

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 698 OF 2025

Rajkumar Mithailal Gupta

.. Applicant

Versus

The State of Maharashtra and Anr.

.. Respondents

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- Mr. Advait Shukla a/w Ms. Aditi Rajput and Mr. Akkshay Kumar Mishra, Advocates for Applicant.
- Mr. Hitendra J. Dedhia, APP for Respondent No. 1 – State.
- Mr. Viral Mukte, Advocate for Respondent No. 2 – victim.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 23, 2024

P. C.:

1. Heard Mr. Shukla, learned Advocate for Applicant, Mr. Dedhia, learned APP for Respondent – State and Mr. Mukte, learned Advocate for Respondent No. 2 – victim.

2. This is an Application under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 seeking Regular Bail in connection with C.R.No.475 of 2020 registered with Andheri Police Station for offences punishable under Sections 376 - AB and 506 of the Indian Penal Code, 1860 (for short 'IPC') read with Sections 4, 6, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO'). Applicant is arrested on 30.12.2020 and is incarcerated for 4 years 3 months 24 days.

3. The First Informant in the present case is the mother of the victim - girl. Prosecution case is that on 06.06.2020 when First Informant returned from work she found her daughter – victim aged about 10 years, being scared and crying. When she was asked the reason for the same victim narrated to First Informant that she was molested by the Applicant on the two previous days that is on 04.06.2020 and 05.6.2020 inside his house and he had threatened to kill her parents and sister. First Informant's sister i.e. maternal aunt of victim girl has a two year old son and she lives in the neighbourhood of First Informant's house.

4. Applicant is the neighbour of First Informant's sister, daughter of First Informant used to visit her house regularly for playing with her son. According to prosecution on 04.06.2020 when the victim was playing outside her maternal aunt's house, Applicant called her in his house for washing some utensils and she followed him. According to prosecution case when victim went inside the house, Applicant latched the house from inside and thereafter molested the victim. According to prosecution thereafter Applicant gave Rs. 100 to the victim and asked her to remain quiet, failing which he threatened to kill her parents. Prosecutrix came home and did not reveal the incident to anybody. However on the following day i.e. on 05.06.2020 once again when she went to play with her maternal aunt's son,

Applicant lured her and gave her Rs. 100 and repeated the same incident. According to prosecution on the following day that is 06.06.2020 victim girl did not go to her maternal aunt's house so therefore Applicant confronted the victim outside her house and asked her the reason for not coming to her maternal aunt's house on that day. The aforesaid incidents were narrated by victim to First Informant mother who has thereafter filed the FIR. Applicant was arrested on 30.12.2020 from his village Fatehpur, Uttar Pradesh and has been in custody since then for the past 4 years 3 months 24 days, pending trial.

5. Mr. Mukte, learned appointed Advocate and Mr. Dedhia, learned APP both have vehemently submitted that the crime in the present case is heinous in nature and construing the age of the victim and act of Applicant no bail should be granted to him. They both would submit that the statement of victim in the present case of having identified the Applicant in presence of the witnesses needs to be accepted by the Court which is duly corroborated by the medical evidence wherein it is opined that there was bleeding and painful urination encountered by victim. They both would submit that there is no reason as to why the victim would implicate the Applicant and therefore Applicant deserves no sympathy. They would submit that threat given by Applicant to victim of harming her parents and sister

prima facie establishes the complicity of Applicant in the crime and therefore he deserves no bail. Hence they would urge the Court to reject the Application for bail.

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

7. *Prima facie* it is seen that case of prosecution is solely based upon the statement of the prosecutrix - victim. FIR is lodged by First Informant mother of victim on 06.06.2020 appended at page 35 of Application. Statement of victim is recorded on 07.06.2020 and appended at page No. 49 of the Application. Statement of victim recorded under Section 164 before Magistrate is dated 22.06.2020 and appended at page No. 53 of the Application. *Prima facie* two specific infirmities and discrepancies are clearly noted in the two statements when read. It is seen that in the statement of victim recorded before police officer she has alleged penetrative sexual assault whereas in her Section 164 statement recorded before the Magistrate she has not stated anything with regard to penetrative sexual assault.

8. The second discrepancy *prima facie* noted is that on 07.06.2020 the victim in her statement before police officer has stated that Applicant confronted her while she was playing in the nearby playground and threatened her whereas in the Section 164 statement

recorded before Magistrate she has stated that Applicant confronted her when she had gone to a nearby shop to buy a chocolate for herself.

9. The aforesaid discrepancies are *prima facie* critical. This is so because prosecution is *prima facie* heavily relying upon the medical evidence to corroborate the prosecution case. The Medico – Legal Examination Report conducted on 07.06.2020 is appended at page No. 66 of the Application. When the same is seen it is *prima facie* stated therein that there is no evidence of any injury on the victim's body and the hymen is intact. During her Medico – Legal Examination the victim has narrated that Applicant touched her inappropriately and thereafter threatened her not to disclose it to anybody. If the aforesaid three statements which are the fulcrum of the prosecution case are seen the apparent dichotomy is *prima facie* noted by the Court. However *prima facie* the case of prosecution of penetrative sexual assault is not supported by the Medico – Legal Examination Report and the Section 164 statement and a clear infirmity is *prima facie* observed by Court. That apart long incarceration for 4 years 4 months pending trial, further persuades me to consider Applicant's case. Needless to state that complicity of Applicant in the crime can be proved by the prosecution in trial.

10. The prosecution side has also 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. 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 advertent 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 paragraphs are reproduced thus:-

"9. Mere delay in reporting the matter to the authorities

1 2019 SCC OnLine 783.

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 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 understood to mean that in every case when a person is

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

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.

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 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 which are required to be considered in such cases.

15. Argued before me is a case concerning liberty of an under-trial who has been incarcerated for almost 4 years 3 months 24

days, a situation impacting the rights of undertrial conferred by Article 21 of Constitution to speedy justice as also personal liberty. In so far as the power of High Courts to grant bail is concerned, when the case is such that involves a question of personal liberty of an undertrial who is incarcerated for a very long period, the powers are wide and unfettered by conditions, the principle rule being that bail is the rule and refusal is the exception, allowing accused persons to better prepare their defense. That apart the *prima facie* discrepancies are noted in the various statements recorded by the prosecution.

16. In the case of ***Emperor vs H.L. Hutchinson***³ the Allahabad High Court, as far back as in the year 1931 held that power of granting bail conferred on High Court is entirely unfettered by any conditions. It held that legislature has given the High Court and the Court of Session discretion unfettered by any limitation other than that which controls all discretionary powers vested in a Judge, viz. that the discretion must be exercised judiciously. The Court has given primacy to the fact that accused person if granted bail will be in a much better position to defend himself. In this very case, it was delineated that grant of Bail is the Rule and refusal is an exception. This was in the famous Meerut Conspiracy case. Justice Mukherjee writing for the Bench in paragraph No.9 held as under:-

3 AIR 1931 ALL 356

“9. Speaking for myself, I think it very unwise to make an attempt to lay down any particular rules for the guidance of the High Court, having regard to the fact that the legislature itself left the discretion of the Court entirely unfettered. The reason for this action on the part of the legislature is not far to seek. The High Court might be safely trusted in this matter and it goes without saying that it would act in the best interests of justice whether it decides in favour of the prosecution or the defence. The variety of cases that may arise from time to time cannot be safely classified and it will be dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes.”

17. The Supreme Court in a landmark decision of 1978 in the case of ***Gudikanti Narasimhulu & Ors. v. Public Prosecutor, High Court of Andhra Pradesh***⁴ observed as under:-

“6. Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the court punishing him with imprisonment. In this perspective...” (emphasis supplied)

18. Thereafter the Supreme Court in a plethora of judgements have discussed the rights conferred by Article 21 qua grant of bail and that such rights cannot be taken away unless the procedure is reasonable and fair and in cases where there is unreasonable delay in trial it would undoubtedly impact the rights of an undertrial. Some of the important decisions of the Supreme Court and some of the High Courts are discussed hereinunder:-

4 1978 (1) SCC 240

18.1. In the landmark judgment of *Maneka Gandhi V Union of India*⁵, Supreme Court held that the right to life and personal liberty under Article 21 is not limited to mere physical existence but includes the right to live with dignity. The court emphasized that the procedure established by law must be fair, just, and reasonable, and it cannot be arbitrary, oppressive, or unreasonable.

18.2. In the case of *Hussainara Khatoon Vs. Home Secy., State of Bihar*⁶ the Supreme Court held as under:-

“Now obviously procedure prescribed by law for depriving a person of liberty cannot be “reasonable, fair or just” unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as “reasonable, fair or just” and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21.”

19. In view of my above *prima facie* observations with regard to discrepancies noted in the statements recorded by the prosecution and the ignominy of Applicant incarcerated in prison for the past 4 years 3 months 24 days pending trial and charge not been framed till date and most importantly certainty of trial not even commencing or for that matter being concluded in the near foreseeable future being a

5 1978 (1) SCC 248

6 (1980) 1 SCC 81

distinct impossibility, I am of the opinion that Applicant can be released on bail.

20. Bail Application stands allowed subject to following conditions:-

- (i) Applicant is directed to be released on furnishing P.R. Bond in the sum of Rs. 25,000/- with one or two sureties in the like amount;
- (ii) After release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (iii) Applicant shall attend the trial Court on first Monday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Monday of the said month falls on a holiday and / or non Court working day, the Applicant shall mark presence on the next working day;
- (iv) 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;
- (v) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court; Applicant shall deposit his passport if any with the Trial Court;

- (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 influence with any of the witnesses or tamper with the evidence in any manner;
- (viii) Before actual release from jail, Applicant shall furnish her address where she proposes to reside after release from jail, to the concerned Police Station and also to the trial Court;
- (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 above observations in this order are limited for the purpose of granting bail only and I have not made any observations on the merits of the case and the trial shall proceed uninfluenced by the present order.

22. This Court appreciates the assistance rendered by Mr. Mukte, learned Advocate appointed through the Legal Aid to espouse the cause of Respondent No. 2. His 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

23. Bail Application is allowed and disposed.

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[MILIND N. JADHAV, J.]

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