

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

903 BAIL APPLICATION NO.1043 OF 2021

ASLAM KALIM SHAIKH

VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER

...

Mr. S.S. Deshmukh, Advocate for the applicant

Mrs. V.N. Patil-Jadhav, APP for respondent No.1/State

Mr. C.C. Deshpande, Advocate (appointed) for the respondent No.2

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 09th DECEMBER, 2021.

ORDER :

1 Present applicant has been arrested, in connection with Crime No.534/2020 dated 23.12.2020 registered with M.I.D.C. Police Station, Latur, Tq. & Dist. Latur, for the offence punishable under Section 366, 376, 376(2) (j), 376(3) of The Indian Penal Code, 1960 and under Section 3, 4, 5(j)(2) and 6 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 Additional Sessions Judge, Latur under POCSO Act bearing Special Case No.12/2021. Present application has been filed for regular bail under Section 439 of The Code of Criminal Procedure, 1973.

2 Heard learned Advocate Mr. S.S. Deshmukh for the applicant, learned APP Mrs. V.N. Patil-Jadhav for the respondent No.1/State and learned Advocate (appointed) Mr. C.C. Deshpande for the respondent No.2.

3 It has been vehemently submitted on behalf of the applicant that perusal of the First Information Report would show that there is no direct or indirect evidence or even circumstantial evidence against the applicant. He is aged 21. He has no criminal antecedents. He is falsely implicated in the offence. He is in jail since 23.12.2020. There is delay in filing the complaint. There is no question of tampering evidence of witnesses and applicant is ready to abide each and every condition.

4 It has been further submitted on behalf of the applicant that victim has lodged the FIR alleging that when she was residing with her parents at Kallam, she got acquainted with applicant Aslam Shaikh and used to meet intermittently. Thereafter for Dassera festival she had been to maternal grandmother at Nagmode Vasti. At that time, applicant come to her at Nagmode Vasti and she was alone at home. Applicant took her by his Scorpio vehicle towards Gawali Vasti around 3.00 to 4.00 p.m. Informant cannot remember the exact date. It is further alleged that in the said vehicle applicant sexually assaulted the informant. She resisted, but applicant threatened her to kill. Thereafter applicant left her at the house of her

maternal grandmother at Nagmode Vasti and threatened that if she discloses to anybody about the said incident he would kill her. Because of fear she did not disclose the incident to anybody. Thereafter, when her menstruation cycle was missed her grandmother took her to Government Hospital and after examination Doctor disclosed that informant was pregnant. It can be seen that there was love affair between applicant and victim. Her consent cannot be ruled out. Now, the investigation is over and the charge sheet is filed, therefore, physical custody of the applicant is not required. Taking into consideration age of the applicant, applicant be released on bail.

5 The learned Advocate appearing for the applicant has relied on the ratio laid down by Calcutta High Court in **Ranjit Rajbanshi vs. The State of West Bengal and others in C.R.A. No.458 of 2018**, wherein it has been held that -

“Although the consent of a minor is not a good consent in law, and cannot be taken into account as ‘consent’ as such, the expression ‘penetration’ as envisaged in the POCSO Act has to be taken to mean a positive, unilateral act on the part of the accused. Consensual participatory intercourse, in view of the passion involved, need not always make penetration, by itself, an unilateral positive act of the accused but might also be a union between two persons out of their own volition. In the latter case, the expression ‘penetrates’, in Section 3(a) of the POCSO Act might not always connote mere voluntary juxtaposition of the sexual organs of two persons of different genders.

If the union is participatory in nature, there is no reason to indict only the male just because of the peculiar nature of anatomy of the sexual organs of different genders. The psyche of the parties and the maturity level of the victim are also relevant factors to be taken into consideration to decide whether the penetration was a unilateral and positive act on the part of the male. Hence, seen in proper perspective, the act alleged, even if proved, could not tantamount to penetration sufficient to attract Section 3 of the POCSO Act, keeping in view the admitted several prior occasions of physical union between the accused and the victim and the maturity of the victim.”

6 Per contra, the learned APP strongly opposed the application and submitted that the applicant is aged 21. 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.

7 It is to be noted that the FIR has been lodged by the victim herself. It is specifically stated that informant is 15 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 21. The applicant had sexual intercourse with the informant and after the medical examination was done of the informant, it was found that she was pregnant of ten months. 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. The statement of the victim would show that applicant took victim in the Scorpio vehicle brought by him towards Gawali Vasti and he had sexual intercourse with her and after some days when the medical examination was done of the victim, it was found that she is pregnant of ten months. No doubt, now, the DNA test has been conducted and the pregnancy of the informant appears to have been terminated. The DNA report of the fetus, applicant and the informant is positive and the opinion given is that the present applicant and the informant are concluded to be the biological parents of the abortus of informant. Therefore, there is ample evidence against the present applicant, apart from the recovery of the clothes, statements of witnesses and the panchnamas.

8 Giving equal treatment to applicant, by giving advantage of the decision in **S. Varadarajan vs. State of Madras, AIR 1965 SC 942**, will not arise in this case. At the outset, it can be said that after entire evidence, that

is on record, the Hon'ble Apex Court had observed in that case -

“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 which above authority is referred. 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."

date of act. He has not claimed ignorance about her age. Therefore, taking into consideration the above said legal position and the fact that there is evidence against the present applicant, benefit of young age cannot be given to the applicant. Further fact, that is, required to be noted from the FIR and statement of the informant is that applicant took the informant in Gawali Vasti and sexually assaulted her and also threatened her to kill and, therefore, this amounts to active role played by him. Therefore, when there is ample prima facie 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. Hence, following order.

ORDER

- 1 Application stands rejected.
- 2 The fees of the appointed Advocate is quantified Rs.5,000/- to be paid by High Court Legal Services Sub Committee, Aurangabad.

(Smt. Vibha Kankanwadi, J.)