

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR CANCELLATION OF BAIL NO. 152 OF 2021

XYZ through her guardian
Mr. Rajabhau s/o Vasant Rao Gujar

...Applicant

Versus

1. State of Maharashtra

2. Vikas s/o Pralhad Dethe

...Respondents

...
Advocate for the Applicant : Mr. Shreyes S. Deshpande
APP for Respondent – State : Mr. S. B. Narwade
Advocate for Respondent No. 2 : Mr. P. P. More

...
CORAM : PRAKASH D. NAIK, J.

RESERVED ON : 23rd NOVEMBER, 2021
PRONOUNCED ON : 21st DECEMBER, 2021

PER COURT :-

1. This application is preferred under Section 439(2) of the Code of Criminal Procedure seeking cancellation of bail granted to respondent No.2 by order dated 06.05.2021.

2. The applicant is the first informant in Crime No. 105/2021 registered with Chandanzira Police Station on 08.03.2021 for offence under Section 363 of IPC. Subsequently the offences punishable under Sections 376(1)(2)(j) of the Indian Penal Code and Section 4 and 8 of Protection of Children from Sexual Offences ("POCSO") Act, 2012 were added.

3. The case of the prosecution is that on 08.03.2021 the daughter of complainant left the house for school. At about 11.00 O' Clock telephonic call was received from the headmaster of the school informing that victim had not attended school. The complainant and his wife tried to search her. She was missing. She had disappeared before reaching school. Enquiry was made with relatives and friends. She could not be traced. It was revealed that the respondent No. 2 who is their neighbour had also disappeared with his four wheeler during the said period. Thus it was suspected that he had enticed the victim and kidnapped her for unknown reason. FIR was registered for offence under Section 363 of IPC.

4. The victim and accused were traced. The respondent No. 2 / accused was arrested on 17.03.2021. He was produced before the Court for remand. He was remanded to police custody till 20.03.2021. Thereafter he was remanded to Magisterial Custody.

5. The respondent No. 2 preferred application for bail before the Court of Sessions on 19.04.2021. By order dated 06.05.2021 he was directed to be released on bail.

6. The application is preferred for cancellation of bail granted to respondent No.2. Learned Advocate for applicant

submits that the accused has committed serious offence. The victim is minor. She was subjected to sexual assault. Prime contention of learned counsel for applicant is that, bail was granted to respondent No.2 without hearing victim. The offences were registered under Section 376 of IPC as well as under Provisions of POCSO Act.

7. It is submitted that the order of granting bail without issuing notice for hearing to the complainant / victim is bad in law and deserves to be set aside. Bail granted to respondent No. 2 may be cancelled. The application may be remanded to the same Court for fresh hearing. It is submitted that the complainant could have opposed the application for bail by pointing out the incriminating evidence against the accused which opportunity was denied to victim / complainant.

8. Learned counsel for applicant relied upon the decision of this Court in the case of **Arjun Kishanrao Malge Vs. State of Maharashtra and others delivered in PIL No. 5/2021** Decision of the Delhi High Court delivered in the case of Reena Jha Vs. Union of India and another decision of Delhi High Court in the case of **Miss G (Minor) vs. State of NCT of Delhi** delivered in **Cri. Misc. Appl.No. 1474/2020**.

9. Learned APP submitted that the prosecution has opposed the application for bail. The incriminating evidence against the respondent No. 2 was brought to the notice of the Court. However, undisputedly the notice of hearing was not given to the complainant / victim. Investigation is complete and charge sheet is filed on 06.05.2021. The offence is made out against respondent No.2.

10. Learned counsel for respondent No. 2 submitted that merely on the ground that the complainant was not heard order of bail need not be set aside. The respondent No. 2 was in custody. At the time of incident there was pandemic and the schools were closed. False story is created that victim had left for school. The victim and the accused were having love affair. The statements on record discloses that the victim had left her house on her own. No force was used against her. The investigation is over. Charge-sheet has been filed. Case was due for framing of charge from 27.10.2021. Assuming that notice of hearing was required to be issued to victim, in the facts of this case bail granted to respondent No. 2 may not be set aside. There is variation in the statement of victim recorded under Section 161 and 164 of Cr.P.C. The relationship

was consensual.

11. While allowing the application for bail the learned Additional Sessions Judge had observed that at the time of incident the victim was aged about sixteen years one month. On perusal of statement of the victim it appears that the accused is her neighbour. On 08.03.2021 the accused came with car. As pre-planned the victim boarded the car and both of them went to Shirdi. Thereafter they went to Shani Shingnapur. They were residing in hotel at Aurangabad. They purchased clothes at Aurangabad. On one occasion there was physical relationship. The statement of the victim was recorded under Section 164 of the Code of Criminal Procedure. Initially she stated that physical relationship was forceful. It was further observed that the victim had left her house on her own and started residing with the accused. The accused is aged about 22 years.

12. The Court had referred to investigation papers. Considered say filed by learned APP and heard learned APP.

13. From the tenor of the order passed by the learned Sessions Judge it is apparent that the complainant / victim was

not heard while adjudicating the application for bail.

14. The FIR was registered on 08.03.2021 under Section 363 of IPC. The victim girl aged 16 years was missing from the house. Although she left for going to school, she did not reach the school. The victim and the accused were traced and they were brought to police station on 16.03.2021. The statement of victim was recorded in the presence of representative of Mahila Samiti, Dakshata Samiti, her mother and lady police constable. She stated that on 08.03.2021, she left house for going to school. Accused came with his car. As per their conversation on phone she sat in his car. They went to Shirdi. They waited in the car for whole night after parking it at parking lot. On the next day also they were in the car in the night at Newasa. Thereafter they went to Shani Shingnapur and waited in the car. They returned to Aurangabad and again waited in Car. Thereafter they went to the hotel near Karmad village and occupied it for a period of 3 to 4 days. They were visiting hotel at Ladgaon Toll Naka. They purchased clothes at Aurangabad and while returning to Ladgaon they were stopped by police and taken in custody. While they were at hotel at Karmad once there was physical relationship between them. Medical examination of the victim and the accused was

conducted on 17.03.2021. During the examination she provided history to Medical Officer stating that accused is her neighbour. They talk on phone regularly. On 08.03.2021 she phoned accused and they planned to leave house. They met on the way. She sat in his car. They went to several places. They had sexual contact once, willingly as they like each other. Thereafter they were traced by police. She was taken to 'Bal Sudhargruha'. She was then taken for medical examination.

15. The victim was medically examined. The report indicate that there was no injury on her body. Old reptured hymen. No injuries over external genitalia. Opinion given in Medical Report mentions that no signs of recent sexual intercourse and old ruptured hymen. Report dated 16.03.2021 was sent by Investigating Officer to Bal Samiti Jalna, stating that victim was produced before Mahila Dakshata Samiti and statement was recorded. Attempts were made to hand over custody of victim give to her parents, but she was not willing to join them hence, victim girl may be kept at observation home, Jalna. Statement of victim was recorded under Section 164 Cr.P.C. on 07.04.2021. In the said statement the victim had stated that the accused used to stalk her. He had threatened her. On 08.03.2021 he forced her to sit in car. She was confined in

lodge. Three other friends of the accused were also with him. They threatened that her brother will be killed. The accused had forceful physical relationship with her on three occasions. He prepared audio clip on 16.03.2021 to record statement that her father should withdraw complaint. On 16.03.2021 they were apprehended by police. Thus there is variation in the statement of the victim under section 161 and 164 of Cr.P.C. In the previous statement she had not referred to use of force and presence of other persons. The history provided by the victim is similar to her version in statement on 16.03.2021. The cell phone of the accused was seized. Audio clip was recovered wherein victims version was recorded stating that her father should withdraw the complaint she is voluntarily residing with accused.

16. The investigation is completed and the charge-sheet has been filed against the accused. The case is pending before the competent Court for framing charge.

17. In the case of **Arjun Kishanrao Malge, decided on 08.04.2021** by the Division Bench of this Court, in paragraph 17 has observed that, Section 439 (1A) stipulates that, the presence of the informant or any person authorised by him

shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of Section 376 or Section 376AB or section 376DA or Section 376DB of the Indian Penal Code. It needs to be noted that, such provisions of the Indian Penal Code referring to sub-section (1A) of Section 439 of Cr.P.C. are in relation to the offences under sub-section (3) of Section 376 or Section 376AB or Section 376DA or Section 376DB of the IPC which relate to children. Akin to the offences which fall under the Indian Penal Code as set out in sub-section (1A) of Section 439 of Cr.P.C., with respect to applications for bail under the POCSO Act, the presence of the informant or any person authorised by him shall be made obligatory at the time of hearing of the application for bail. This would be in consonance with object of Section 40 of POCSO Act read with Rule 4(13) and 4(15) of POCSO Rules. It needs to be noted that Section 376 (3) related to rape on women under 16 years of age. Section 376AB relates to rape on women under 12 years of age. Section 376DA refers to gang rape on women below 16 years. 376DB relates to gang rape on women below 12 years. The age of victim in present case is 16 years 1 month. All the aforesaid provisions of IPC are not applicable and Section 439(1A) is not applicable in the present case. However in paragraph 20(1) it is observed that

where an application made before the Court on behalf of the accused, it shall be the duty of the accused to issue notice for hearing of such application to the child's family or as the case may be, the guardian, and where a legal counsel on behalf of the child is already on record, to such legal counsel along with all the relevant documents and the record necessary for effective participation in the proceedings. In the case of **Miss G (Minor) Vs. State of NCT of Delhi & Anr**, the Delhi High Court has referred to the provisions of POCSO Act and CRPC and the Practice Directions dated 24th September, 2019. It was observed that non issuance of notice to the complainant / victim is not merely a procedural lapse, but contrary to the unequivocal legislative mandate and settled law. Reference is made to decision of Delhi High Court in the case of *Rena Jha Vs. Union of India*.

18. Learned counsel for the applicant has urged that the Delhi High Court in above decision had set aside bail order and directed lower Court to decide application for bail. It is pertinent to note that the accused therein was granted temporary bail which expired on the date of decision by High Court and fresh application for bail was preferred before lower Court. The Court has directed that Sessions Court shall decide

the application in accordance with law without being affected by said order or previous order, granting bail. In the present case bail is granted to accused on 6.5.2021 and charge sheet has been filed.

19. The respondent No. 2 was arrested on 17.03.2021. He was in custody, till he was released on bail. The application was opposed by the prosecution. There are variations in the statement of the victim. The material on record discloses that accused and victim were in relationship. The victim left the house. She was of the age of understanding. Investigation was completed. Although notice was not given to victim in the facts and circumstances of this case the bail granted to respondent No.2 need not be set aside. Hence, the order :

ORDER

Anticipatory Bail Application No.152 of 2021 stand rejected and disposed of.

**(PRAKASH D. NAIK)
JUDGE**

shp/-