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

CRIMINAL BAIL APPLICATION NO. 496 OF 2025

Atish Ramesh Kamble

.. Applicant

Versus

The State of Maharashtra and Anr.

.. Respondent

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- Mr. M.B. Shirsat a/w Ms. Fehmida Ahmed and Ms. Swati Pandey, Advocates for Applicant.
 - Mr. Balraj B. Kulkarni, APP for Respondent No. 1 – State.
 - Ms. Lochan Chandka, Advocate for Respondent No. 2.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 29, 2025.

P.C.:

1. This is an Application under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 seeking Regular Bail in connection with C.R.No. 07 of 2021 registered with Matunga Police Station for offences punishable under Sections 363, 376 (2)(i)(j)(n), 354(A)(D) and 506 of the Indian Penal Code, 1860 (for short 'IPC') read with Sections 4, 8 and 12 of the Protection of Children against Sexual Offences Act, 2012 (for short 'POCSO Act'). Applicant is arrested on 13.01.2021 and he is incarcerated for 4 years 3 months 16 days pending trial.

2. First – Informant mother is a house maid. It is prosecution case that on 10.01.2021 First - Informant mother being unwell sent prosecutrix as substitute to work. Prosecutrix did not return back

home. First – Informant filed missing complaint against unknown person. On 13.01.2021 prosecutrix was found and brought to the police station and her statement was recorded. Prosecutrix was 17 years and 2 months old and Applicant was 26 years old at the time of incident. She stated that on 10.01.2021 after work while returning back home by bus she met Applicant who forcefully took her to various places and molested her. She has stated that thereafter he left her at Mahulagaon bus stop where she spent two days below a mono-rail bridge waiting for him and he intermittently visited her. It is prosecution case that on 12.01.2021 Applicant took her near Building No. 18 in the vicinity where he forcibly had physical relations with her. Thereafter he threatened her of dire consequences and left the incident spot. Hence the present FIR.

3. Mr. Shirsat, learned Advocate for Applicant would submit that prosecutrix and Applicant were well acquainted with each other for the past 3 years and were in a relationship for the past 2 years prior to the alleged incident in the FIR as both used to live in the same building. He would submit that there is a clear dichotomy in prosecutrix's statements recorded in the FIR on 13.01.2021 on page No. 33, her narration in the Medical Examination dated 15.01.2021 appended on page No. 50 and when read at page No. 52 and her Section 164 statement recorded before Magistrate on 21.01.2021 appended on page No. 91. When the above statements are read it is

seen that there are substantial infirmities and absurdities in the version of prosecutrix regarding alleged incidents which raise a serious doubt on prosecution case.

3.1. He would submit that as per prosecutrix's own statement she has stated that she on her own volition without any lure or force and without informing her parents went with the Applicant and was with him for 3 days she being clearly aware of her own actions. He would submit that Medical Examination Report of prosecutrix appended at page No. 50 does not record any injury on prosecutrix which itself shows and reflects that there was no sign of coercion or force by Applicant. The prosecution story therefore falls to the ground.

3.2. He would submit that Applicant is the sole breadwinner of his family and does not have any criminal antecedents. He would submit that Applicant is not named in the FIR as it is initially lodged against an unknown person. He would submit that Applicant is arrested on 13.01.2021 and has been incarcerated for the past 4 years 3 months 16 days pending trial. He would submit that investigation is completed, charge-sheet is filed, prosecution has examined 3 witnesses out of the probable 23 witnesses, hence completion of trial in the near foreseeable future is bleak. Hence he would urge the Court to allow the present Application in the above facts.

4. Mr. Kulkarni, 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. He would submit that prosecutrix was 17 years 2 months old at the time of incident. He 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. He would submit that facts of the case as delineated will have to be examined by the Court for consideration as placed on record in the present case. He would submit that there is every likelihood of the Applicant exploiting the vulnerability of the prosecutrix in the facts of the present case and induced her to accompany him to various places without informing her parents.

4.1. He would submit that Applicant had threatened her with dire consequences if she disclosed the incident. He would submit that if Applicant is released on bail there is a possibility of him re-offending himself, influencing the prosecutrix and witnesses as he resides in the same vicinity. He would submit that charge is framed, 3 prosecution witnesses have been examined and hence would urge the Court to reject the Application.

5. Ms. Chandka, learned appointed Advocate for Respondent No. 2 would adopt the submissions made by learned APP and would persuade me to consider the minor age of prosecutrix and argue that considering that facet it would be possible that prosecutrix was lured

into a relationship by Applicant considering her immature age of understanding. She would submit that Applicant took a chance by seeing prosecutrix travel alone in the bus and may have induced her to accompany him to various places without informing her parents. She would therefore request that the Application be rejected.

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

7. It is *prima facie* seen that Applicant and prosecutrix were well acquainted with each other for the past 3 years and were in a relationship for the past 2 years as admitted by her in the statement recorded during her Medico- Legal Examination appended at page No. 50. Her Medical Examination Report at page No.50 *prima facie* shows no evidence of injury on her body. A *prima facie* discrepancy is noticed when statements recorded in the FIR, Medical Examination and under Section 164 are juxtaposed and read. If at all prosecution case is considered prosecutrix has alleged that Applicant forcefully took her to various places, touched her inappropriately and thereafter left her near Mahulagaon bus stop. However it is seen that prosecutrix on her own volition without any lure, force or threat spent two days below the bridge waiting for Applicant to return which is confirmed by her own statement recorded under Section 164 on 21.01.2021 appended at page No. 91. It is seen that prosecutrix had ample opportunity to

return back home to seek assistance from her parents or file any complaint against Applicant but she failed to do so. It is *prima facie* seen that she maintained a stoic silence for two days and stayed there waiting for him without informing her parents. This clearly shows that she was clear about her actions and decisions though she was below 18 years of age.

8. However what intrigues the Court is whether further incarceration of Applicant is required or justified overriding his right to liberty and speedy trial? The reason which impels me to consider the present Application is long incarceration of Applicant in prison which is for the past 4 years 3 months 16 days pending trial. Case of prosecution is based on circumstantial evidence. Needless to state that complicity of Applicant can be proved in trial.

9. 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 broad parameters 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 are required to be considered in such cases.

10. The prosecution side namely the learned appointed Advocate has persuaded the Court to consider the presumption under Section 29

of the POCSO Act to contend that unless the contrary is proved, the said presumption will have to be accepted by the Court even at the bail stage.

11. 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.

12. 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 see that application of presumption without adverting to the essential facts shall not lead to injustice since we are at a *prima facie* stage. 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 paragraphs are reproduced thus:-

¹ 2019 SCC OnLine 783.

"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 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, 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."

13. 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*². 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

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

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 Cr.LJ 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.

14. 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

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

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)."

15. In such circumstances assistance is drawn from the decision of the Supreme Court in the case of ***S. Varadarajan v. State of Madras***⁴ 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."

16. Though this case was decided well before POCSO Act was enacted, this Court is conscious of the presumption ingrained in the said Act and that argument on her consent is irrelevant but *prima facie* if the statements recorded of the prosecutrix are seen, she on her own volition waited for the Applicant without any lure or force is gathered from the record of the case.

17. 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***⁵ to contend that consensus of the prosecutrix who is below the age of 18 years is a mitigating

⁴ AIR 1965 942

⁵ Bail Application No. 1036 of 2015, decided on 03.08.2015.

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 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."*

18. In so far as offences punishable under Sections 4, 8 and 12 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 more than 4 years.

19. Considering the overall facts of the case *vis-a-vis* the above judicial pronouncements and the facet of long incarceration of Applicant for 4 years 3 months 16 days pending trial, prosecution having examined 3 prosecution witnesses out of the probable 23 witnesses, completion of trial in the near foreseeable being doubtful, I am of the opinion that Applicant can be released on bail.

20. 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.15,000/- 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 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;

(vi) 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;

(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.

21. 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.

22. Fees of the learned Advocate Ms. Chandka, 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.

23. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]

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