

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

BAIL APPLICATION NO.5 OF 2021

Raju s/o Chatriya Nenawath = **APPLICANT**

VERSUS

The State of Maharashtra = **RESPONDENT/S**

Mr.VD Gunale, Advocate for Applicant/s;

Ms.DS Jape, APP for Respondent-State.

CORAM : SMT.VIBHA KANKANWADI, J.

DATE : 12th February, 2021.

PER COURT :-

1. Present application has been filed by the applicant-accused, under Section 439 of Cr.P.C., for bail. The applicant has been arrested in connection with CR No.161/2020, registered with Mukramabad police station, District Nanded, for the offences punishable under sections 363, 366(A), 376(2)(i)(n) of IPC and under Sections 4 and 6 of POCSO Act.

2. Heard learned Advocate Mr. VD Gunale for the applicant and learned APP Ms. Jape for Respondent-State.

3. It has been submitted on behalf of the applicant that the FIR has been lodged by father of the victim, who was admittedly not residing with the victim at the relevant time. Further, the FIR

is against unknown persons regarding kidnapping of the victim, who was then 15 years of age. Now, the investigation in the crime is over and charge sheet has been filed.

4. Perusal of the chargesheet would show that there are certain statements of the witnesses, especially statement of one Kaushabai Eknath Rathod, with whom the victim was residing on the day of the incident, who has only stated that a boy, aged around 22, had come to the house and under the pretext of delivering a parcel and waiting in the house to charge his mobile, was in the house. However, thereafter, the victim, under the pretext of answering nature's call, went outside and it is stated by the other witnesses, who had seen the girl going along with the boy. Further, the evidence that is collected would show that the girl was taken to Pune and thereafter to Vikharabad in Telangana State. The statement of the victim, after the accused was arrested and the victim was taken in custody, has been recorded and her statement would show that the victim was knowing the accused when she was residing at Pune with her mother. She had developed love relationship with the accused about six months prior to her statement and it is her statement that the accused was promising her that they would perform marriage. She had come to Paratpur, Tq. Mukhed, as her grand-mother had expired. Her mother had returned to Pune. However, she continued to stay at Paratpur with her paternal aunt. She

has, therefore, stated that she had given phone call to the accused and at that time the accused told her that he would come to take her and thereafter, under the pretext of giving the parcel, he had come to Paratpur in the house of her paternal aunt. The accused had gave her indication to come out and thereafter, under the pretext of answering nature's call, she went out and thereafter, she went along with the accused to Pune. They remained in a room which was taken on rent by accused. However, when they came to know that the police are searching them, the accused took her to his place, i.e. Vikharabad. They performed marriage in a temple and then when they came to know that police have gone back, they returned to Pune. In the meantime, they were staying as husband and wife and there was sexual intercourse between them.

5. After taking this Court thorough the statement of the victim, the learned Advocate for the applicant, submitted that no force was applied by the accused. The victim had come voluntarily along with him. Now, the investigation is over and charge sheet is filed. Further physical custody of the applicant is not required and if he is allowed to linger in jail, it will amount to pre-conviction custody. The applicant is ready to abide by the terms of the bail.

6. The learned Advocate for the applicant has relied on the decision given by this Court at

principal seat in the case of Sunil Mahadev Patil Vs. State of Maharashtra – 2016 All MR (Cri.) 1712, wherein there were similar facts. It was also the case of bail, wherein the accused, who was 20 years old boy, was arrayed for kidnapping, abduction and rape in respect of prosecutrix, who was 15 years of age. He also submits that the prosecutrix and witnesses showed that they were in love with each other and, therefore, they had eloped and went to temple. They had garlanded each other and according to them, they have performed the marriage and thereafter they started living together as husband and wife. Taking into consideration the mitigating factors and also after relying on the decision in the case of S.Varadrajan Vs State of Madras – AIR 1965 SC 942, bail was granted to the accused therein.

7. Per contra, learned APP strongly opposed the application and submitted that there is ample evidence against the present applicant. The victim was admittedly minor. There is evidence in the form of school leaving certificate as well as her Aadhar Card, which show her birth date. Though the FIR is against unknown persons; yet it can be seen from the statements of the witnesses that the victim was taken by the boy, aged 20-22 years on motorcycle. Further, there are statements of witnesses from Pune, who showed that the victim was with the accused. Though the witnesses say that the accused informed them that he has performed marriage with the victim; yet it can be seen from

the statement of the victim herself that she had come to know that the accused had already married with a lady of 21 years of age and when he had taken her to Vikharabad, at that time, his wife had gone for delivery.

8. Medical evidence also states that "findings are consistent with sexual intercourse, however, final opinion is kept pending till receipt of FSI report.". When there is ample evidence that is collected against the present applicant, he does not deserve any discretionary relief.

9. Perusal of the FIR would show that the girl, in respect of whom, the offence is stated to have been committed, is aged 15 and when the father was not knowing the identity of the person as to who had taken his daughter out of his legal guardianship, the FIR was against the unknown persons. But, then the statements of the witnesses, especially paternal aunt and the neighbours in the said village, would show that the victim had gone with the boy on his motorcycle. The paternal aunt says that the boy had come to the house under the pretext of delivery of the parcel and then he pretended that he wants to charge his mobile phone. After waiting for a while, the victim went out from the house under the pretext of answering nature's call and thereafter said boy had also gone out of the house. In her statement, the paternal aunt says that they got suspicion about the behavior of that boy and, therefore, they started making

enquiry and they came to know that he has taken the victim along with him. As aforesaid, the witnesses from Pune, do state that they had seen the victim with the present applicant-accused and the accused had introduced her as his wife.

10. The statement of the victim has been already covered as part of the submissions by the learned Advocate for the applicant and, therefore, it is not now reproduced. However, it is to be noted, at the first place, that she has stated that after she came to stay with her father, she had given a phone call to the accused. At that time, the accused told her that he would come to take her. It does not have the meaning as it has been tried to be stated by the learned Advocate for the applicant that she had called the accused and then the accused told that he would come. Even if she would have stated, for the sake of arguments, that he should come to take her, active role of the accused would be, he would come to take her, which can be covered in the meaning "taking" as contemplated under Section 361 of IPC. There is half-hearted attempt on behalf of the applicant to rely on some portion of the statement of the victim and to leave other fact, which will have to be considered. In her statement, the victim has stated that the accused was already married. Under such circumstance, the so-called marriage, which is alleged to have been performed in the temple by the accused with the victim, whether will have a legal entity and effect is a question and it cannot be so

interpreted as the applicant wants at this stage. The medical evidence is supporting the prosecution at this stage.

11. Now, the applicant has tried to rely on the decision in the case of Sunil Mahadev Patil (supra) for giving equal treatment to him by giving advantage of the decision in S.Varadrajan's case (supra). At the outset, it can be said that after the entire evidence that was before the Hon'ble Apex Court in S.Varadrajan's case, the Hon'ble Apex court had observed thus,

"...Where a minor girl alleged to be taken away by the accused person, had left her father's protection knowing and having capacity to know the full import of what she was doing and voluntarily joined the accused, it could not be said that the accused had taken her away from the keeping of her lawful guardian within the meaning of section 361 of the Indian Penal Code, 1860 ("IPC" for short). Something more had to be done in a case of that kind, such as an inducement held out by the accused person or an active participation by him in the formation of the intention either immediately prior to the minor leaving her father protection or at some earlier stage."

12. Here, we are at a very *prima facie* stage and we are required to consider the evidence that is collected in this case. The difference, which could be found in the facts in Sunil's case and the present case, is that, in that case, the accused/applicant was not already married. Here, the applicant is already married and it will not

be presumed, at this stage, that he knows the consequence of illegal second marriage.

13. Secondly, the recent pronouncement by the Hon'ble Apex court is required to be considered which is in Criminal Appeal No. **Criminal Appeal No.1919 of 2020, Anversinh @ Kiransinh Fatesinh Zala vs. State of Gujarat**, decided by Three Judge Bench of Hon'ble Supreme Court on 12.01.2021, it has been observed -

"17. The ratio of **S. Varadarajan** (supra), although attractive at first glance, does little to aid the appellant's case. On facts, the case is distinguishable as it was restricted to an instance of "taking" and not "enticement". Further, this Court in **S. Varadarajan** (supra) explicitly held that a charge of kidnapping would not be made out only in a case where a minor, with the knowledge and capacity to know the full import of her actions, voluntarily abandons the care of her guardian without any assistance or inducement on part of the accused. The cited judgment, therefore, cannot be of any assistance without establishing: first, knowledge and capacity with the minor of her actions; second, voluntary abandonment on part of the minor; and third, lack of inducement by the accused."

14. Here in this case, all these factors will have to be established by the present applicant at the time of the trial. They cannot be merely ignored on the basis of the statement of the minor.

15. Another fact that is required to be considered is that the offence under Section 4 and 6 of the POCSO Act are also invoked in this case. The basic object and purpose, for which POCSO Act was enacted, was to protect the rights of minors. The very

intention of the legislature cannot be side-lined under the pretext that there was some love affair and the minor was then involved. Under the pretext of love affair, illegal activities cannot be allowed to be done.

16. Further, in the aforesaid decision in the case of **Anversinh @ Kiransinh Fatesinh Zala vs. State of Gujarat (supra)**, it has been observed as regards the defence of consensual affair, that was taken by the accused therein, that, -

"12. A perusal of Section 361 of IPC shows that it is necessary that there be an act of enticing or taking, in addition to establishing the child's minority (being sixteen for boys and eighteen for girls) and care/keep of a lawful guardian. Such 'enticement' need not be direct or immediate in time and can also be through subtle actions like winning over the affection of a minor girl. However, mere recovery of a missing minor from the custody of a stranger would not ipso-facto establish the offence of kidnapping. Thus, where the prosecution fails to prove that the incident of removal was committed by or at the instigation of the accused, it would be nearly impossible to bring the guilt home as happened in the cases of **King Emperor v. Gokaran** and **Emperor v. Abdul Rahman**.

13. Adverting to the facts of the present case, the appellant has unintentionally admitted his culpability. Besides the victim being recovered from his custody, the appellant admits to having established sexual intercourse and of having an intention to marry her. Although the victim's deposition that she was forcefully removed from the custody of her parents might possibly be a belated improvement but the testimonies of numerous witnesses make out a clear case of enticement. The evidence on record further unequivocally suggests that the appellant induced the prosecutrix to reach at a designated place to accompany him.

14. Behind all the chaff of legalese, the appellant has failed to propound how the elements of kidnapping have not been made out. His core contention appears to be that in view of consensual affair between them, the prosecutrix joined his company voluntarily. Such a plea, in our opinion, cannot be acceded to given the unambiguous language of the statute as the prosecutrix was admittedly below 18 years of age.

15. A bare perusal of the relevant legal provisions, as extracted above, show that consent of the minor is immaterial for purposes of Section 361 of IPC. Indeed, as borne out through various other provisions in the IPC and other laws like the Indian Contract Act, 1872, minors are deemed incapable of giving lawful consent. Section 361 IPC, particularly, goes beyond this simple presumption. It bestows the ability to make crucial decisions regarding a minor's physical safety upon his/her guardians. Therefore, a minor girl's infatuation with her alleged kidnapper cannot by itself be allowed as a defence, for the same would amount to surreptitiously undermining the protective essence of the offence of kidnapping.

16. Similarly, Section 366 of IPC postulates that once the prosecution leads evidence to show that the kidnapping was with the intention/knowledge to compel marriage of the girl or to force/induce her to have illicit intercourse, the enhanced punishment of 10 years as provided there under would stand attracted."

17. Thus, it can be seen that the entire law has been crystallized now by the Hon'ble three Judge Bench of the Apex court, which will definitely prevail over the decision in the case of **S.Varadrajan (supra)**. No doubt, even it will have to be clarified that those observations from **Anversinh @ Kiransinh Fatesinh Zala vs. State of Gujarat (supra)** were also after the entire evidence was led. But, when it comes to crystallize the legal aspect involved in the case and

the interpretation of Sections 361 and 366 of IPC, then those interpretations are binding on this Court.

18. At this *prima facie* stage, it is coming on record that the victim is 15 years of age. She was taken away by the present applicant and thereafter there was sexual intercourse between them. The consent of the minor is "no consent" at all and, therefore, there is *prima facie* evidence against the applicant. He does not deserve discretionary relief. Hence, the Bail Application stands rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV