

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE SIDE JURISDICTION  
CRIMINAL BAIL APPLICATION NO. 1519 OF 2016

Mazhar @ Azhar Mohammed Ibrahim  
V/s.

.....Applicant

The State of Maharashtra and another

....Respondents

Mr. Mateen Abdul Rahim Shaikh Advocate for Applicant.

Mr. Y. M. Nakhwa APP for the State.

**CORAM : SMT. SADHANA S. JADHAV, J.**

**DATED : SEPTEMBER 14, 2016.**

**PC :**

1) Heard. This is an application under section 439 of the Code of Criminal Procedure, 1973. Applicant herein is charge-sheeted for offence punishable under sections 363, 366 (A), 376, 504 r/w section 34 of the Indian Penal Code in crime no. 32 of 2016 registered at Azad Nagar Police Station, Nashik on 22/03/2016.

2) It is the case of the prosecution that on 22/03/2016, Abdul Majid Abdul Hamid lodged the report at the police station alleging therein that his daughter Ms. 'X' whose date of birth is 18/06/2000 is studying in 10<sup>th</sup> standard in Sardar High School at Malegaon. Her examination had commenced on 01/03/2016. On 22/03/2016, she had left the house for appearing for the

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examination. School peon had informed that Ms. 'X' had not appeared for the examination. Upon enquiry there was a search for Ms. 'X' but was not found. The first informant recollected that she was using the cellphone he had seen the last dialled number 9970600474. He traced the person in whose name the sim card is registered and it is revealed that the sim card is registered in the name of present applicant. He enquired with the family of the applicant and learnt that he had left the house and had taken Rs. 40,000/- along with him. The victim was traced at Vajreshwari, Dist. Thane on 27/03/2016.

3) The statement of the victim was recorded under section 164 of the Code of Criminal Procedure, 1973. She has not named the present applicant but has stated that in the eventuality she is shown the accused persons who abducted her, she would be able to identify. According to her on 22/03/2016, a white colour car had stopped near Pach Kandil. Three persons were there in the car. They had gagged her mouth and had abducted her. She was detained in a room by three male persons and one female. One boy used to get food for her. That he had misbehaved with her and thereafter, had sexual intercourse with her against her will. The papers of investigation would reveal that on 04/04/2016, Investigating Officer had recorded the statement of one Shaikh

Nasir who happens to be the friend of present applicant. He had disclosed to the police that on 22/03/2016, present applicant had requested him to take his car to Malegaon. That they stopped at Pach Kandil where one girl who was clad in Burkha was waiting for them. Upon seeing present applicant, the girl had boarded the car and thereafter, they had been to Bhiwandi. Both of them had called upon a friend called Sonu. The victim Ms. 'X' was introduced as the niece of the present applicant.

4) The learned counsel for the applicant submits that in fact, Ms. 'X' had left her house voluntarily and had accompanied the present applicant as they were in love. It is submitted that they were also intending to get married. It is also submitted that father of the victim had detected phone number of the present applicant in the cellphone which was used by his daughter. That applicant was contacted on the said cellphone which would primarily indicate that the victim was knowing the present applicant. The victim has not named the present applicant in her statement under section 164 of the Code of Criminal Procedure, 1973. The test identification parade is also not conducted, despite the fact that she has disclosed that she would be able to identify the accused, if shown to her.

5) Taking into consideration the nature of allegations and the compilation of the charge-sheet, it prima facie appears that offence punishable under section 363, 366 of the Indian Penal Code is not made out. As far as offence under section 376 of the Indian Penal Code is concerned, the learned APP rightly submits that the consent of the victim cannot be taken into consideration as there is a statutory embargo. However, considering the statement of the victim and the witnesses, it appears that the victim had voluntarily accompanied the applicant.

6) The learned counsel for the applicant has placed reliance upon the judgment of the Hon'ble Apex Court in the case of **S. Varadraján v/s. State of Madras (1965 SC 942)** wherein the Hon'ble Apex Court held as follows :

*“It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of s. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to*

*know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian”.*

7) Hence, applicant deserves to be enlarged on bail. It is made clear that observations made herein above are restricted to application under section 439 of the Code of Criminal Procedure, 1973 and shall not be considered for discharge application, quashing of F.I.R. or at the time of trial.

### **ORDER**

- (i) Application is allowed.
- (ii) Applicant be enlarged on bail on furnishing P.R. bond in the sum of Rs. 25,000/- with one or two sureties in the like amount.
- (iii) Applicant shall report to the concerned police station on first Sunday of each month till the framing of the charge.
- (iv) Application stands disposed of.

**(SMT. SADHANA S. JADHAV, J.)**