

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.1973 OF 2017

MOHAMMAD NASEEM NISAR MALIK@KHAN)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Neville Deboo i/b. Mr.Abhay Bhoir, Advocate for the Applicant.

Ms.J.S.Lohokare, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 30th OCTOBER 2017

P.C. :

1 The applicant / accused in Crime No.I-131 of 2014 registered with Police Station Turbhe, Navi Mumbai, for offences punishable under Sections 363, 365, 376, 417 of the Indian Penal Code (IPC) read with Sections 7 and 8 of the Protection of Children from Sexual Offences Act (POCSO Act), by this application, is seeking his release on bail, after filing of the charge-sheet.

2 Heard the learned advocate appearing for the applicant / accused. He submitted that statement of the prosecutrix goes to show that she was in love with the applicant / accused and she herself had joined company of the applicant / accused, though the applicant / accused time and again insisted her to go to her aunt. The learned advocate further argued that as the applicant / accused was constrained to be with the prosecutrix, he married the prosecutrix and because of this marriage, a child was born. The learned advocate further submitted that the prosecutrix along with the child is now kept at Navjeevan Mahila Sudhar Gruha. In submission of the learned advocate for the applicant / accused, the prosecutrix is his legally married wife and it is for the prosecutrix to opt for continuing the wedlock.

3 The learned APP opposed the application by contending that the applicant / accused is not a permanent resident of Mumbai, and he was residing somewhere else after he

had kidnapped the prosecutrix. He may not be available for trial, if released on bail.

4 I have carefully considered the rival submissions and also perused the charge-sheet. The First Information Report (FIR) came to be lodged by Ms.Ruma, aunt of the prosecutrix. She averred that after death of parents of the prosecutrix, she was maintaining the prosecutrix. It is further averred that on 7th October 2014, she found the prosecutrix missing and therefore, she lodged a report. The charge-sheet shows that the prosecutrix was found in company of the present applicant / accused and accordingly, the applicant / accused came to be arrested on 20th September 2016.

5 Statement of the prosecutrix shows that while staying with her aunt, she had developed love relation with the present applicant / accused, which ultimately culminated into physical relations between them. Statement of the prosecutrix further reveals that on 6th October 2014, her aunt had quarreled with her

and therefore, she joined company of the present applicant / accused on 7th October 2014. The prosecutrix further stated that when the applicant / accused came to know that she had eloped from her house, the applicant / accused asked her to return to her house, but because of her disinclination, the applicant / accused had kept her with a person of his acquaintance. On 8th October 2014 also, as per version of the prosecutrix, the applicant / accused insisted her to return to her house, but she again refused and threatened the applicant / accused that she will end her life, if she is compelled to return to her aunt. Statement of the prosecutrix further reveals that, then they both decided to marry and after marriage, they started residing as husband and wife at various places including Delhi, Uttar Pradesh, Nepal etc. Because of this wedlock, the prosecutrix has delivered a child.

6 No doubt, the prosecutrix had not attained the consenting age at the time when she joined company of the present applicant / accused and insisted him to allow her to be in his company, but with passage of time, the prosecutrix has

attained majority. Infact, it appears that at the time of arrest of the applicant / accused, the prosecutrix was 18 years of age. The record shows that even aunt of the prosecutrix had abandoned her and as a result, she along with her minor son named Shahid are staying at Navjeevan Mahila Sudhar Gruha. In the matter of **Sunil Mahadev Patil vs. State of Maharashtra**¹ in paragraph 12, this court has laid down guidelines in a case where a boy and a minor girl in love chose to live together without consent of their parents. Paragraph 12 of the said ruling needs reproduction and it reads thus :

“12 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.

¹ 2016 ALL MR (Cri) 1710

(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.”

7 Similar to the facts of the case in the matter of Sunil (supra), in the case in hand also, the prosecutrix was more than 15 years of age, when the incident took place. With passage of time, she has attained majority and it appears that when she attained majority, she was found in company of the present applicant / accused and they were residing together as husband and wife, after their marriage, which was solemnised at Delhi. The prosecutrix has delivered a male child because of this wedlock.

8 The investigation of the crime in question is over. Considering the nature of evidence against the applicant / accused

as well as the fact that the applicant / accused has not acted in violence and it was the prosecutrix, who insisted him to allow her to reside with him, and that, they were residing together for a period of about two years as husband and wife, further pretrial detention of the applicant / accused is not warranted. Apprehension of the prosecution that the applicant / accused will not be available for trial can be taken care of by imposing appropriate conditions. Even otherwise, it is seen that the applicant / accused was residing at Navi Mumbai and he was apprehended from Navi Mumbai itself. Therefore the order :

ORDER

- i) The application is allowed.
- ii) The applicant / accused in Crime No.I-131 of 2014 registered with Police Station Turbhe, Navi Mumbai, for offences punishable under Sections 363, 365, 376, 417 of the IPC read with Sections 7 and 8 of the POCSO Act, is directed to be released on bail, on his executing PR.Bond in the sum of Rs.15,000/- and on furnishing surety in like amount.

- iii) As a condition of this order, the applicant / accused should attend the concerned Police station twice i.e. on first and third Sunday of every calendar month, in between 11.00 a.m. and 1.00 p.m.
- iv) The applicant / accused shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case, so as to dissuade him from disclosing such facts to the court or to the Police Officer.
- v) The application is disposed of.

(A. M. BADAR, J.)