

**ALLAHABAD HIGH COURT****Before : Siddharth, J.****Decided on : 06-11-2023**

Criminal Misc. Bail Application No. 47221 of 2023

**SALMAN — Appellant****Vs.****STATE OF U.P. AND 3 OTHERS — Respondent**

Sections, Acts, and Articles Mentioned:

- Sections 363, 376 of the Indian Penal Code (IPC)
- Section 164 of the Code of Criminal Procedure (Cr.P.C.)
- Sections 3/4 of the Protection of Children from Sexual Offences (POCSO) Act
- Article 21 of the Constitution of India
- Section 229-A of the Indian Penal Code
- Section 82 of the Code of Criminal Procedure (Cr.P.C.)
- Section 174-A of the Indian Penal Code

Subject of Judgment:

- Consideration for the grant of bail in cases involving allegations of abduction and sexual assault of a minor, where the aspect of minor's consent in a romantic relationship is involved, particularly in the context of the POCSO Act.

Headnotes

**Bail Application – Minor Consent Consideration: Salman v. State of U.P. and 3 Others, Criminal Misc. Bail Application No. 47221 of 2023.** The Court considered the implications of minor consent in a case involving abduction and sexual assault charges, emphasizing the need for a nuanced understanding of adolescent relationships under the POCSO Act.

**Legal Significance of Minor Consent in Sexual Offences:** The Court analyzed the legal challenges in interpreting minor consent in sexual offence cases, stressing the importance of a bio-social approach and judicial discretion.

**Conditions for Bail:** The Court outlined specific conditions for granting bail, aimed at ensuring the applicant's compliance with trial procedures and maintaining the integrity of the judicial process.

**Judicial Approach in POCSO Act Cases:** Emphasized the need for judicial discretion in POCSO Act cases involving adolescents and consent, referencing relevant legal precedents.

Referred Cases with Citations:

S Varadarajan Vs. State of Madras, 1964 Law Suit (SC) 209

Atul Mishra vs. State of U.P. and 3 Others, Criminal Misc. Bail Application No. 53947 of 2021

Faizan Wahid Baig vs. The State of Maharashtra, Bail Application No. 3372 of 2021

Satendra Kumar Antil Vs. C.B.I. & Another, passed in S.L.P.(Crl.) No. 5191 of 2021, judgement dated 11.7.2022

## **JUDGMENT**

**Siddharth, J.** - List has been revised.

2. Heard learned counsel for the applicant as well as the learned AGA for the State and perused the material placed on record.

3. The instant bail application has been filed on behalf of the applicant, Salman, with a prayer to release him on bail in Case Crime No.576 of 2023, under Sections 363, 376 IPC and 3/4 POCSO Act, Police Station Nandgram, District- Ghaziabad, during pendency of trial.

4. There are allegations against the applicant of abduction of a minor girl with intent to marry, commission of offences of rape and penetrative sexual assault.

5. Learned counsel for the applicant has submitted that in her statement under Section 164 Cr.P.C., the victim has claimed her age as 17 years and 10 months. She has admitted that she eloped with the applicant and went with him to different places. Therefore, his implication under Section 363 IPC is unwarranted. Learned counsel for the applicant has relied upon the judgement of Apex Court in the case of S Varadarajan Vs. State of Madras, 1964 Law Suit (SC) 209. It has been submitted that victim herself left the company of lawful guardianship of her parents on her own. The applicant did not took her away from the company of her guardianship. The applicant has been falsely implicated in this case. He has no criminal history to his credit and is languishing in jail since 14.8.2023. In case, the applicant is released on bail, he will not misuse the liberty of bail.

6. Per contra learned A.G.A. has opposed the prayer for bail of the applicant by contending that the innocence of the applicant cannot be adjudged at pre trial stage, therefore, he does not deserves any indulgence. In case the

applicant is released on bail he will again indulge in similar activities and will misuse the liberty of bail.

7. This court had to consider whether the implication under POCSO Act would be justified where the victim appears of have consented to her relationship with an accused despite being minor in the case of Atul Mishra vs. State of U.P and 3 others in Criminal Misc. Bail Application No. 53947 of 2021. The relevant paragraphs nos. 11 to 14 are as follows :-

" 11. As mentioned above, undisputedly on the date of incident i.e. 06.11.2019, the victim Ms. 'A' was a minor girl and her 'consent' as contemplated u/s 375/376 I.P.C. has got no value in the eyes of law. This seems to be conservative approach to deal and decide the instant issue and rightly so. But as I have stated in the opening part of the order, that applicability of any statutory penal provision is not a mathematical exposition or theorem. It contains inherent flexibility to cope up an extraordinary situation and to have more meaningful and larger good.

12. There can be no second thought as to the seriousness of the offence under the POCSO Act and the object to achieve. Enactment of POCSO Act was to effectively address the heinous crime of sexual abuse and sexual exploitation of children. The Act was introduced to provide protection of children from the offences of sexual assault and harassment etc. This Act also provides for safeguarding the interest of the child at every stage of judicial process. But this laudable object must have some genuine and inherent exceptions too. It is imperative for the Court of law to draw thin line that demarcates the nature of acts that should not be made to fall within the scope of this enactment. There are certain gray areas, where the severity of the sentences provided under the Act, rightly so be diluted keeping in view the facts of each case. If these rigors of the enactment is pasted hastily or irresponsibly, it could lead to irreparable damage to the reputation and future of young whose actions would have been only innocuous and may lead to spoiling the future life of that innocent lovers or couple who out of sheer innocence have initially developed and thereafter established that relationship, which if seen through the bioscope of these penal provisions of Act of 2012, would fall within the realm of offence.

13. Growing incidences where teenagers and young adults fall victim of the offences under the POCSO Act, being slapped by the penal provisions of POCSO Act without understanding the far reaching implication of the severity of the enactment, is an issue that brings much concern to the conscience of this Court. A reading of the statement of objects and reasons of POCSO Act would show that, as mentioned, to protect the child from the offences of sexual abuse, sexual assault and harassment, pornography, pursuant to the Article-15 of the Constitution of India, 1950 and the Conservation on the Rights of the children. However, a large array of the cases filed under the POCSO Act seems to be those arising on the basis of the complaints/F.I.Rs. lodged by the families of adolescents and teenagers who are involved in romantic relationship with each other. The scheme of the Act clearly shows that it did not intend to bring within its scope or limits, the cases of the nature where the adolescents or teenagers involved in the dense romantic affair.

14. This Court deems it fit and necessary to take a moment to delve into an important aspect, the awareness of which is crucial in understanding and appreciating with the cases of instant nature. It is crucial to accept the science and psychology of an adolescent and young adulthood at this juncture. This is because social and biological phenomena are widely recognised as determinates of human development, health and socio-economic attainment

across the life course, but our understanding of the underlying pathways and processes remains limited. Therefore, a "bio-social approach" needs to be adopted and appreciated i.e. one that conceptualizes the biological and social requirements of two teenagers, who on account of mutual infatuation are attracted and decide for their future. Their decision could be impulsive, immature but certainly not sinful or tainted as branded in the F.I.R. or complaint of the informant. "

8. The Bombay High Court in the case of Faizan Wahid Baig vs. The State of Maharashtra in Bail Application No. 3372 of 2021 in about similar situation held in paragraph nos. 6 and 7 are as follows :-

"6. Taking an overall view of the material compiled in the charge-sheet, it appears that the applicant though minor, was capable of understanding the consequences of her act and she voluntarily accompanied the applicant to her aunt's place. Though she is minor and her consent become immaterial, in a case like this, where she voluntarily joined the company of the applicant, and she had categorically admitted that she was in love with the applicant, whether that she consented for the sexual intercourse or not, is the matter of evidence. Till what point of time, she accompanied the applicant and whether she resisted the actual physical indulgence, when according to her, the applicant forcibly committed sexual intercourse with her against her wishes, will have to be determined. In any case, the prosecutrix / victim kept quiet till her whatsapp chat with the applicant was objected to, by the family members and then she narrated the incident which was alleged to have taken place on 06.04.2020. The time gap between these two events is also crucial as it was always open for the prosecutrix to disclose the incident about the forcible act if it was committed in her house, but she continued to remain silent and disclosed the incident only when an objection was taken for her establishing contact with the applicant.

7. In the aforesaid circumstances and particularly, when the applicant is also a young boy, the possibility of him also smitten by infatuation, cannot be ruled out and though he may take the consequences of the accusations levelled against him, at present, he need not be further incarcerated being arrested on 29.04.2021, when the trial may consume considerable time.

9. This is however, subject to the stipulation that he shall, in no way establish contact with the prosecutrix and shall move himself along with the family from the area where the prosecutrix is residing and shall not in any way make any attempt to establish contact with her, either physically or virtually.

10. Observations made above are prima facie in nature and limited for the purpose of adjudication of the present application, and shall in no way, bind the Sessions Judge while he is trying the applicant for the offence with which he is charged."

11. In view of the above considerations, applicant deserves to be enlarged on bail keeping in view the consent of victim by her behaviour.

12. Having considered the submissions of the parties noted above, finding force in the submissions made by the learned counsel for the applicant; keeping in view uncertainty regarding conclusion of trial; one sided investigation by police, ignoring the case of accused side; applicant being under-trial having fundamental right to speedy trial; larger mandate of the Article 21 of the Constitution of India, considering the dictum of Apex Court in the case of Satendra Kumar Antil Vs. C.B.I. & Another, passed in S.L.P.(CrI.) No. 5191 of 2021, judgement dated 11.7.2022 and considering 5-6 times overcrowding in jails over and above their capacity by under trials and without

expressing any opinion on the merits of the case, let the applicant involved in the aforesaid crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions that :-

(i) The applicant shall not tamper with the evidence or threaten the witnesses.

(ii) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in Court. In case of default of this condition, it shall be open for the Trial Court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(iii) The applicant shall remain present before the Trial Court on each date fixed, either personally or as directed by the Court. In case of his absence, without sufficient cause, the Trial Court may proceed against him under Section 229-A of the Indian Penal Code.

(iv) In case the applicant misuse the liberty of bail during trial and in order to secure his presence, proclamation under Section 82 Cr.P.C. is issued and the applicants fail to appear before the Court on the date fixed in such proclamation then the Trial Court shall initiate proceedings against him in accordance with law under Section 174-A of the Indian Penal Code.

(v) The applicant shall remain present in person before the Trial Court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the Trial Court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the Trial Court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

13. In case, of breach of any of the above conditions, it shall be a ground for cancellation of bail. Identity and residence proof of the applicant and sureties be verified by the court concerned before the bonds are accepted.

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