

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 777 OF 2025

Hariom Ramnarayan Sing

.. Applicant

Versus

State of Maharashtra & Anr.

.. Respondents

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- Mr. Rishikesh A. Mohite, Advocate for Applicant
- Ms. Shilpa K. Gajare-Dhumal, APP for Respondent No. 1 - State
- Ms. Pipli Datta, Advocate (appointed) for Respondent No. 2

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 23, 2025

P. C.:

1. Heard Mr. Mohite, learned Advocate for Applicant; Ms. Gajare-Dhumal, learned APP for Respondent No. 1 - State and Ms. Datta, learned Advocate (appointed) for Respondent No. 2.

2. Applicant - accused has filed the present Application for regular bail under Section 439 of the Code of Criminal Procedure, 1973 (for short, "**Cr.PC.**") in connection with C.R. No. 180/2024 registered with Boisar Police Station, Palghar for the offences punishable under Sections 376 and 376(2)(n) of the Indian Penal Code, 1860 (for short, "**IPC**") and under Sections 4 & 8 of the Protection of Child from Sexual Offences Act, 2012 (for short, "**POCSO Act**"). Applicant is arrested on 09.09.2024 and as on today he is in detention for a period of 7 months & 14 days.

3. The case of prosecution is that Applicant is resident of the same area as that of prosecutrix. Age of the prosecutrix was 18 years at the time of filing of the FIR whereas age of Applicant was 26 years. Applicant is a vegetable vendor. According to prosecution case, Applicant and the prosecutrix befriended each other during the Navratri festival three years prior to the lodging of the FIR and became very good friends and used to regularly remain in touch with each other. According to prosecution case during that time, Applicant expressed his liking towards prosecutrix and proposed her for marriage. The prosecutrix accepted the proposal of Applicant, however she informed him that since she was a minor and was about to attain the age of majority, they would marry only thereafter to which Applicant agreed. Date of birth of the prosecutrix is 04.02.2006.

4. According to the prosecution in June 2020, prosecutrix visited the residence of the Applicant when no one was present there and at his instance indulged in physical relationship with him. Thereafter it is the prosecutrix's own case that she and the Applicant regularly indulged in physical relationship either at his residence when no one used to be present and she also visited various hotels which are specifically named by her in her statement in Boisar area along with Applicant on several occasions where they indulged in physical

relationship. Prosecutrix attained majority on 04.02.2024. Thereafter, it is case of prosecution that prosecutrix persuaded Applicant to marry her upon which Applicant began to evade her and discontinued all communication. Consequently prosecutrix lodged the present FIR on 21.04.2024.

5. Mr. Mohite, learned Advocate for the Applicant would persuade me to consider the fact that admittedly according to prosecutrix's own statement and the prosecution case, the parties i.e. Applicant and the prosecutrix were in a love relationship from June 2020 to February 2024 until prosecutrix turn 18 years. He would submit that during the said period, she has admitted that they used to have physical relationship either at the Applicant's house or prosecutrix's house or at various hotels where she accompanied Applicant. He would submit that it is an admitted fact that at the time of relationship between the parties, prosecutrix was below 18 years of age but considering the long tenure of her relationship and nature of relationship between them, it cannot be said that she continued into the relationship with the Applicant for 4 years on the pretext of Applicant giving her a false assurance of marriage. He would submit that insofar as having physical relationship between them is concerned, prosecution has recorded statement of the Manager of one of the hotel where both used to repeatedly visit which shows that prosecutrix had given her

Aadhar card with date of birth having been tampered therein. Though it is case of prosecution as also learned appointed Advocate for prosecutrix that it was Applicant who was responsible in forging and tampering with the Aadhar card, the same would be a matter of trial. Though Ms. Datta, learned appointed Advocate for Respondent No. 2 would vehemently submit that even though tenure of the incident was over a period of 4 years and it is an admitted fact that she was a minor at that time, her consent would be immaterial and irrelevant in view of the presumption envisaged under Section 29 of the POCSO Act. Ms. Datta would vehemently refute the case of Applicant that the incidents in the present case cannot be said to be that of a teenager being in a love relationship rather according to her version this is a case where the prosecutrix being a minor was exploited by Applicant with a false promise and lure to marry her and was repeatedly exploited over a period of 4 years. Hence learned APP and learned appointed Advocate would both persuade the Court to reject the present Bail Application.

6. I have heard learned Advocates appearing for the respective parties and with their able assistance perused the record of the case.

7. First informant is the prosecutrix herself. She lodged the FIR after turning 18 years old on 04.02.2024. FIR is lodged on 21.04.2024. Prosecutrix has herself stated in the FIR that she

befriended the Applicant in the year 2020 and since then used to repeatedly go to meet him at his residence in the neighbourhood of her residence. She has stated that she used to regularly visit various hotels in Boisar area along with Applicant and they both used to indulge in physical relationship. Last physical encounter narrated by her in her statement is of February 2024. Section 164 statement of the prosecutrix is appended at page No. 52 of the Application. This statement is recorded before the Magistrate. It is seen that Section 164 statement of the prosecutrix is very cryptic. In this statement, the prosecutrix categorically states that since 2020, she was in a love relationship with the Applicant. (सन २०२० से मेरे घरके पास रहनेवाले XXXX के साथ मेरे प्रेम संबंध थे. हम दोनोमे बहुत बार शारीरिक संबंध हुए.) *Prima facie* when Section 164 statement is perused, it is seen that through the prosecutrix was below 18 years of age, she was fully aware about the import of her actions with the Applicant over a long period of time. Medical report is inconclusive and it does not support the prosecution case. Neither there is any element of violence or force alleged by the prosecutrix during the entire tenure.

8. 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:-

¹ AIR 1965 942

“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.”

9. 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.

10. In this regard attention is drawn to the decision of this Court (*Coram: Ms. 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

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

principles which I find it apt to reproduced hereinbelow 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 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."*

11. 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

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

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).”

12. 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.

13. 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***⁴. The relevant paragraphs are reproduced thus:-

4 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."

14. 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***

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

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.Veerarwami 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.

15. *Prima facie* from the case of the prosecution, it is seen that relationship between the Applicant and prosecutrix was consensual and it was over a period of almost 4 years. In view of the *prima facie* admission of the above fact by the prosecutrix herself, Applicant deserves to be released on bail. Needless to state that complicity of Applicant in the crime can be proved by prosecution at the trial. 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 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 leave the State of Maharashtra without prior permission of the Trial Court;

(vii) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner; and

(viii) 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. This Court appreciates the assistance rendered by Ms. Datta, 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.

18. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]