

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

902 BAIL APPLICATION NO.1468 OF 2020

VINODKUMAR ANJALIAH GAYADHA

VERSUS

THE STATE OF MAHARASHTRA

...

Mr. R.M. Lone, Advocate for the applicant

Mr. S.Y. Mahajan, APP for the respondent

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 11th MARCH, 2021.

ORDER :

1 Present applicant has been arrested, in connection with Crime No.131/2019 dated 28.05.2019 registered with Biloli Police Station, Dist. Nanded, for the offence punishable under Section 363, 376(3) of The Indian Penal Code, 1860 and under Section 3 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 learned Special Judge, Biloli bearing Special Case No.8/2019. Present application has been filed for regular bail under Section 439 of The Code of Criminal Procedure, 1973.

2 Heard learned Advocate Mr. R.M. Lone for the applicant and

learned APP Mr. S.Y. Mahajan for the respondent.

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 evidence against the applicant. He is aged 31. He has permanent place of abode. Applicant is an innocent person and he has not committed any crime. He has no criminal antecedents. His native place is Vinayak Nagar, Mailardevpally, Pailecheru Keshogiri Rangareddy, Hyderabad. He is in jail since 01.06.2019. His three applications for regular bail are rejected by the learned Special Judge. Victim had left the house of her brother-in-law and accompanied the applicant. She did not even raise alarm while travelling despite the opportunity of running away. Further, it appears that she voluntarily consented for the sexual relationship with the applicant. The victim was knowing the applicant since before the incident and it appears to be a love affair. Photographs annexed to the application would support the fact of love affair. Now, the investigation is over, charge-sheet is filed 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 31. 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 father of the victim. It is specifically stated that victim is 15 years of age. The father was not aware, as to where the girl has gone, and therefore, the FIR came to be lodged against unknown person under Section 363 of the Indian Penal Code. Informant stays in Hyderabad; whereas victim was staying with her sister and her husband at Hipparga Thaddi, Tq. Biloli. 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 31. Applicant says that he and victim were in love. In a way the applicant is admitting that he was with the victim since she left the house of her brother-in-law and till they were apprehended. The FIR has been lodged on 28.05.2019 and the victim was brought by police on 31.05.2019. The statement as well as supplementary statement of the victim would show that the present applicant had sexual intercourse with her for five days at Jetchel, where they stayed.

She has specifically stated that she was taken away against her wish. She has also stated so in her statement under Section 164 of the Code of Criminal Procedure. There are statements of witnesses, who have seen them together and they had introduced themselves as husband and wife. We cannot forget the age of the victim. Applicant is double her age. Therefore, there is ample evidence against the present applicant, apart from the recovery of the clothes, medical report, statements of witnesses and the panchnamas.

6 Here, we are at the prima facie stage. Note of 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.”

7 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."

8 Therefore, taking into consideration the above said legal position and the fact that there is ample evidence against the present applicant, benefit of alleged love affair cannot be given to the applicant. Further fact, that is, required to be noted from the statement of the victim is that on

23.05.2019 at 12.00 hours at night applicant came to her and took her with him. She states that she had informed him about her location. But the applicant is the person, who had come down to Hipparga Thadi and took her with him. The present applicant had sexual intercourse with her for five days at Jetchel, where they stayed, as per her statement. This amounts to active role played by him. 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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