

**ORDER BELOW EXHIBIT NO. 4 IN SESSION CASE NO.16/2025**

**(Today Dated 29.07.2025)**

**CNR NO. MHRG0170006052025**

**Akshay Suresh Pawar**

**Vs**

**The State of Maharashtra**

Perused this **bail application** u/sec.483 of The BNSS ; in C.R.No.33/2025 of Poynad Police Station for the offence p/u/sec.69 and 64 (2)(f) of The BNS, 2023. Also perused the say filed by the IO and Ld. APP jointly vide Exh.8. Also perused the say filed by the complainant – victim vide Exh.9.

2] Perused the entire case papers especially case diary etc. but also pertinent to note that, as the charge-sheet is already filed, all statutory papers therewith are part and parcel of record and perused the same alongwith the relevant documents filed with this bail petition especially vide list Exh.11 Sr.No.1 to 3. The charge is not yet framed.

3] Heard Mr. P. M. Thakur the Ld. Counsel for the accused and Ld. APP as per the notes of their oral arguments jotted by me in the open Court vide Exh.15. Also perused the authorities relied upon by

- by the defence vide Bhupesh Thakur Vs. State of Himachal Pradesh Criminal M.P (M) No.1798/2024 D. D. 30.08.2024 to the effect that, Section 2 (35) of the BNS defines woman as a female human of any age and transgender have been given distinct separate identify

different identity and defined independently u/sec.2(10) of BNS transgenders cannot claim themselves to be male or female and hence, the accused cannot be booked under Section 69 of BNS but u/sec. 18(d) relating to harm, injury, endanger or economic abuse to the transgenders.

By the Ld.APP vide

- Rao Vs. State of A. P 2006 (11) S.C.C. 615 wherein it has been held that, Section 376 and 417 r/w 90 - Rape - Misconception of the fact – Under the pretext of marriage is not a valid consent and presumption u/sec. 114 (A) necessarily arises.
- Virupaksh Gouda Vs. State of Karnataka AIR 2017 SC (Cri) 718 Para No.13 wherein it has been held that filing of charge-sheet does not amount to change in circumstance. It does not in any manner lessen the allegations made by the prosecution and on the contrary filing of the charge-sheet establishes that after due investigation the investigation agency having found materials as placed the charge-sheet for trial of the accused persons.

It is a matter of record that

- a) Initially the FIR was lodged on 08.04.2025 under the offence p/u/sec.69 of BNS, 2023 only. The present accused was arrested on 17.04.2025 and granted MCR from 21.04.2025 – time to time and filed earlier Bail Application – Criminal Miscellaneous Application No. 60/2025 pending the investigation and the same has been rejected by the Hon'ble Additional Session Judge – 1 on 13.05.2025.
- b) Thereafter the investigation continued further and finally charge-sheet is submitted for offences p/u/sec. 69, 64(2)(f) of The BNS, 2023 and 64 (2)(f) of The BNS is major offence and as such as is rightly relied

upon by Ld. APP Smt. Komal Rathod the filing of the charge-sheet does not amount to change of circumstance or filing of charge-sheet does not in any manner lessen the allegations made by the prosecution. On the contrary filing of the charge-sheet now under additional head of 64(2)(f) of The BNS, 2023 establishes that after due investigation the investigating agency having found materials has filed the charge-sheet for trial of the accused as is held in the case of Virupaksh Gouda Vs. State of Karnataka AIR 2017 SC (Cri) 718 Para No.13 which applies herein toto and hence, there is no change of circumstances merely because of filing of charge-sheet as per law.

4] More so in the case of State of **Tamilnadu Vs. S. A. Rao, (2005) 8 S.C.C. 380** the Hon'ble Supreme Court has categorically held that when there has no changed circumstances, the successive bail application is nothing but review of the earlier bail application which cannot be maintainable and the same applies herein toto and consequently this bail application by the accused is not tenable as per law.

5] Even otherwise while entertaining such successive bail applications the Court is duty bound to consider the reasons and grounds on which the earlier bail application is rejected and what are fresh grounds which persuaded it warranting the evaluation and consideration of the bail application afresh and to take a view different from the one taken in earlier application. The change of circumstance must be change in fact situation or in law which requires the earlier view being inferred

with or where the earlier finding has become obsolete. That is to say the change of circumstance must be substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence.

6] On this parameter the contrary position emerges as per law ;

Initially FIR was u/sec. 69 of BNS but on submission of charge-sheet the offence u/sec.64(2)(f) is also leveled in the charge-sheet so instead of lessening the offence, the gravity of offence charged has increased to that of rape in addition to consensual or deceitful means for consent and aggravates the grounds for rejecting the bail. Hence, even on this count the earlier reasons still intact and coupled with this 64 (2)(f) of BNS, 2023 elevate the magnitude to a serious offence of rape and that too allegedly committed by the accused being a relative of the complainant-victim and staying with her in his odd times when he had alleged dispute with his wife and alleged traditional divorce (काडीमोड) having taken place. On the anvil of human conduct, the averments of complainant – victim through out her complaint, FIR, statement recorded before JMFC u/sec.183 of BNSS as well as history of the incident narrated by her to the medical officer at the time of her medico-legal examination are all consistent inter se especially on the averment that somewhere in November, 2024 the accused gave her a sedated pattice whereby she felt dizzy and slept and taking disadvantage

this of she was raped by him and the medico-legal sexual examination of the complainant- victim in the opinion column clearly mentions 'incidence of penetrative sexual violence cannot be ruled out'.

7] To the height, after arrest of the accused, his medico-legal examination was conducted and wherein he has also narrated about the incident to the Medical Officer dtd 18.04.2025 to the effect that 'he admits the incidents since November, 2024 to February 2025' and the Medical Officer being third independent person there is no reason to disbelieve him and more especially on the page No.27 that accused has narrated that he knew the victim since 04 years and he had sexual intercourse with her in November, 2024 and February, 2025 albeit with her consent- the element of consent by a person who is fat asleep on being made to eat sedative edible is no valid consent in the eyes of law and more so the same medical officer in the last column No.13 (d) of final opinion specifically mentions that, there is nothing to suggest that the accused is incapable of performing vaginal penetrative sexual assault and hence, for such circumstances this bail application does not tilt in favour of the accused as mitigating change in the circumstance by merely filing of charge-sheet.

8] Lastly the authority relied upon by the Ld. Defence Counsel Bhupesh Thakur Vs. State of Himachal Pradesh

Criminal M.P (M) No.1798/2024 D. D. 30.08.2024 to the effect that, Section 2 (35) of the BNS defines woman as a female human of any age and transgender have been given distinct separate identify different identity and defined independently u/sec.2(10) of BNS transgenders cannot claim themselves to be male or female and hence, the accused cannot be booked under Section 69 of BNS but u/sec. 18(d) relating to harm, injury, endanger or economic abuse to the transgenders and hence, the present sections 69 and 64 (2)(f) of the BNS 2023 cannot be applicable but at the most section 18(d) of the BNS 2023 applies especially for causing harm/injury/endangering the life, liberty, safety, health, well being, all sort of abuses – physical, sexual, verbal, emotional, economic etc. shall be punishable with imprisonment for a term which shall not be less than 06 months but which may extend to 02 years and with fine, and hence, considering these maximum 02 years punishment he submitted that, the accused is entitled to bail.

9] However, it is pertinent to note that, the very same authority of Bhupesh Thakur supra vide para No.11 & 12 specifically laid down that sec 2 (35) of BNS defines woman as ‘ a female human being of any age’ and at the same time section 2 (10) of BNS the word gender is defined to be including a male, female or transgender thereby implying that, the transgenders cannot claim themselves to be male or female as they are given separate identity.

10] However, the main distinguishing feature in the present case is that, although the complainant-victim since birth **was** transgender, yet as per his complaint, FIR, statement and most important medico-legal scientific examination and all the medical case papers from the Mayuresh Hospital, Vashi, Navi Mumbai, it is ample and clear on record that, in the year 2023 i.e. 01 year prior to the alleged incident the complainant - victim had undergone sex alignment surgery creating vagina etc. and fully transformed to a female with female sex organs and capable of being having sexual intercourse as a woman and it being so she is no longer a transgender but a woman and hence, an offence of sexual violence – rape, penetrative assault etc. etc. can be committed on her in scientific terms and more so as per the definition of rape in BNS, even touching, putting finger or any object amounts to rape. Hence, and for all these reasons the mere fact that, the complainant-victim has not changed his Aadhar card, status from male to female or Government gazettes or notification, as per medical papers he is very much biological structured female genitals and capable of being sexually assault.

Hence, the case law Bhupesh Thakur supra does not apply here.

11] Consequently there being no substantial change, instead aggravating circumstance of rape sec.64(2)(f) of BNS and very short span of preferring these 02 applications, review of earlier order in the garb of present bail application order is not tenable

both technically as well as on merit. Hence and for these reasons I do not find this as a fit case to exercise judicial discretion of bail in favour of accused.

Hence, order infra.

**ORDER**

1. This second bail application Exh.4 of the accused for bail u/sec.483 BNSS is hereby rejected.
2. The IO and Ld. APP to take note and directed to expedite the trial and co-operate in speedy framing of charge and formulating the sessions program in consecutive dates rather than piece meal.

Alibag

Date : 29.07.2025

( Smt. Sunita Tiwari )

Additional Sessions Judge,  
Alibag-Raigad

**CERTIFICATE.**

I affirm that the contents of the PDF file Judgment are in verbatim as per original Judgment.

Name of Steno	: Mrs. S. J. Sheth (Steno) (Gr-1)
Name of Court	: District Judge-2, Raigad-Alibag.
Date of Order	: 29.07.2025.
Order signed by PO on	: 29.07.2025.
Order uploaded on	: 30.07.2025.