

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 1036 OF 2015

Sunil Mahadev Patil	... Applicant
Vs.	
The State of Maharashtra	... Respondent

Mr. Kuldeep U. Nikam, Advocate for the applicant.
Mr. J.H. Ramugade, APP for the State.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE : **AUGUST 3, 2015**

P.C.:

This Application is moved for regular bail under section 439 of Cr.P.C., as the applicant/accused is prosecuted for the offences punishable under sections 376, 363, 366A of the Indian Penal Code and under section 3, 4, 5 and 6 of the Protection of Children from Sexual Offences Act, 2012. The age of prosecutrix is 15 years old.

2. It is the case of the prosecution that complainant, father of prosecutrix gave information to the police that his daughter, who was studying in 9th Std., informed him on 25th November that she is going to meet her teacher but she did not return home. So, he searched for her in the village, but she could not be found. Hence, he gave missing complaint to the police on 27th November, 2014. Accordingly, missing report was registered at 23/2014. On the same day, he informed the police that after enquiry, applicant/accused was not found in the village since 25th November, 2014. So, the offence was registered under sections 363 and

366A against the applicant/accused. Both of them were found on 9th December, 2014. The applicant/accused was arrested on the same day and he is in jail since then. Thereafter on 11th December, 2014, section 376 and sections 3, 4, 5 and 6 of the Protection of Children from Sexual Offences Act, 2012 were added, as applicant Sunil had kidnapped the prosecutrix and performed alleged marriage and established sexual relations with her. Hence, this Bail Application.

3. The learned counsel for the applicant/accused has submitted that the applicant/accused and prosecutrix were in love with each other. The prosecutrix wanted to marry the applicant/accused and therefore, they both left their respective families. They got married and lived together like husband and wife. He submitted that it was consensual and the applicant/accused did not take any advantage of the girl. He relied on the statement of prosecutrix which was recorded on 9th December, 2014 under section 164. He also relied on the statement of Pooja Desawale, maternal aunt of the prosecutrix recorded on 9th December, 2014. He further relied on the judgment of Hon'ble Supreme Court in the case of **S. Varadarajan vs. State of Madras, reported in AIR 1965 SC 942**. He also relied on unreported orders passed in Bail Application No. 159 of 2014 dated 11th February, 2014; Bail Application No. 182 of 2014 dated 5th March, 2014 and Bail Application No. 416 of 2015 dated 25th March, 2015, which is on similar facts of granting bail.

4. Learned APP opposed the Application. He submitted that at the relevant time, the prosecutrix was 15 years old. She being the minor, the question of consent does not arise. The applicant/accused kidnapped her and sexually abused her. The offence under section 376(i) is being committed.

5. This is a usual case of a boy and girl having an affair and then they eloped and got married. As the girl is minor, the boy is sent behind the prison because of the complaint lodged by the parents of the prosecutrix. Undoubtedly, a minor girl is to be protected under the law, as there are number of incidents of sexual abuse of minor girls and therefore, there is a special legislation of POCSO in the year 2012 and amendment in sections 375 and 376 of the Indian Penal Code in 2014. The judiciary takes a very serious note of sexual offences against women and especially against the minor girls. In the present case, the facts are clear that prosecutrix and applicant/accused were in love with each other. The prosecutrix was a minor girl of 15 years. They both eloped to marry. The trial Court rejected the Bail Application by its order dated 31st March, 2015 mainly on the ground that the girl is 15 years old and her consent is immaterial and if at all the marriage was performed between the applicant/accused and prosecutrix, it was against the provisions of Child Marriage Restraint Act. Legally she is below the age of consent. However, in many such cases, a boy who has eloped and established sexual relations with the girl, is 19 to 22 years of age and also in love with the prosecutrix. Under such

circumstances, considering the law, facts and discretionary powers vested with the Court, it is difficult for the Court to decide the issue of regular bail under section 439 of Cr. P.C. Before dealing with this issue, which is faced often by the Courts, it is necessary to deal with the provisions under section 375 and 376 of the Indian Penal Code.

375. Rape - A man is said to commit "rape" if he -

- a)
- b) ...
- c) ...
- d) ...

under the circumstances falling under any of the following seven descriptions:-

First: -

Secondly: -

Thirdly: -

Fourthly: -

Fifthly: -

Sixthly: - With or without her consent, when she is under eighteen years of age;

Seventhly: -

Explanation 1: -

Explanation 2: -

Exception 1.-

Exception 2.- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

376. Punishment for rape – (1) Whoever, except in the cases provided for in sub-section (2), commits rape shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever: -

- (a)
- (i)
- (ii)
- (iii)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g)
- (h)

(i) Commits rape on a woman when she is under sixteen years of age; or

6. In 2014 after Nirbhaya's case, sections 375 and 376 of the Indian Penal Code were amended. The age of consent was increased from 16 to 18 years. So also the discretion to give punishment less than 7 years for reasons recorded is taken away. The minimum punishment in all the rape cases is now 7 years and for the offences which are covered under section 376(2), the punishment is minimum 10 years. These are aggravated forms of rape and most of them are the incidents where the accused is in control of the situation or having a dominant position. Under section 376(2)(i) if the girl is below 16 years, her consent is immaterial, so punishment is to be given for 10 years. Thus, under section 376(2)(i) for the purpose of aggravated form of punishment, the age of minority is considered as 16 years. However, in defining clause "sixthly" under section 375, the age of consent is 18 years of age. A girl between 16 to 18 years if raped and consensual sexual intercourse might have taken place, then depending on the facts of the case, minimum punishment for 7

years can be given. The Court has discretion from 7 years and above, but in Section 376(2)(i) the punishment is not less than 10 years. Under section 375 proviso of its Exception (2), if the age of a woman is 15 years but she is married, then it won't amount to rape. Therefore, in the event of marriage, the minimum age of capability to have sex is fifteen years.

7. In the case of **S. Varadarajan** (*supra*) though the age of consent though as per law was 18 years, when the girl eloped with the accused, she was approximately 17 years and 9 months old. The Hon'ble Supreme Court in the case of **S. Varadarajan** has distinguished Section 361 on the point of taking from the guardian or enticing the girl and the girl herself leaving the house of the parents of her own and accused allowing her to be in his company and has held that it not a case of rape. In the case of **S. Varadarajan**, the matter was finally heard and the accused was convicted. In appeal, the decision of the Hon'ble Supreme Court can be culled out that if a girl takes initiative or she is active in taking decision of going away with the boy and she understands the meaning of man-woman relationship and of marriage, then the rigor of offence is reduced.

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. The offence of rape can be distinguished on the basis of the intention of the accused. There are incidents of rapes committed by gang like the case of Nirbhaya or Maya Thagi or Mathura which cannot be forgotten by Indian Society. So also rape committed in a savage manner

or repeatedly by a single accused. There are some instances of rape which take place as a man wants to satisfy his lust and animal within him overpowers his reason. There are instances of rape where a man and a woman both are in love with each other and get involved into sexual relationship due to either physical or psychological need and in such type of rape, there is no violence which exists in other types of rape.

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.

13. In the present case, the prosecutrix is 15 years old and the accused is 20 years old. It appears from the record, statement of the prosecutrix

and witnesses that they were in love with each other, so they eloped and went to the temple. There they garlanded each other and according to them they performed marriage and thereafter they started residing together in the house of their relative. In between prosecutrix called her distant aunt and requested her to make arrangement of some money and she disclosed that she is married and wants to stay with applicant/accused. In this case there are many mitigating factors. Under such circumstances, I am inclined to grant bail to the applicant/accused on the following terms and conditions:

ORDER

- i) The applicant/accused shall be released on bail upon furnishing P.R. Bond in the sum of Rs.30,000/-, with one or two sureties in the like amount;
- ii) The applicant shall not tamper with the evidence;
- iii) The applicant shall not pressurize the prosecutrix, complainant and his family members;
- iv) The applicant shall not indulge in any offence;
- v) The applicant shall make himself available and attend all Court dates;
- vi) The applicant shall not abscond and furnish his address to the police along with address proof;
- vii) The applicant shall not leave India without the prior permission of the Court.

viii) Violation of any of the conditions imposed shall amount to cancellation of bail forthwith;

14. The Application stands disposed of on the above terms.

(MRS.MRIDULA BHATKAR, J.)