



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

BAIL APPLICATION NO. 1016 OF 2024

SANDIP @ GANESH CHANDRAKANT TAPDIA  
*VERSUS*

THE STATE OF MAHARASHTRA AND OTHERS

...

Advocate for Applicant : Mr. Karishma Sanjay Sarin

APP for Respondent No.1 : Ms. P. V. Diggikar

Advocate for Respondent No.2 : Mr. K. N. Shermale

Advocate for Respondent No.3 : Mr. V. M. Lomte

(Appointed Through Legal Aid)

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**CORAM : S. G. MEHARE, J.**

**DATE : 26-08-2024**

**PER COURT :-**

1. Heard the learned counsel for the applicant/accused, the learned A.P.P. for respondent No.1/State, the learned counsel for respondent No.2/father of the victim and the learned counsel for respondent No.3/victim.

2. The applicant seeks bail in C.R.No.1278 of 2023 registered with Newasa Police Station, District Ahmednagar, for the offences punishable under Sections 363, 366A, 376(2)(i)(n) of the Indian Penal Code and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012.

3. This case has its own facts. Respondent No.2/victim and the applicant had a love affair. Therefore, she eloped with the applicant. One fine night, the victim and her sister were seen

missing in the room at late night hours. Her father lodged a report against an unknown person. On the report of her father, Crime No.0556 of 2023 was registered with the Police Station, Pathardi, District Ahmednagar. During the course of the investigation, the applicant and the victim were apprehended. The parents took her custody. In that crime, the applicant was granted bail on the condition that he should not contact the victim. Thereafter, as alleged against the applicant, he contacted the victim and again took her with him. Since he had violated the bail condition, an application for cancellation of bail filed by the parents is pending before the learned Additional Sessions Judge.

4. The first question to be answered is whether the parents have a right or voice to oppose the application.

5. It is not disputed that now the victim has attained the majority. She was served with notice at Children's Home. She did not consent to stay with her parents. Hence, she was taken to the Children's Home. When, as per the Court's order, she was produced before the Court, she asked for legal assistance. The legal assistance was granted, and a lawyer from the panel was appointed to represent her.

6. Since the lawyer had no contact with her, he was permitted to contact the victim at the Children's Home by telephone to take instructions. The lawyer appointed through legal aid contacted her

and took instructions on the telephone. She replied to him that she wanted to marry the applicant. He did not elope her. She still loves him. She had no objection to release him on bail.

7. The parents opposed the bail application on two grounds: *firstly*, the character of the applicant, and *secondly*, family members of the applicant/accused had threatened them.

8. It has been argued for the parents that the parents or the guardian of the victim are entitled under Section 40 of the POCSO Act to the legal assistance of counsel of their choice for any offence under the Act.

9. The learned counsel for the respondent/parent relied on ***Rohit s/o Chandrakant Bhagat (in jail) versus The State of Maharashtra, Th: PSO PS Hingna, Nagpur & another, Criminal Appeal (St) No.8953 of 2023 (Nagpur Bench) dated 10 November 2023.***

10. The facts of the case of ***Rohit (supra)*** were that the petitioner before the Division Bench was a social worker working with the child victims of sexual abuse and their families across Mumbai. According to him, in several cases under the POCSO Act, the Courts and the Police have overlooked or failed to give effect to the mandate of Section 40 of the POCSO Act, read with Rule 4 of the POCSO Rules.

11. This Court (Coram: Anil L. Pansare, J.) at Nagpur Bench in the above case in paragraph No.8 observed thus;

“8. As could be seen the family or the guardian of the child is entitled to the assistance of legal counsel of their choice for any offence under this Act, but subject to the proviso to Section 301 of the Code. The provision also incorporates that if the family or the guardian of the child are unable to afford local counsel, the Legal Services Authority shall provide a lawyer to them. Thus, this Section provides for a right of child to take assistance of legal practitioner through the family or the guardian. The said right is subject to the proviso to Section 301 of the Code which provides that the Public Prosecutor or the Assistant Public Prosecutor, who shall be the in charge of a case, may appear and plead without any written authority before any Court in which the appeal is pending. It further provides that if in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or the Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or the Assistant Public Prosecutor and may with the permission of the Court submit written arguments after the evidence is closed in the case.”

12. The learned counsel for the applicant submits that the victim has attained the majority. She is not a child as per the definition of a child under the POCSO Act. The victim never supported the parents. On the contrary, she refused to go with her parents. Hence, he was sent to the Children's Home. Considering her statement and age, the Court served notice on her. She was produced before the Court and sought the legal assistance. Therefore, the parents cannot take advantage of Section 40 of the POCSO Act.

13. Section 40 of the POCSO Act reads thus:

“40. Right of child to take assistance of experts, etc. –

Subject to the proviso to Section 301 of the Code of Criminal Procedure, 1973 (2 of 1974), the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act;

Provided that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Service Authority shall provide a lawyer to them.”

14. Section 40 of the POCSO Act provides for the right of a child to take the assistance of a legal practitioner subject to the proviso to Section 301 of the Code. Further, it provides that the family or guardian of the child shall be entitled to the assistance of legal counsel for their choice of any offence under this Act.

15. Section 2(1)(d) of the POCSO Act defines the term 'child' means any person below the age of eighteen years.

16. Sub-Section (2) of Section 301 of Cr.P.C. provides that if in any such case i.e. inquiry, trial or appeal, any private person instructs a pleader to prosecute any person in the Court, the public prosecutor or assistant public prosecutor in charge of the case shall conduct the prosecution and the pleader so instructed shall act therein under the directions of the public prosecutor or the assistant public prosecutor, and may with the permission of the Court submit written arguments after the evidence is closed in the case.

17. The Punjab and Haryana High Court, in the case of **Kuldip Singh vs. State of Haryana, 1980 CrLJ 1159**, held that the first informant or the complainant in the proceeding seeking grant of anticipatory bail neither can be considered as a necessary party or proper party and has no *locus standi* to be heard.

18. In 2009, the term 'victim' has been added to Section 2, which means a person who has suffered any loss or injury caused by any person of the Act or omission for which the accused person has been charged, and the expression "victim" includes his or her guardian or legal heir.

19. As far as the right to take the assistance of expert, etc., under Section 40 of the POCSO Act is a right of a child. If the definition of a child as mentioned above is read, the guardian or the family of a child are entitled to the assistance of a legal counsel of their choice for any offence under this Act. If they are unable to afford legal counsel, the legal services authority has to provide a lawyer to them.

20. In the case at hand, when the victim was called before the Court, she had attained the age of majority. She has completed her 18 years. Hence, it is difficult to accept that she is a child. Since she had attained the age of majority, her family members and guardian have no right to have the legal assistance of counsel of their choice for the offence under this Act. Therefore, the Court is of the view that, the provision of Special Act would prevail over the general Act of Cr.P.C. In the circumstances, the Court expresses a view that the parents have no voice or right to address the Court.

21. This is not the case where the trial has commenced. It is a pre-trial stage. Considering the bail application under Section 439 of the Cr.P.C. and reading Section 40 of the POCSO Act with Rule 4 of the POCSO Rules, it can be gathered that the interest and the right of the child have been protected and legal assistance was provided to her on her request.

22. Considering the facts and circumstances of the case, this Court is of the view that the victim attained the age of majority. She had specifically instructed the learned counsel appointed for her through legal aid that she wanted to marry the applicant. She has no objection to grant him bail. The girl/their daughter is the victim. Hence, her say would prevail over the say of her parents.

23. So far as threats to the parents of the victim are concerned, those were the threats arising out of a love affair between their daughter and the applicant. Serious allegations have been levelled against the parents that when she eloped first time with the applicant, she was taken into custody and married to her close relative. The material placed on record shows that the victim called the applicant and forced him to take her away and went voluntarily with him. At that time, she was 17 years 11 months and 24 days old. Again, the first information report was registered, and she was produced before the concerned Court. She flatly denied to go with her parents. Hence, she was sent to the Children's Home to protect her interest.

24. It has been alleged through the parents that the applicant, his relatives and the lawyer representing him went to the Children's Home and threatened her. However, there is no statement from the Superintendent of the Children's Home or the victim that they went there to threaten her.

25. The learned counsel for the applicant produced the photographs of the victim. It shows that a *Mangalsutra* was in her neck. She states that it proves that when she was in the custody of her parents, she was married to her close relative.

26. As observed above, the learned A.P.P. and the learned counsel for the parents, who had no right to oppose the bail application, tried to point out that the victim was married to a close relative after attaining her majority. Considering the date of eloping and her age, such arguments would not stand.

27. The learned counsel for the victim, though, has specific instructions on a telephone that she does not want to oppose the application, she wanted to marry the applicant, he did not elope her, she has love with him, has tried to oppose the application contending that yet it is not ensured that the applicant would marry her.

28. The overall facts of the case reveal that it was a case of love affair. Though it has been tried to convince the Court that the applicant has bad antecedents, the Court is of the view that those offences are independent. It has also been vehemently argued that the applicant has contact with a Don who has been killed, but nothing is on record to show that the applicant was co-accused with the so-called Don of Jalna.

29. As far as cancellation of bail is concerned, it is a matter of investigation and the concerned Additional Sessions Judge is dealing with it.

30. There was a development. The victim has attained the majority. She has absolutely no complaint against the applicant. However, the parents are trying to say that she should not elope with the applicant. Their daughter is not with them.

31. The learned counsel for the applicant made a statement that the victim is asking the relatives of the applicant whether the applicant has been released on bail.

32. As far as apprehension of threat is concerned, the applicant is a resident of Gevrai, District Beed. The parents of the victim are the residents of village Bhenda, Taluka Newasa, District Ahmednagar. So, it cannot be believed that the applicant would go there to threaten the parents. In the circumstances, the parents of the victim cannot be said to be in danger. At the cost of repetition, once again, it can be said that the victim has attained the majority and able to take the appropriate decision. She has specific instructions to the learned counsel appointed for her through legal aid, as mentioned above.

33. For the above reasons, the applicant deserves bail.

Hence, the order;

ORDER

- i) The bail application is allowed.
- ii) Applicant - Sandip @ Ganesh Chandrakant Tapdia be released on bail, on furnishing PB and SB of Rs.50,000/-, with one solvent surety of the like amount, in the above crime for the aforesaid offences, on the conditions that
  - (a) He should not tamper with the prosecution witnesses.
  - (b) He should attend the trial on each and every date.
- iii) The observations are limited to the bail application.
- iv) The Court dealing with the cancellation of bail application should not influence of the findings recorded in this case.
- v) The Secretary, High Court Legal Services Sub-Committee, Aurangabad do pay the fees of the appointed counsel for respondent No.3/victim as per schedule.

**( S. G. MEHARE )**  
**JUDGE**