



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

1 CRIMINAL APPLICATION NO. 4953 OF 2024

MAHESH RAJESH SALVE

VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER

...

Advocate for Applicant : Ms. Y. A. Namde

APP for Respondents: Mr. A. R. Kale

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**CORAM : SMT. VIBHA KANKANWADI AND
ROHIT W. JOSHI, JJ.**

DATED : 16th JANUARY, 2025

PER COURT :-

1. Present application has been filed for quashing the chargesheet bearing No. 1984608024000601 of 2024 pending before the learned Judicial Magistrate First Class, Sengaon, District-Hingoli on 30.06.2024 arising out of FIR vide C.R. No.6/2024 dated 03.01.2024 for the offence punishable under Section 363, 366-A of the Indian Penal Code, 1860 ("IPC").

2. Heard Ms. Namde, learned Advocate appearing for the applicant and learned A.P.P. appearing for respondent/State.

3. Learned Advocate appearing for the applicant has taken us

through the FIR which is lodged by respondent No.2, who is the father of the kidnapper minor. It is to be noted that when the FIR was lodged it was only under Section 363 of IPC and it was against unknown person. However, it appears that later on the girl is found and her statement has been recorded. On the basis of the statement of the girl who says that she had voluntarily left the house on 01.01.2024 and went to Chhatrapati Sambhajnagar. Waited there whole night on CIDCO Bus Stop. She then says that although she had searched for a room, no room was found, hence she had taken shelter in CIDCO Bus Stand for three to four days. She says that on 10.04.2024 she met the applicant. She told him that as her family members had planned her marriage against her wish, she had left the house. She says that the applicant had then told her that he would allow her to pursue further study and would marry her. She says that they got married on 13.04.2024. After they had roomed around Chhatrapati Sambhajnagar between 14.04.2024 to 16.04.2024, the applicant had taken mobile phone of an unknown person and gave phone call to his relative on 16.04,2024 and informed that they would be coming to their village. They went from Chhatrapati Sambhajnagar to Mehkar on 17.04.2024. Then applicant had met his relative who have brought them to Sengaon Police Station. After considering this statement, as well as the affidavit which the girl had

filed before learned Sessions Judge when the applicant had filed application for bail, learned Advocate for the applicant submits that the girl had voluntarily left the guardianship of respondent No.2. She therefore relied upon the decision in ***S. Varadarajan Vs. State of Madras (AIR 1965 S.C. 942)*** and submits that it would be unjust to ask the applicant to face the trial. Upon questioning she states that in ***Moniram Hazarika Vs. State of Assam (AIR 2004 (SC) 2472)*** the Hon'ble Supreme Court while distinguishing the decision in ***S. Varadarajan*** (supra) that it will have to be seen as to whether the accused had played any specific role at any stage by which he either solicited or persuaded the minor to abandon the legal guardianship to hold him guilty for kidnapping.

4. Taking into consideration the submissions on behalf of the applicant, we are of the opinion that this is not a fit case where even we should issue notice to respondent No.2.

5. Learned A.P.P. submits that now the charge sheet is filed. There are statements of witnesses and a fact which is coming on record by way of FIR is that when the girl had returned from the house of her maternal aunt and was found talking on phone. Inquiry was made and she told the name of the applicant as the person with whom she

was talking. It was told by the father that since she is minor she should pursue her education and not to talk to any boy. But thereafter also the girl went missing on 18.12.2023. This indicates that it was at the instance of the applicant she had left the house. Now in view of the statement of the girl, the police have not added offences punishable under the Protection of Children from Sexual Offences Act, 2012 or any other Sections. In view of the statement by her that there were no physical relations between her and the applicant during the said period, however, Section 366-A of IPC has been then added. Let the trial be held.

6. The first and foremost fact that requires consideration is that the informant who is the legal guardian, i.e., father of the applicant has specifically stated that the girl was kidnapped. He gave the age of the girl as 17 years 9 months. Definitely in view of old decision of **S. Varadarajan** (supra) it would have been required to see as to whether the minor was able to understand the consequences of the Act. However, it is to be noted that at the time of decision in **S. Varadarajan** (supra) there was no POCSO Act and now in view of the said Act the liabilities are more crystallized. Here, in this case, the main incident that is required to be considered is that the girl's statement is taken after her marriage with the applicant and

therefore, she was bound to support the applicant. In her statement, she accepts that when she had gone to her aunt's place she came to know applicant who was residing behind the house of her aunt but then she has not stated that at that time itself the love relationship developed between them. She has stated that though she left her house on 18.12.2023 she had gone to the house of her aunt at Mehkar but could not meet applicant till 01.01.2024. Then she says that she left aunt's house also on 01.01.2024 at 7 a.m. under the range of anger as her family members were planning her marriage against her wish by stopping her education. It is to be noted that even on that day she was minor. Then as earlier stated she says that she met the applicant on 10.04.2024, there has to be an explanation where she was between 01.01.2024 to 10.04.2024, which is not explained in her statement under Section 161 of Cr.P.C. and she appears to have given explanation for three to four days only prior to 10.04.2024. Therefore, there are disputed facts and the explanation of the same would come on record only upon the evidence.

7. As aforesaid, in **Moniram Hazarika** (supra) the Hon'ble Supreme Court had distinguished **S. Varadarajan** (supra), wherein, it is observed that the facts from **S. Varadarajan** (supra) were different and "it is clear from the above observations of this court that if the

accused played some role at any stage by which he either solicited or persuaded the minor to abandon the legal guardianship, it would be sufficient to hold such person guilty of kidnapping.” Further we would like to rely on the case of **Anversinh @ Kiransinh Fatesinh Zala Vs. State of Gujarat** (Criminal Appeal No.1919 of 2010 decided by a three Judges Bench on 12.01.2021), wherein, the ingredients of Section 361, 366 of IPC have been considered. It has been observed on the law point in para 12, as under :

*“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**”.*

8. Further in paragraph Nos.15 and 16 it has been observed as under:-

“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 of 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”.

9. As regards the ratio in respect of **S. Varadarajan** (supra), it has been observed thus :

“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.

10. We are aware that all that is **S. Varadarajan** (supra), **Moniram Hazarika** (supra) and **Anversinh @ Kiransinh Fatesinh Zala** (supra) are the cases in criminal appeal where there was already the entire evidence available before the Hon'ble Supreme Court, however, here we are at a very preliminary stage and therefore when certain explanations are not forthcoming from the girl and the fact that her statement itself has been recorded after the marriage, we are of the opinion that this is not a fit case where we should exercise our inherent powers under Section 482 of Cr.P.C.

11. The application is rejected at the threshold.

[ROHIT W. JOSHI]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

A.G.Narwade