

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO. 3272 OF 2024

1. Divya Kailash Singh
 2. Payal Hemant Shah
- ...Applicants

Versus

The State of Maharashtra

...Respondent

- Mr. Harshad Sathe a/w Ms. Manvi Sharma and Mr. Shubham G. i/b Mr. Saurabh Butala, for Applicant.
- Mr. Sagar R. Agarkar, APP for Respondent.
- Mr. Abhijit Tekawade, PSI, Bhandup Police Station.

CORAM : MANISH PITALE, J.

DATE : 19th NOVEMBER, 2024.

P. C. :

1. Heard Mr. Sathe, learned counsel for the applicants and learned Mr. Agarkar, APP for the respondent-State.

2. The applicants are seeking bail, as they were arrested on 25th March, 2024, in connection with First Information Report No.0187 of 2024, dated 25th March, 2024, registered at Police Station Bhandup, Brihanmumbai. Initially, FIR was registered for an offence under Section 363 read with Section 34 of the Indian Penal Code, 1860 (IPC) against co-accused Khushbu and unknown persons. Subsequently, the applicants and others were added as accused persons and as on today there are 5 accused persons in the present case.

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3. The FIR was registered at the behest of the mother of the minor child, who reported to the police that on 24th March, 2024 at about 09:00 p.m., her daughter had gone missing. She and her husband were told that the minor child was found in the company of co-accused Khushbu and an unknown lady at about 09:30 p.m. on 24th March, 2024. Upon FIR being registered the police initiated the investigation and at about 01:00 a.m. on 25th March, 2024, the minor girl child was found in the house of the applicants. The minor child was recovered and the applicants were arrested.

4. Upon completion of the investigation, charge-sheet was filed. As per the documents filed alongwith charge-sheet and the facts narrated in the charge-sheet, it is alleged that the applicants were in a live-in relationship and they procured the child through co-accused persons, for which they arranged for payment of ₹ 9,000/- to the co-accused person.

5. The learned counsel for the applicants submit that since the investigation is now complete and charge-sheet has been filed, even if the material filed alongwith the charge-sheet is to be taken into consideration, further judicial custody of the applicants is not warranted. He submits that the statements of the witnesses recorded during the course of investigation, particularly the statement of nephew of the applicant No.1 would show that the applicants have been in a relationship for about 10 years and they have

lived together. Since they were unable to bear a child, they were interested in having a child and in that regard, at worst, the applicants became party to the illegal act of the minor child being taken away from the company of her parents. It is submitted that since the material on record does not indicate any sexual exploitation of the minor child, the ingredients of offence under Section 370 of the IPC are not made out. It is submitted that the offence under Section 363 of the IPC is a bailable offence. It is further submitted that even the medical examination report of the minor child supports the contention raised on behalf of the applicants.

6. On the other hand, the learned APP vehemently opposed the present application. He submitted that the minor girl child of about 5 years and 5 months was taken away from her parents by inducement and allurement given by the co-accused persons. Ultimately she was given into the custody of the applicants in exchange of payment of ₹ 9,000/-. The method of payment is well documented and therefore, the ingredients of the offences registered against the applicants are clearly made out. It is submitted that in such a situation, when the minor girl child was kidnapped and she was concealed by the applicants, it can be said that the charge-sheet brings out the ingredients of offence under Section 368 of the IPC also. On this basis, it was submitted that the application deserves to be dismissed.

7. This Court has considered the rival submissions in the light of the material placed on record. The material unearthed during the investigation, which forms part of the charge-sheet, undoubtedly indicates the role of the applicants, as regards the manner in which the minor girl child was taken away from the company of her parents and eventually she was found in the custody of the applicants. To that extent, ingredients of the offence under Section 363 of the IPC, pertaining to kidnapping can be said to be made out. But, it is relevant to note that the said offence is a bailable offence.

8. As regards offence under Section 370 of the IPC, the key words in the said Section are “whoever, for the purpose of exploitation.” The expression “exploitation” has been explained in explanation (1) to the aforesaid provision, which specifies that it shall include an act of physical exploitation or any form of sexual exploitation, slavery or practices similar thereto or forced removal of organs.

9. Although a strong *prima facie* case is made out against the applicants that they indeed received the minor girl child from the co-accused persons, but there does not appear to be material on record to show that the minor girl child was indeed sexually exploited in the process. In this regard, the medical examination report of the minor girl child is relevant. In the history given to the Doctor, it is specifically recorded that no history of sexual

violence was ever given. In fact, it is not even the case of the Investigating Authority that when the minor girl child was recovered from the applicants, she was subjected to sexual or physical violence or that there were teutale signs of an attempt in that regard having been made by the applicants. To that extent, there is substance in the contention raised on behalf of the applicants that the material on record may fall short of showing the ingredients of the offence under Section 370 of the IPC, which pertains to trafficking of persons.

10. It is the specific case of the applicants as stated in the application that they are in a same sex relationship and that they have lived together for about 10 years. Apart from the statement made in this regard by the applicants in the present application, a statement of one of the witnesses recorded during the course of the investigation *prima facie* supports the said stand taken by the applicants. The statement of witness, who is nephew of applicant No.1 and the person who transferred the aforesaid amount of ₹ 9,000/-, shows that the applicant No.1 and applicant No.2 were living together for about 10 years and that in fact, they had “married” each other in a temple. The aforesaid statement does indicate a *prima facie* case in favour of the applicants to claim that they are in a same sex relationship. It is specifically stated that they were desirous of having a child, which was biologically impossible. In the present state of affairs, they would also be unable to adopt a minor child.

11. In this backdrop, at worst, it can be said that the applicants undertook an illegal approach to satisfy their desire of having a child by conniving with co-accused persons to take away the minor girl child from her parents. This may show the ingredients of the offence under Section 363 of the IPC, which is bailable. Even if the contention raised by the learned APP that ingredients of the offence under Section 368 of the IPC can be said to be made out, which is a non-bailable offence, suffice it to say that even if it was to be alleged that the applicants had wrongfully concealed the minor girl child, in the absence of sufficient material to indicate that the applicants retained the custody of the child for sexual or physical exploitation, it can be said that a *prima facie* case is made out by the applicants in their favour.

12. In this regard, reliance placed on order passed by this Court in the case of XXX Vs. The State of Maharashtra¹, can be said to be appropriate. In the said case also, this Court took note of the fact that the applicant was a person belonging to LGBTQ+ community, who could be said to be a person vulnerable in the four corners of jail.

13. The applicants in the present case have been able to show sufficient material to reach a *prima facie* conclusion that they can be said to be persons belonging to the said LGBTQ+ community. They have already

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suffered incarceration for about 8 months. Such persons are unfortunately subjected to ridicule in the society and particularly in the confines of jail. In the light of the fact that they have made out a *prima facie* case in their favour, this Court is inclined to allow the present application.

14. Accordingly, the application is allowed in the following terms :

- (A) The applicants (1) Divya Kailash Singh and (2) Payal Hemant Shah, shall be released on bail in connection with FIR No.0187 of 2024, dated 25th March, 2024, registered at Police Station Bhandup, Brihanmumbai, on furnishing PR bonds of ₹ 25,000/-each with one or two sureties each in the like amount to the satisfaction of the Trial Court.
- (B) The applicants shall attend the proceedings before the Trial Court on every date, except when exempted, for reasons to be recorded in writing.
- (C) The applicants shall not tamper with the evidence in any manner. They shall not influence the informant, witnesses or any other persons concerned with the case.
- (D) The applicants shall upon being released immediately inform the Investigating Officer of their Contact numbers and residential addresses and update the same in case of any change.

15. Needless to say, in case of violation of any of the aforesaid conditions, the bail granted to the applicants shall be liable to be cancelled.

16. It is made clear that the observations made in this order are limited to the question of grant of bail to the applicants and that the Trial Court shall proceed further in the matter without being influenced by the observations made hereinabove.

17. The application is disposed of.

(MANNISH PI TALE, J.)