

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

905 BAIL APPLICATION NO.1090 OF 2021

SANTOSH KISAN PAWAR

VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER

...

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

Mr. V.M. Kagne, APP for respondent No.1/State

Mr. V.H. Solanke, Advocate (appointed) for the respondent No.2

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 09th DECEMBER, 2021.

ORDER :

1 Present applicant has been arrested, in connection with Crime No.129/2020 dated 29.08.2020 registered with Shirur Anantpal Police Station, Dist. Latur, for the offence punishable under Section 363, 366(A), 376, 376(2)(I), 376(2)(N)(F), 376(3) of The Indian Penal Code, 1860 and under Section 3(1), 4, 5(L), 5(N) 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 on 10.11.2020 before the learned Special Judge under POCSO Act bearing Special Case No.8/2020. Present application has been filed for regular bail under Section 439 of The Code of Criminal

Procedure, 1973.

2 Heard learned Advocate Mr. S.S. Deshmukh for the applicant, learned APP Mr. V.M. Kagne for the respondent No.1/State and learned Advocate (appointed) Mr. V.H. Solanke 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 accused. The victim had herself left the house of her father without any inducement by the present applicant. The applicant merely allowed her to accompany him, and therefore, Section 363 of the Indian Penal Code is not attracted, as the facts do not amount to (taking or inducing away) of a minor from the lawful custody of the guardian, which is an essential ingredient. As per the record, the age of the victim is 15 years. She had left the company of her parents and accompanied the applicant. She did not even raise alarm while travelling despite the opportunity of running away. On this count also it shows that when it was by her consent; ingredients of Section 366 of the Indian Penal Code are not attracted. The statement of the Business Contractor Satish Gurunath Chavan would show that the victim had given her consent to reside with the applicant. Further, it appears that she voluntarily consented for the sexual relationship with the applicant.

Applicant is the cousin brother of victim's mother, therefore, victim was knowing the applicant since childhood and it appears to be a love affair. Now, the investigation is over and the further physical custody of the applicant is not required. He, therefore, prayed for release of the applicant on bail.

4 Per contra, the learned APP strongly opposed the application and submitted that the applicant is aged 25. 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.

5 It is to be noted that the FIR has been lodged by the mother of the victim. It is specifically stated that victim is 15 years of age. The mother was not aware, as to where the girl has gone, and therefore, the FIR came to be lodged against the applicant on suspicion under Section 363 of the Indian Penal Code. 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 25. 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. In a way the applicant is admitting that he was with the victim since she left her house and till they were apprehended. He has not tried to give any reason, as to why he was with her. The FIR has been lodged on 29.08.2020 and the victim was brought by police on 11.09.2020. Thus, when he has not given any reason, as to why he was with her during the said period, he cannot try to say that he had not taken and enticed her away. The statement of the victim would show that under the promise of marriage the present applicant had taken her away and had sexual intercourse with her. Medical examination of victim was done. It was found that applicant has committed sexual intercourse with the victim. Therefore, there is ample evidence against the present applicant, apart from the recovery of the clothes, statements of witnesses and the panchnamas.

6 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."

7 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.”

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 Here, the accused has not denied that victim was 15 years on the 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 statement of the victim is that on 18.08.2020 applicant told her to phone him in the evening and when she phoned him applicant called her behind the house and took her with him 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. Application stands rejected.

(Smt. Vibha Kankanwadi, J.)

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