

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO.3203 OF 2019

Kadir Kabir Husen,]
R/a. Sanjay Nagar, Near Auto Rickshaw]
Parking, Goregaon (E), Mumbai.] ... Applicant

Versus

The State of Maharashtra]
(At the instance of Andheri Police Station,] ... Respondent
Mumbai.)

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Mr. Mahesh Rajpopat i/b Mr. Ramesh Mishra for the Applicant.

Mr. S.R. Agarkar, A.P.P. for the State.

Mr. Vijay Jadhav, PSI attached to Andheri Police Station is present.

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CORAM : MRS. BHARATI DANGRE, J.

DATED : 14TH JUNE, 2021.

ORDER:-

1. The Applicant seeks his release on bail in connection with FIR lodged with Andheri Police Station vide C.R.No. 320 of 2018 invoking Sections 354, 363, 376 of the IPC and Sections 8 and 12 of the POCSO Act. The Applicant came to be arrested on 26/06/2018 and since then, he is languishing in Thane Jail. On

completion of investigation, charge-sheet came to be filed in the said crime and the Special Case No.389 of 2018 is pending before the Sessions Court at Dindoshi, Mumbai.

2. On the earlier dates, when the matter was being heard, some disturbing facts were noticed by me; when the notice came to be issued to the victim girl while the Bail Application was being heard and it dawned that the victim girl is not available and resultantly could not be served. A shocking revelation was made that the girl used to dwell on platform no.1 of Andheri Railway Station but thereafter she had suddenly disappeared and her whereabouts are not known. Neither her statement under Section 164 was recorded, nor she was subjected to ossification test to confirm her age since the case was registered on the basis that she is a minor. In spite of repeated orders, the victim girl could not be traced and PI (Crime), attached to Andheri Police Station filed an affidavit on 29/04/2021 stating that inquiries were made with the grandparents of the victim girl who stated that the girl had resided with them for 8 to 10 days at native place but thereafter she left their house and, at the time of recording of the statement, her whereabouts are not known. A categorical statement is made that Andheri Police Station team is taking serious efforts to trace the victim girl.

3. When the matter is being heard today, the position continues to remain the same and except for lamenting about the

unfortunate situation, nothing more can be done by this Court to trace the girl. The applicant, however, continue to remain incarcerated since June, 2018 on lapse of period of three years. The matter is therefore, heard on merits on the plea of the Applicant to release him on bail, on the charge-sheet being filed on completion of investigation.

4. The complaint is lodged by the complainant on 26/06/2018 alleging that when he had halted at a signal on his bike on 25/06/2018 on his way towards the International Airport, an auto-rickshaw was also waiting its turn for the signal to turn green and he could hear the cries of a girl from the said auto-rickshaw which had black curtains drawn on two sides. He inquired with the auto-rickshaw driver and was informed that the passengers were occupying the auto-rickshaw but since the frantic cries continued, he lifted the curtains of the auto-rickshaw, to notice that a person wearing khakhi colour clothes was forcing himself upon a girl. The complainant asked the man to come out and on his refusal, the complainant dragged him out and reported the matter to the traffic police at the signal and the said person along with another person came to be apprehended. This complaint resulted into registration of the FIR arraigning the present Applicant as one of the accused along with one other by name Rizwan Hussain.

5. The statement of the victim girl came to be recorded on 26/06/2018 itself where she narrated that she was acquainted with

the auto-rickshaw driver since last five to six months since she is residing in Juhu Galli. On date of incident, she boarded the auto-rickshaw, which was already occupied by one person and the rickshaw driver told her that he is his brother. After this, she was taken to a forest area where she was served food to eat and liquor to consume and since she had liking for liquor, she consumed the same. The victim girl also reported that the auto-rickshaw driver committed forcible sexual intercourse with her and since she was drunk, she was not in a position to stop him. After that, the other person also repeated the act with her and this continued in the moving rickshaw which was intercepted by the complainant. The charge-sheet further reveal that the victim girl was referred for medical examination by the Andheri Police Station but she did not accord her consent for vaginal examination or for carrying out any test including the blood test. Though she was advised admission, she denied to stay at the hospital and it was recorded that she was not accompanied by any relative. The papers record the age of the victim girl as 16 years. The basis of recording said age, however, is not known. The medical papers further record that the MLC was done at R.N. Cooper Hospital but patient came to labour room at 10.00 am and her UPT came positive. After performing the ultra sound sonography, she was taken to the labour room, where she gave her consent for admission. The papers from the Cooper General Hospital, Mumbai shows that on 02/07/2018, the gestational age of the foetus was found to be seven weeks and four days. The conclusion is recorded as "*Pregnancy failure of*

corresponding gestational age 7 wk 4 days". She came to be discharged on 10/07/2018.

6. As on date, the whereabouts of the victim girl are not known. No doubt, the accusation faced by the Applicant is serious one but, in absence of any proof to demonstrate that the victim girl is aged 16 years and a minor and, the basis of recording her age as 16 in the hospital papers being not known, in the absence of any documentary proof or any ossification test being carried out, the Applicant cannot be kept incarcerated for further period of time. The age of the girl is the most relevant factor to hold the Applicant guilty under the POCSO Act. At some place, in the medical papers like the paper which reflects she underwent HIV test, her age is reflected as 17 years and in some place, her age is mentioned as 18 years. The victim girl ought to have subjected to ossification test, but she is not available for undergoing the same. Her statement under Section 164 of the Cr.P.C. is also not recorded and the DNA Report of the foetus has been forwarded for forensic analysis, but one thing is clear from the medical papers that on 02/07/2018, the foetus which was removed was having gestational age of more than 7 weeks and, therefore, *prima facie* the incident complained of in which the Applicant is arraigned as an accused is not responsible for the pregnancy. The medical papers further revealed the mental status of the girl and on 29/06/2018, the medical papers record her behaviour as "*highly violent behaviour – laughing at inappropriate time*". On 07/07/2018, at 11.40 a.m.,

in the Hospital Register in her own handwriting there is a statement that she had terminated the lump (*ghat*) without informing either the doctor, sister or police constable and threw it in the garbage,. The remarks on the case papers further reflect that *“the patient had interviewed, counselled and advised to her for future life as she missed abortion and discorded products of conception. Now patient can be discharged. Not any objection about patient’s discharge from me. All risk and responsibility is taken by self. In future, hospital authority is not responsible in this matter.”*

7. In the light of the aforesaid scenario, when the investigation in the present C.R. is complete and the charge-sheet being already filed and in the absence of any antecedents attributed to the present Applicant, he need not be kept incarcerated and is entitled to be released on bail. Needless to state that the investigating machinery will continue its attempt to trace the victim girl. Hence, the Applicant is entitled to bail subject to the following conditions:

:ORDER:

- (a) The Applicant – **Kadir Kabir Husen** shall be released on bail in Special Case No.389 of 2018 (Andheri Police Station C.R. No.320 of 2018) on

executing P.R. bond in the sum of Rs.25,000/- and furnishing one or two sureties, in the like amount.

- (b) The Applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case and shall not tamper with prosecution evidence.
- (c) The Applicant shall report to the Andheri Police Station on the first Monday of every month where his attendance shall be marked.

8. The Application is allowed in the aforestated terms.

(BHARATI DANGRE, J.)