

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.739 of 2017

ORDER:

The petitioner/Accused filed the present application under Section 438 Cr.P.C. to release him in the event of his arrest in connection with Crime No.13 of 2017 of Indrapalem Police Station, Kakinada Rural Mandal, East Godavari District, registered for the offences punishable under Sections 376 and 506 IPC and sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, the Act”).

2. It is the case of the prosecution that the *de facto* complainant V.Devi D/o Baburao and the accused are the residents of Cheediga Dibbalu Village, Kakinada Rural, East Godavari District. The *de facto* complainant studied upto 3rd class and thereafter, discontinued her studies and assisting to her sister in household duties. She was born on 31.05.1999. On 01.01.2016 when the *de facto* complainant was proceeding to Kirana shop, the petitioner wished her Happy New Year, but she did not respond. Thereafter, the petitioner following her on the pretext of loving her, promising to marry her and as the petitioner apprehending commission of suicide, *de facto* complainant used to contact him by mobile numbers 7989749954 and 9018870690 and several attempts were made to compel to satisfy his lust, but she did not agree.

On 20.11.2016 at mid night, the petitioner telephoned the *de facto* complainant and enquired about her. She informed that she is lying on a cot on the eastern side room of the house. Thereupon, the petitioner entered into room and laid on her and when she made an

attempt to raise cries, he gagged her mouth and putting her in fear, enjoyed sexually and snatched the mobile phone and started running. On hearing the cries, her parents woke up and made an attempt to apprehend him, he pulled them and ran away leaving the motorcycle outside the house of the *de facto* complainant. Thereafter, the matter was referred to panchayat, but the petitioner did not appear before the panchat elders. Hence, the *de facto* complainant lodged the complaint.

3. The main contention of counsel for the petitioner is that the incident allegedly occurred on 20.11.2016, but the complaint was lodged on 07.01.2016 almost after lapse of 48 days from the date of occurrence and that too the information on phone that she was lying on a cot in the eastern side room of the house is improbable and there is nothing on record to suggest that the petitioner had any forcible sexual intercourse with the *de facto* complainant and thereby apprehending his arrest in connection with the above crime and enlarge him on pre-arrest bail.

4. Learned Additional Public Prosecutor for the State of Andhra Pradesh contended that only 12 witnesses were examined and investigation is not yet completed; and that the petitioner is absconding and therefore, no pre-arrest bail can be granted exercising the discretionary power of this Court.

5. Undisputedly there is a delay of 48 days in lodging the report. The alleged incident took place on 20.11.2016 and the date of complaint is 07.01.2017. The offence allegedly committed against the *de facto* complainant is a serious offence of rape and she was a minor by the date of the alleged offence. But, counsel for the petitioner

contended that she was a major by the date of incident. However, no piece of evidence is brought to the notice of this Court to *prima facie* conclude that she is a major by the date of the incident so as to apply the provisions more particularly Sections 3 and 4 of the Act.

6. Section 2 (d) of the Act defined the child.

“Child” means any person below the age of eighteen years.

7. The allegation made in the complaint that the *de facto* complainant was born on 31.05.1999 is accepted, *prima facie* she was a child within the definition of Section 2 (d) of the Act. Therefore, the contention of learned counsel for the petitioner cannot be accepted at this stage. However, it is left open to the petitioner to raise such contention at appropriate stage.

8. So far as the delay is concerned, the offences allegedly committed against the *de facto* complainant are serious in nature involving family reputation. Therefore, the matter was referred to elders for settlement. Despite the requests made by the panchayat elders, the petitioner did not appear before them, consequently, she lodged a complaint. When a family prestige is involved, the delay in lodging the complaint is insignificant and however, this can be explained during trial. But, that by itself is not a ground to enlarge the petitioner on pre-arrest bail. The other ground urged before this Court is that giving information that she was sleeping alone in the eastern side room of the house is improbable. But, it appears from allegations made in the complaint that they are contacting by mobile phone maintaining two sim cards each though the *de facto* complainant is a semiliterate studied 3rd class, in view of acquaintance between them she might have given such information

and even such information is given, the petitioner is not supposed to commit such heinous act without the consent of *de facto* complainant. Even if any consent is given, she was put in fear and obtained such consent and that consent cannot be said to be a free consent as per explanation to Section 376 IPC. Therefore, the act of the petitioner cannot be construed as consensual sex. The material on record collected by the police during investigation, more particularly the statements recorded by the police, clearly *prima facie* show that the petitioner committed such a serious offence against the child and it is not an offence against the victim alone and it is against the society at large. While granting bail, the Court has to strike the balance between the right of individual liberty and societal interest

If that is the situation, the societal interest has to be taken care of and to strike the balance between these two it is not case to grant pre-arrest bail since there is *prima facie* material to conclude that the petitioner committed the offence and he successfully avoiding his arrest by police and absconding till date. In such a case, the petitioner is disentitled to pre-arrest bail, which is based on purely discretion of the Court and such discretion has to be exercised based on settled principles of law.

9. Therefore, I find that it is not fit case to grant pre-arrest bail to the petitioner.

10. Accordingly, the Criminal Petition is dismissed. Miscellaneous petitions, if any, pending in this petition shall stand closed.

M.SATYANARAYANA MURTHY, J

08.02.2017
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