

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

BAIL APPLICATION NO.1459 OF 2020

Chetan Pitambar Sonar,
Age 19 years, Occupation Education,
R/o Plot No.8, Parvata Bai Oak Nagar,
Jalgaon Taluka and District Jalgaon. **...Applicant**

VERSUS

State of Maharashtra,
Through Investigation Officer
Shani Peth Police Station,
Jalgaon Taluka and District Jalgaon. **...Respondent**

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Advocate for Applicant : Mr. S. S. Chitre
APP for Respondent-State : Mr. A. M. Phule
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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 20-01-2021.

ORDER :

1. Present applicant has been arrested in connection with Crime No.59 of 2020, registered with Shani Peth Police Station, Jalgaon for the offence punishable under Section 376, 354, 506 read with 34 of the Indian Penal Code and under Section 4, 6 and 8 of The Protection of Children from Sexual Offences (POCSO) Act, 2012. Applicant is seeking bail under Section 439 of Code of Criminal Procedure.

2. Heard learned Advocate Mr. S. S. Chitre for applicant and learned Additional Public Prosecutor Mr. A. M. Phule for respondent-State.

3. It has been vehemently submitted on behalf of the applicant that the applicant is 19 year old boy taking education. He has been falsely involved in the case. In fact, the mother of accused No.1 had lodged report against the father of the victim girl and accordingly non-cognizable case for the offence under Section 504 of the Indian Penal Code was registered on 12-08-2020, and therefore, as a counterblast, the victim has lodged a false case. Accused No.1 is son of City President of Women Wing of Nationalist Congress Party, Jalgaon. The victim resides in the neighbourhood of accused No.1. Her father is addicted to liquor. Further the mother of the victim had asked financial help from the mother of the accused in 2019, accordingly amount of Rs.1,50,000/- was given. However, it has not been returned, it has led to his involvement and since the present applicant is the friend of accused No.1, he has been involved. The story given in the First Information Report by the prosecutrix, is concocted. There is belated First Information Report. Offence under Section 376 of Indian Penal Code is not made out against the

present applicant. The prosecutrix is a grown up girl having sufficient understanding capacity. The mobile phone of the present applicant is seized by the police, however they have failed to collect any material from his phone. Now the investigation is over and the charge-sheet has been filed before the Special Judge. If the statement of witnesses and other material that is collected is considered then there is no eye-witness to the incident. The medical certificate does not say that there was any injury mark. There is no such evidence against the present applicant which will connect him to the crime, and therefore, he deserves to be released on bail.

4. The learned Advocate appearing for the applicant has relied on the decision in *Mr. Sandeep Suresh Patil v. The State of Maharashtra, reported in 2018 ALL MR (Cri) 5242*, wherein the applicant who was accused No.2 had allegedly committed sexual intercourse with the victim by threatening her to disclose her affair with accused No.1 to her parents. It was held that the victim had attributed primary role of repeated sexual assaults to accused No.1. As per the victim, applicant had seen her with accused No.1 and blackmailing her by clicking her photographs with accused No.1. Taking into consideration this fact it was observed that if victim was

not a consenting party to relationship with accused No.1, then no question of any apprehension for her. Further observations have been made in respect of evidence that is collected which are almost similar to the present case, but in that case this Court at Principal Seat granted bail to the applicant. The learned Advocate for the applicant, therefore, on similar lines prayed for releasing the present applicant on bail

5. Per contra, the learned Additional Public Prosecutor strongly opposed the application and submitted that there is ample evidence against the present applicant. Though it is stated in the First Information Report that there was love affair between the accused No.1 and the victim, yet whatever accused No.1 has done with the victim itself amounts to rape. The girl is aged 16, and therefore, her consent cannot be taken as consent for sexual relationship. It is stated in her First Information Report by the prosecutrix that the present applicant used to be along with accused No.1 and he has taken photographs. By threatening her of making those photographs viral, he has taken her to Kolhe Hills, and by giving her threats, he has committed rape on her. Thereafter, the accused No.1 and 2 used to torture her by giving obscene remarks, and by

giving threats to make her photographs viral, they were soliciting sexual favour from her. However, thereafter, she had disclosed the entire facts to her parents. The present applicant had gone absconding since 12-08-2020. Both accused came to be arrested on 20-08-2020, and thereafter, the mobile phones were collected. The mobile which was seized from the present applicant had no SIM Card as well as Memory Card. However, he had one photo having name, "BROTHER'S KING OF 302 GROUP JALGAO CITY," and another was his own photograph having choppers in his both hands. The medical report is supporting the prosecution. The present applicant resides in the neighbourhood of the prosecutrix, and therefore, possibility of tampering with the evidence by pressurizing the witnesses as well as possibility of another offence at the hands of the applicant cannot be ruled out. Learned Additional Public Prosecutor, therefore, prayed for rejection of the application.

6. At the outset it can be seen that in each and every matter the age of the applicant cannot be the sole criteria to release him on bail. The offence that is committed by such person and the circumstances in which it has been committed, deserves to be considered. In this case, the investigation is over and charge-sheet

has been filed. Therefore, definitely the physical custody of the applicant is not required for the purpose of investigation, and therefore, the evidence that is collected against the present applicant is required to be considered. It appears that, the first bail application filed by the present applicant was rejected by learned Trial Court, and therefore, it appears that the second bail application was filed and it has also been rejected on 02-11-2020.

7. The prsoecutrix is aged 16 years 05 months, and therefore, definitely on the basis of the allegations in the First Information Report, the provisions of The Protection of Children from Sexual Offences (POCSO) Act have been invoked along with sections of Indian Penal Code. As regards the present applicant is concerned, she has made specific allegations. She has stated that though she had friendship with accused No.1, yet along with them the present applicant used to go and he has taken photographs of the intimate scenes between her and the accused No.1. She then says that after the parents came to know about the friendship between her and accused No.1, they had scolded to her as well as to accused No.1, and therefore, they were not talking with each other. But then the present applicant made advancement and by giving threats to her to

make her photographs viral about the intimate scene between her and accused No.1, he has committed sexual intercourse with her. Thus, the allegations are very much specific and the applicant cannot say that the allegations of rape are not against him, they are against him also.

8. Present applicant has tried to give a reason as to why he is involved in this case. This is not the proper stage where this Court should go into the details of the same without there being any evidence. However a passing observation can be made that for the alleged enmity or transactions between the family of the prosecutrix and accused No.1, why the applicant would be involved merely because he is the friend of accused No.1, raises question.

9. The medical report states that there were no injuries on the person of the prosecutrix. It is obvious because she was medically examined on 13-08-2020 and as per the First Information Report, the incident had taken place on 28-02-2019 and in February 2020. Now as regards delay in lodging the First Information Report is concerned, the prosecutrix has tried to give reason. Every delay is not fatal, it is required to be explained by the prosecution, and therefore, merely on the basis of delay in lodging the First

Information Report, the applicant cannot be released on bail.

10. It will not be out of place to mention here that this Court after considering the fact that the mobile phone of the present applicant was also seized and it has been alleged against him that he had taken photographs of the accused No.1 and the prosecutrix, then it was asked to the Investigation Officer as to whether he has collected material from the mobile. In response to the query, it has been informed that at the time of seizure of his mobile there was no SIM Card and Memory Card in the mobile. The Investigating officer has not explained as to whether he had made efforts to seize the SIM Card and Memory Card. It appears that he has not even taken pains to send the mobile phone to the Forensic Expert. He has given copy of two photographs which could be recovered from the mobile of the present applicant, one is under caption "BROTHER'S KING OF 302 GROUP JALGAON CITY," and another is the boy holding Choppers in his both hands and he is shirtless. The Investigating Officer says that he is the present applicant. Present applicant is 19 years old person. He has not explained what he is doing with the Choppers / big knives. It impresses that releasing him on bail would create fear in the mind of the witnesses.

11. Facts in case of *Mr. Sandeep Suresh Patil (Supra)* might be similar, but the statements cannot be similar, based upon the statements those were produced along with the charge-sheet, the said Bench has released the applicant on bail. However, the statements and other material before this Court does not permit Court to exercise the discretionary powers.

12. Further reliance has been placed by the learned Advocate for the applicant on the decision in *Anirudha Radheshyam Yadav v. the State of Maharashtra, reported in 2020 ALL MR (Cri) 1351*. However, it appears that in that case the victim who was 14 years and 11 months old had left the custody of parents and surrendered to physical desires of the applicant therein out of her love and affection for him. Thereafter, taking the ratio from *S. Varadarajan v. State of Madras, reported in AIR 1965 SC 942*, that bail application came to be allowed. Here in this case the present applicant has not come with a case that he was loving the prosecutrix. 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 v. 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."

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

"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."

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.

13. Therefore, taking into consideration the above position of law and facts of the case, this Court is not inclined to grant the discretionary relief. Hence, application stands rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-