.2 can be taken care of by imposing stringent conditions.

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

15. 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) 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.

16. 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.

17. Bail Application is allowed and disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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SAWANT

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Date:
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