

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

912 BAIL APPLICATION NO.109 OF 2021

MILIND MANIKRAO KASBE

VERSUS

THE STATE OF MAHARASHTRA

...

Mr. S.J. Salunke, Advocate for the applicant

Mrs. D.S. Jape, APP for the respondent

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 02nd MARCH, 2021.

ORDER :

1 Present applicant has been arrested, in connection with Crime No.163/2020 dated 22.07.2020 registered with Dindrud Police Station, Tq. Majalgaon, Dist. Beed, for the offence punishable under Section 363, 376 (j) (n) of The Indian Penal Code and under Section 4 and 8 of The Protection of Children from Sexual Offences Act, 2012. It appears that the investigation is over and charge sheet has been filed before the learned Special Judge under POCSO Act bearing Special Case No.43/2020. Present application has been filed for regular bail under Section 439 of The Code of Criminal Procedure, 1973.

2 Heard learned Advocate Mr. S.J. Salunke for the applicant and learned APP Mrs. D.S. Jape for the respondent.

3 It has been vehemently submitted on behalf of the applicant that perusal of the First Information Report would show that it is against unknown person, and therefore, we will have to see the statement of the victim. In her statement it is specifically stated that she is 17 years 10 months old. She was knowing the present applicant, who was residing in the neighbourhood. She had stated that applicant had given phone call to her at about 7.00 a.m. on 21.07.2020. Thereupon the victim informed her that her parents are looking for suitable match for her, and therefore, he should take her along with him and she has desire to marry him. Thereafter, she says that the applicant came near Hingni Phata on his motorcycle at about 4.00 p.m. and then they went to Lingali, Tq. Daund, Dist. Pune. He was introduced to one Babasaheb Jagdale, in whose field they stayed, that the victim is his wife and thereafter they stayed there as husband and wife for more than two months. This clearly shows that the applicant has not done any overt act and the persons around whom they were staying had not found any dispute between them. That means, he was looking after her properly. Therefore, none of the offence attracted against him. The victim was quite mature and able to understand the consequences of her act. Medical

evidence is not supporting the prosecution. The supplementary statement has been recorded after 20 days when the victim was given in custody of parents, therefore, there is every possibility of tutoring her before taking her supplementary statement. In her supplementary statement she has stated that she was forcibly taken by the applicant and kept at Lingali, Tq. Daund, Dist. Pune and there were sexual intercourses between them. Now, the charge sheet is filed. Therefore, further physical custody of the applicant is not required. Learned Advocate for the applicant vehemently canvassed for releasing the applicant on bail and he relied on the decision by the Division Bench of this Court, Bench at Nagpur, in **Vishal Omprakash Verma vs. The State of Maharashtra and another**, 2021 ALL M.R. (Cri.) 187, wherein the accused had established physical relations with 15 years old child, on the promise of false marriage was the allegation. However, in the FIR and the statement of victim it do not reflected that she was having love affair with the applicant/accused and there was consensual relations between them. When the trial was not likely to commence in future it was held that the accused was entitled to be released on bail.

4 Per contra, the learned APP strongly opposed the application and submitted that the applicant is aged 27. He is presumed to have every understanding capacity, but then the victim is minor. He has taken

disadvantage of the innocence of the victim and took her away from the lawful custody of her guardian. The medical report of the victim supports the prosecution story. When there is sufficient evidence on record the applicant does not deserve any kind of sympathy. The evidence collected would show that there was total suppression of facts by the present applicant from the victim. It was not at all disclosed to her that the applicant was already married. He could not have performed a legal marriage with the girl and a girl of 17 years 10 months cannot be said to have enough mature to know what is legal and what is illegal in respect of a marriage is concerned. Therefore, her alleged invitation will not absolve the applicant from the consequences, for the simple reason that the applicant is having sufficient maturity.

5 It is to be noted that the FIR has been lodged by the mother of the victim, in which she has specifically stated that the age of the victim as 17 years 10 months. She had no idea as to where the girl has gone, and therefore, the FIR has been lodged against unknown person under Section 363 of the Indian Penal Code. No doubt, now, the investigation is over and charge sheet has been filed, therefore, further physical custody only for the purpose of investigation is not required, but at the same time, we are required to consider what evidence has collected against the present

applicant and whether he can be released on bail. If prima facie case is made out, then definitely the discretionary power of granting bail cannot be exercised in favour of the applicant. As regards trial of the case is concerned, the POCSO Act itself makes it time bound. Thereafter, it depends upon the assistance rendered by the learned Advocate representing the accused to the Court for expeditious disposal of a case, therefore, it cannot be said that there is absolutely no likelihood commencement of the trial in the near future.

6 The important point is that applicant is aged 27 and he is already married. Statement of his wife is taken. It appears that further statement of the mother and brother of the present applicant is also taken, which reflects that present applicant used to stay near Ahmednagar and used to work in field as annual agricultural labour (सालगडी). Mother of the present applicant has stated that there was the dispute between the present applicant and his wife, and therefore, she was residing at her parents house since last about 2 months from the date of the statement of the mother. Present applicant was not in contact after 22.07.2020. The alleged incident of kidnapping has taken place on 21.07.2020. Even if we take as it is that since the applicant was residing or his family was residing in the neighbourhood of the informant and the victim, and therefore, they should have knowledge about the marriage of the present applicant; yet, taking into consideration the

minority of the girl it is hard to believe that she could have understood the consequences of her act of eloping with applicant. Merely by her statement that she wants to marry him, it will not be available as a defence for the applicant to state that he believed in that. Since he himself is a married person, he could not have performed a legal marriage without giving a divorce to his wife. Even if the statement of the victim is taken as it is that when she had called her, she informed him that the parents are looking for suitable match of her and he should take her, it was for the applicant to explain her, even at that time, that it will not be legal on his part to do any such act. But it appears that he has not done that and they decided to meet near Hingni Phata and thereafter they eloped. Applicant cannot rely on the said statement, though at this stage under Section 161 of Cr.PC., only to suit him for the purpose of bail. In her initial statement also, as well as in the supplementary statement, she has stated that at Lingali, where they were staying, they had sexual intercourse, almost daily, and taking into consideration the minority of the victim her consent is no consent. There appears to be prima facie ample evidence against the present applicant, apart from the medical evidence. As regards the medical evidence, since it has been done after a long gap and in view of the fact that the victim had submitted herself to the applicant, there could not have been injury marks, but certainly the medical evidence suggests physical relations.

7 Now, the applicant has relied on the decision in **Vishal Verma** (supra). The main fact, that is differentiating two cases, is that in the present case the applicant is already married, therefore, even if it is taken that he had taken the victim under the pretext of marriage, it will have to be termed as false, because it could not have been a legal marriage. In the case of **Vishal Verma** the Court had relied on the decision in **Sunil Mahadev Patil vs. State of Maharashtra, 2016 ALL M.R. (Cri.) 1712**, wherein certain factors, those are required to be considered while dealing with such applications were summed up. However, the recent pronouncement of Hon'ble Apex Court is to be considered here. In **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.”

8 As regards the defence of consensual affair taken by the accused is concerned, it has been observed -

“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. Abdur 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 thereunder would stand attracted."

9 No doubt, the above observations in **Anversinh Zala's** case (supra) are after the entire appeal was heard, that means, after weighing the evidence that was led before the trial Court; yet, when it comes to explanation of legal position, then definitely, that legal position will have to be considered here, even for the consideration of bail application. Further, a

note is also taken that a Special Leave Petition is stated to be pending before Hon'ble Supreme Court, raising the issue that whether an adolescent boy, who enters into a relationship with a girl, who is less than 18 years of age, can be punished for the offence punishable under the POCSO Act. The said verdict is still awaited. The present applicant cannot be said to be an adolescent person. Therefore, the benefit of the decision in **Vishal Verma** cannot be given to the present applicant. Since there is prima facie ample evidence against the present applicant, he does not deserve discretionary relief of grant of bail. He was not supposed to take disadvantage of the innocence of the innocent girl. Therefore, his application stands rejected.

(Smt. Vibha Kankanwadi, J.)

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