

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

918 BAIL APPLICATION NO.144 OF 2021

SHAILESH KANTILAL KOKANI

VERSUS

THE STATE OF MAHARASHTRA

...

Mrs. S.T. Kazi, Advocate for applicant

Mr. N.T. Bhagat, APP for the respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 25th FEBRUARY, 2021.

ORDER :

1 Present applicant has been arrested in connection with Crime No.283/2020 dated 26.08.2020 by Nandurbar Taluka Police Station, Dist. Nandurbar, for the offence punishable under Section 376(2)(n), 363, 366, 323 of the Indian Penal Code and under Section 3, 4, 5(l) and 6 of the Protection of Children from Sexual Offences Act, 2012. He has prayed for bail under Section 439 of the Code of Criminal Procedure, 1973.

2 Heard learned Advocate Mrs. S.T. Kazi for the applicant and learned APP Mr. N.T. Bhagat for the respondent.

3 It has been vehemently submitted on behalf of the applicant that

the investigation is over and charge sheet is filed before the Special judge bearing Special Case No.25/2020. It would take long time for the concerned Court to hold the trial. Applicant is aged 22. He has permanent place of abode. Perusal of the First Information Report would show that the girl was in relation with the present applicant. Though she has stated that for the first time the applicant had told her on 30.07.2019 at about 1.00 p.m. that he loves her and they should elope and marry and took her along with him to Gawdi in Gujrat State on motorcycle. Yet, it appears that they both might be having love affair since prior to that. She states that at that place in Gujrat State they had stayed for about 5 days and thereafter they came to Dhule and reside with their another relative for two days. After two days she was left by the applicant to her village. She says that thereafter about a month she and present applicant were residing in his house and during that period they had sexual intercourse. The applicant used to say that she is his wife and would marry in near future. The informant further says that when she had gone to her parental house in the same village for about 20 days and then returned to applicant's place, she was then taken to Mulher, Dist. Nashik. There also they stayed as husband and wife and had sexual intercourse. They came back to village after the lock-down in March, 2020. She then says that at about 8.00 p.m. on 23.08.2020 the applicant raised dispute with her, on account of serving food to him and then thrown her out of the house. Though he was

tried to be persuaded by her parents, the applicant states that he is not ready to accept her and then she has lodged report.

4 It has been further submitted on behalf of the applicant that it appears that the victim had gone along with the applicant voluntarily and she had sufficient knowledge and consequences of her acts. It appears that when the applicant was insisted by her parents that he should marry her and he told that they should wait till she becomes major, she got annoyed and lodged report. It might be in anger. When, now, entire investigation is over and no forcible act was done by the applicant, he deserves to be released on bail.

5 Per contra, the learned APP strongly opposed the application and submitted that the applicant is aged 22. 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.

6 The learned Advocate appearing for the applicant has relied on the order passed by this Court at Principal Seat in **Criminal Bail Application**

No.2632 of 2019, Anirudha Radheshyam Yadav vs. The State of Maharashtra, wherein after relying on the decision in **S. Varadarajan vs. State of Madras, AIR 1965 942,** the applicant therein, who was facing similar offence, has been released on bail. Per contra, the learned APP submitted that the facts of those cases were different and at that time the POCSO Act was not in force. Specific legislation has been enacted to protect the minors, and therefore, the same criterion need not be applied.

7 It is to be noted that the First Information Report is lodged by the victim herself. She was taken away by the present applicant from her school. Her parents, who can be said to be the guardian of the minor girl, were not aware, as to where the applicant had taken her. At the time of lodging First Information Report her age was 15 and the incident is stated to have taken place about a year prior to the FIR. So, at the time of taking her away she was 14 years of age. No doubt, now, the investigation is over and charge sheet has been filed, therefore, the further physical custody only for the purpose of investigation is not required. But, at the same time, now, we are required to consider what is the evidence, that is collected against the present applicant. Applicant is aged 22. In his bail application, there is no specific word or sentence, which states that he had love affair with the victim. Therefore, the said angle cannot be inferred, though tried to be

canvassed on his behalf. No doubt, the prosecutrix herself has stated that she was taken by the applicant under the pretext that he loves her, but it is to be noted that in his application he has not stated anything about it. But it appears that in his third bail application before the learned Special Judge he has stated that he and the victim were in love. Even if we take the case as it is that there was love affair between them, yet, applicant, who himself is major, cannot cross the boundaries and now cannot take advantage of the fact that they were having love affair. The FIR rather states that for a considerable time the victim was residing in the house of the applicant as if she is his wife. That means, his parents had accepted her as wife of the applicant. Then the question arises, as to why he could not have performed the marriage. Now, he cannot take defence of the minority of the prosecutrix. Therefore, there is ample evidence against the present applicant, apart from the recovery of the clothes, statements of witnesses and the panchnamas. The statements of witnesses would show that the present prosecutrix was residing in the house of the applicant as his wife. Under such circumstance, it cannot be now imagine that there would not have been sexual intercourse between them. When the consent of a minor for sexual intercourse cannot be taken as a consent under the eye of law, the defence, even at this stage tried to be raised by the applicant, cannot be considered to release him on bail.

8 Now, the applicant has tried to rely on the decision in **Anirudha Radheshyam Yadav** (supra) for giving equal treatment to him, by giving advantage of the decision in **S. Varadarajan** (supra). At the outset, it can be said that after entire evidence, that is on record, the Hon'ble Apex Court had observed -

“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.”

9 Here, we are at the prima facie stage, first. Secondly, the recent pronouncement by the Hon'ble Apex Court is required to be considered. 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.”

10 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.”

11 Therefore, taking into consideration the above said legal position and the fact that there is ample evidence against the present applicant, benefit of **Anirudha Radheshyam Yadav**’s case (supra) cannot be given to the applicant. Further fact, that is, required to be noted from the FIR, that applicant had gone to the school of the victim and from there he had taken her on motorcycle to Gujrat. This amounts to active role of the applicant. Therefore, when there is ample evidence against him, he does not deserve discretionary relief to be released on bail. He was not supposed to take disadvantage of the innocence of the innocent girl. Application stands rejected.

(Smt. Vibha Kankanwadi, J.)

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