

IN THE HIGH COURT OF DELHI AT NEW DELHI

Order reserved on: 20.07.2022

Order delivered on: 22.07.2022

+ BAIL APPLN. 111/2022

JAGBIR

..... Petitioner

Through: Mr.Lokesh Kumar Mishra,
Mr.Himanshu Sharma and Mr.Haider
Khan, Advocates.

versus

STATE (N.C.T. OF DELHI)

..... Respondent

Through: Mr. Laksh Khanna, APP for the State
Mr.Adhishwar Suri, Advocate for
Ms.Supriya Juneja, Advocate for
complainant with Complainant in-
person.

CORAM:

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

ORDER

ANOOP KUMAR MENDIRATTA, J.

1. Petition under Section 439 Cr.P.C. has been preferred on behalf of the petitioner in FIR No.226/2019, under Sections 363/366/376 I.P.C. and Sections 4/6 of POCSO Act registered at Police Station: Mayur Vihar, Delhi.
2. In brief, as per the case of the prosecution, the aforesaid FIR was registered at Police Station Mayur Vihar on statement of 'Mrs.R', mother of the victim, wherein she alleged that some unknown person had kidnapped her daughter namely 'N', aged about 15 years. The victim was reportedly missing since 09/07/2019.

A Habeas Corpus application was further filed vide Writ Petition No.3453/2019 on behalf of the complainant after the registration of aforesaid FIR No.226/2019, under Sections 363/366/376 I.P.C. and Sections 4/6 of POCSO Act registered at Police Station: Mayur Vihar, Delhi.

The investigation was transferred to AHTU/Crime Branch. The petitioner/accused during course of investigation misled the investigating agency by suppressing the whereabouts of the victim. Even the polygraph test of all the 07 suspects was got conducted in view of orders of the Hon'ble High Court of Delhi in Writ Petition No.3453/2019.

3. Finally, on the basis of mobile technical surveillance and CDR location, victim was eventually recovered on 05.10.2021 along with her 8 month old female child from the house of petitioner/accused. The UPT of the victim is also stated to have been found positive and she was about 1½ months pregnant.

4. It is further the case of prosecution that victim was persuaded and kidnapped by petitioner/accused Jagbir, aged about 27 years, when victim was waiting for her boyfriend Shahid @ Rahul at Chilla Village, Mayur Vihar, Delhi. The said Shahid @ Rahul used to reside on rent in a house at Chilla Village, where Jagbir worked as its caretaker. Petitioner further lured the victim and allegedly married her in a temple at Delhi.

5. Learned counsel for the petitioner submits that petitioner is in custody since 06.10.2021 and the relation between the parties was voluntary. It is urged that the age of the victim has not been verified in accordance with law and the victim/wife of the petitioner is suffering on account of incarceration of the petitioner. It is further urged that petitioner is required to look after the

victim as well as the minor children.

Reliance is further placed upon '*Chaman vs. State of NCT of Delhi*' in BAIL APPLN.404/2022 decided on 03.03.2022, '*Roshan vs. State Govt. of NCT of Delhi & Ors.*' in BAIL APPLN.2108/2020 decided on 27.11.2020, '*Sanjeev Kumar Mehra vs. State & Ors.*' in W.P.(CRL)2441/2019 decided on 05.11.2019, '*Monu vs. State*' in BAIL APPLN.2146/2014 decided on 03.11.2014, '*Vishal @ Ravi vs. State Govt. NCT of Delhi*' in BAIL APPLN.2735/2021 decided on 12.10.2021, '*Kundan & Anr. Vs. State & Ors.*' in CRL.M.C.27/2022 decided on 21.02.2022, ABC 2016 (I) 34 BOM '*Sunil Mahadev Patil vs. State of Maharashtra*', 283 (2021) Delhi Law Times 321 '*Praduman vs. State (Govt. of NCT of Delhi) & Anr.*', 283 (2021) Delhi Law Times 329 '*ABP Network Private Limited vs. Malika Malhotra*', 275 (2020) Delhi Law Times 49 '*Dharmander Singh @ Saheb vs. State (Govt. of NCT, Delhi)*' and 2022 LawSuit(All) 117 '*Atul Mishra vs. State of UP and 3 Others*'.

6. It may also be noticed that victim does not oppose the application for grant of bail.

7. On the other hand, learned APP for the State vehemently opposes the bail application and submits that victim was merely 14 years and 06 months of age, at the time she was lured and kidnapped by the petitioner. It is urged that entire machinery was kept in the dark by the petitioner who deliberately concealed the particulars of the victim and led the investigating agency on the wrong path despite filing of the Habeas Corpus petition by the mother of the victim.

8. It is further submitted that the victim was studying in 9th Class at the

time of missing and as per her last attended school documents, the Date of Birth is 05.01.2005 and she was only 14 years and 06 months old at the time of missing/kidnapping.

It is also urged that the petitioner who is aged about 27 years is more than 10 years older than the age of the victim and the consent by the minor victim cannot be recognized in law. It is also pointed out that alleged marriage with a minor as claimed by the petitioner is in violation of the provisions of The Prohibition of Child Marriage Act, 2006.

It is contended that during the course of investigation, the DNA profile was generated for the purpose of determining the biological parents of the baby.

It is further submitted that sexual intercourse or sexual act by a man, even with his own wife under 15 years of age, has been classified as rape. Reliance is also placed upon '*Independent Thought vs. Union of India and Anr.*' (2017) 10 SCC 800.

9. I have given considered thought to the contentions raised.

It may be appropriate to refer to observations in *Satish Kumar Jayanti Lal Dabgar vs. State of Gujarat*, CrI. Appeal No.230 of 2013 decided by the Hon'ble Supreme Court on March 10, 2015 wherein it was observed as under:-

"14) First thing which is to be borne in mind is that the prosecutrix was less than 16 years of age. On this fact, clause sixthly of Section 375 of the IPC would get attracted making her consent for sexual intercourse as immaterial and

inconsequential. It reads as follows:-

“375. Rape—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

xx xx xx

Sixthly - With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.”

15) The Legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other

partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.

16) Once we put the things in right perspective in the manner stated above, we have to treat it a case where the appellant has committed rape of a minor girl which is regarded as heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when we keep in mind the letter and spirit behind Protection of Children from Sexual Offences Act.

10. In view of settled position of law, sexual relationship with minor is prohibited and the law clearly treats them as offences even if the same is based upon alleged consent of a minor. It may also be noticed that a girl child faces several adverse challenges if she is married below 18 years of age. The child marriage is also prohibited under the Prohibition of Child Marriage Act, 2006. Also, Section 375 defines “rape” and it provides that a man is said to commit “rape” if he has sexual intercourse with a woman under the circumstances falling under any of the seven descriptions mentioned in the Section. Clause six of Section 375 makes it clear that if the woman is under the age of 18 years then sexual intercourse with her, with or without consent is “rape”. Even a sexual intercourse with wife under 18 years of age regardless of her willingness or consent is rape as held in

Independent Thought vs. Union of India, (2017) 10 SCC 800 giving a meaningful reading to Exception 2 to Section 375.

11. In view of the principles of law enunciated by the Hon'ble Supreme Court, the consent, if any, given by the victim girl for the alleged physical relationship being a minor cannot be treated as a consent in the eyes of law. It may also be observed that sexual exploitation and sexual abuse of children are heinous crimes which need to be effectively addressed. Merely because such sexual abuse results in tying of knot between the victim and the accused in violation of provisions of law or results in birth of a child, it does not mitigate the act of the petitioner in any manner, since the consent of a minor is immaterial and inconsequential in law.

12. The sexual exploitation by the petitioner in the facts and circumstances of the case, clearly falls within aggravated penetrated assault as defined in Section 5 of POCSO Act punishable under Section 6 of POCSO Act, even if it is claimed that the 'act' was consensual.

Such incidents of luring a minor and entering into physical relationship, accused thereafter claiming consent of the minor, cannot be treated in a routine manner, since rape is not only a crime against the minor victim but is a crime against the entire society which leaves little option for the minor child but to toe the line of the petitioner/accused.

Merely because the petitioner has claimed that marriage had been performed with the victim in a temple, the same cannot sanctify the offence as the victim was a minor and under 15 years of age at the time of the incident. The claim of marriage is also yet to be proved on record. It is imperative to keep in perspective that the statutes concerning the rights of

children are special laws and must prevail and take precedents for ensuring the benefit of children.

13. It may further be observed that there is no evidence suggesting that victim had consented to be taken from her parents' lawful custody. Rather, the petitioner/accused misled the entire prosecuting agency including the parents of victim having committed the offence. Since the victim was minor at the time of occurrence, even the claim that sexual intercourse was with her consent, is immaterial as the circumstances clearly point out that the minor had been enticed and lured with an intention to have the intercourse. Even the minor girl's infatuation with the alleged kidnapper cannot be permitted as a valid defence as it would amount to undermining the essence of legislative intent under Section 361 of IPC. Reliance in this regard may also be placed upon *Anversinh vs. State of Gujarat*, AIR 2021 SC 477.

14. The contention raised by learned counsel for the petitioner that age of the victim has not been correctly assessed by the investigating agency can be duly considered at the stage of trial.

15. The authorities cited by the learned counsel for the petitioner are distinguishable on facts as in most of the cases relied by counsel for the petitioner, the difference of age between the victim and the petitioner was less, and the age of victims happened to be largely just below the age of majority (i.e. 18 years). Also, in view of principles of law as laid down in *Independent Thought vs. Union of India (supra)* and *Jayanti Lal Dabgar vs. State of Gujarat (supra)*, the petitioner does not deserve the discretion of bail.

Considering the facts and circumstances of the case, conduct of

accused/petitioner and the fact that victim was aged only about 14 years and 06 months at the time of incident, the petition is dismissed.

16. However, nothing stated hereinabove shall tantamount to expression of opinion on the merits of the case.

A copy of this order be forwarded to the Jail Superintendent and learned Trial Court for information.

(ANOOP KUMAR MENDIRATTA)
JUDGE

JULY 22, 2022/R

