

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

BAIL APPLICATION NO. 1511 OF 2021

Geetabai @ Sumanbai Namdeorao Gaikwad

Applicant

Versus

The State of Maharashtra & another

Respondents

Mr. S.J. Salunke, Advocate for the applicant.

Mr. S.B. Narwade, APP for respondent/State.

Mr. Balasaheb Magar, Advocate for the informant.

CORAM : M.G. Sewlikar, J.

DATE : 11th FEBRUARY, 2022.

PER COURT :

1. By this application, the applicant is seeking her enlargement on bail in connection with Crime No. 232/2021 registered with Hatta Police Station, Dist. Hingoli, for the offences punishable under Sections 363, 366(A), 376(c)(f)(i)(j)(n), read with Section 34 of the Indian Penal Code and under Sections 3, 4, 12 of Protection of Children from Sexual Offences Act.

2. The victim is the cousin of the informant. Accused No. 1 Kalyan runs coaching class and the victim aged 13 years is the

student of accused No. 1. It is alleged in the First Information Report that accused No. 1 Kalyan is a divorcee. He had developed infatuation towards the victim. Accused Kalyan used to run coaching class from his house. He used to ask the other students and the brother of the victim to leave the house on one or the other pretext to get privacy. He used to hug the victim and used to touch her inappropriately. Accused Kalyan used to say that he liked the victim very much and that his mother i.e. applicant herein used to say that victim and accused Kalyan would make a good couple. On the day of the incident i.e. on 31st August, 2021, accused Kalyan kidnapped the victim. They went place to place. He had penetrative sexual assault with the victim. He had taken the victim to a lodge at Shirdi and from there he had called the applicant and the applicant told accused Kalyan that both of them should not return to the village, both the brother of the victim had been to the applicant in search of the victim. Victim and accused were apprehended. They were brought to the police station. It is alleged that the applicant abetted commission of the offence. On these allegations, First Information Report came to be lodged against the applicant.

3. Heard Shri Salunke, learned counsel for the applicant,

Shri Narwade, learned APP for the State and Shri Magar, learned counsel for the informant.

4. Learned counsel Shri Salunke submits that there is no evidence to show that the applicant in any manner abetted the commission of the offence. He submits that merely saying that victim and accused Kalyan should not return to the village and they should stay away from the village does not mean that she had abetted the commission of the offence. He further submits that there is no evidence to show that she had instigated or intentionally aided the commission of the offence nor there is any evidence to show that she in any manner facilitated the commission of the offence.

5. Learned APP Shri Narwade and learned counsel Shri Magar submit that there is ample evidence on record to show that the applicant facilitated the commission of the offence. They submit that the spot panchanama shows that there are only two rooms in the house. Accused Kalyan used to run coaching class from one of the rooms of the house. They further submit that applicant, who is the mother of accused Kalyan, had said that the victim and accused Kalyan would make a good couple. She also had liking towards the

victim. All these circumstances show that she abetted the commission of the offence. They submit that it is impossible to comprehend that the applicant did not have knowledge of the intentions of accused Kalyan of kidnapping and marrying the victim, a minor aged 13 years. They submit that all these circumstances cumulatively taken together go to show that the applicant abetted the commission of the offence.

6. 'Abetment of offence' is explained under Section 16 of the Protection of Children from Sexual Offences Act. It reads as under :-

16. Abetment of an offence :- A person abets an offence, who-

First – Instigates any person to do that offence; or

Secondly – Engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to doing of that offence; or

Thirdly – Intentionally aids, by any act or illegal omission, the doing of that offence.

Explanation I – A person who, by wilful

misrepresentation, or by wilful concealment of a material fact, which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that offence.

Explanation III – Whoever employs, harbours, receives or transports a child, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position, vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of any offence under this Act, is said to aid the doing of that act.

7. It is thus clear that in order to invoke provisions of Section 16 of Protection of Children from Sexual Offences Act, there has to be instigation to do a particular thing or the person engages with one or more other person or persons in any conspiracy for the doing of that offence, there should be evidence to show that the person intentionally aids the doing of that offence.

8. In the matter of Chitresh Kumar Chopra vs. Government of NCT Delhi, **AIR 2010 SC 1446**, the word 'instigation' has been

defined as instigation is to goad, urge forward, provoke, incite or encourage to do an act. Explanation II to Section 16 requires that the facilitation of the commission of the offence should be done either prior to or at the time of commission of an act. It is thus clear that for constituting abetment by facilitating, there should be evidence that either prior to or at the time of commission of the offence, the offender must do any act towards commission of the offence. In the case at hand, no evidence is adduced to show that prior to the commission of the offence or at the time of commission of the offence the applicant did any act which would show that she facilitated commission of the offence.

9. Learned APP submits that the applicant could have prevented the commission of the offence. Just because she could have prevented the offence does not mean that she had abetted the commission of the offence. For constituting abetment there should be clinching evidence to show that the accused instigated or intentionally aided commission of the offence or intentionally engaged himself in the conspiracy for committing the offence. Merely saying that applicant liked the victim and the victim and accused Kalyan would make a good couple would not amount to the abetment of the

commission of the offence. She has only expressed her opinion. Merely expressing opinion does not amount to abetment of the offence. Even her subsequent conduct as is revealed from the First Information Report, statement of Sandhya and statement of the victim under Section 164 of the Code of Criminal Procedure, it is clear that the applicant was not aware of kidnapping of the child by the accused No. 1. The applicant has stated to accused Kalyan that victim's two brothers had come in search of her and she should inform her parents that they should not bother them and victim and accused Kalyan should live together and do not come back. This evidence does not show that the applicant was aware of kidnapping. In this view of the matter, there is no sufficient evidence to connect the applicant with the offence. Applicant is a lady of the age of 50 years. There are no criminal antecedents against the applicant. In view of this, I am inclined to release the applicant on bail. Hence the following order :-

ORDER

- i) Application is allowed.
- ii) Applicant be released on PR Bond of Rs.25,000/- (Rs. Twenty Five Thousand) with one

solvent surety in connection with Crime No. Crime No. 232/2021 registered with Hatta Police Station, Dist. Hingoli, for the offences punishable under Sections 363, 366(A), 376(c)(f)(i)(j)(n), read with Section 34 of the Indian Penal Code and under Sections 3, 4, 12 of Protection of Children from Sexual Offences Act, on condition that she shall not tamper the prosecution evidence, shall attend the dates fixed during the trial and shall not keep any contact with the victim till the conclusion of the trial.

iii) Application stands disposed of.

iv) It is clarified that the observations made in the above order are restricted to the decision of this application only and the trial Court shall not get influenced by the same and can come to its independent conclusion during trial.

(M. G. SEWLIKAR)
Judge