

(2020) 08 GUJ CK 0292

In the Gujarat High Court

Case No : R/Criminal Misc.Application No. 10523 Of 2020

Varunbhai Dilipbhai Kharad

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 27-08-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 439

Indian Penal Code, 1860 — Section 323, 354, 363, 376(N), 504, 506(2)

Protection Of Children From Sexual Offences Act, 2012 — Section 3, 4, 8

Citation : (2020) 08 GUJ CK 0292

Hon'ble Judges : Dr. Ashokkumar C. Joshi, J

Bench : Single Bench

Advocate : Vijal P Desai, H. K. Patel

Final Decision : Allowed

Judgement

Dr. Ashokkumar C. Joshi, J

1. This Application is filed by the Applicant - Accused under Section 439 of the Code of Criminal Procedure for enlarging him on Regular Bail in connection with C.R. No. I -96 of 2018 registered with Devgadbaria Police Station, District-Dahod for the offences punishable under Sections 354, 363, 376(N), 323, 504, 506(2) of the Indian Penal Code and Sections 3, 4, and 8 of the POCSO Act, 2012.

2. Heard learned Advocate Mr.Vijal Desai for the Applicant and learned APP Mr. H.K. Patel for the Respondent-State and learned advocate Mr.Kushal Desai for the respondent Nos.2 and 3 through Video Conference.

3. Victim and father of the victim have been identified by the learned advocate Mr. Kishan Ninama who have remained present through video conference.

4. Registry to accept Vakalatnama of learned advocate Mr.Kushal Desai for the respondent Nos.2 and 3.

Factual matrix of the case

5. A complaint came to be filed by one Mitalben D/o Manharbhai Sursingbhai Mavi, alleging she is residing at Devgadhbharia with her family. It is further stated that on 08.09.2018 the complainant talked on telephone with the accused in the evening and thereafter she slept. Then the complainant went out of her house and at that time accused came there and threatened her and took her to the jungle and beaten her. Some other persons were also there, thereafter she went back to her house. It is also mentioned in the complaint that no rape is committed by the accused. That the applicant and the victim were in love and they were about to get married, after the victim attained the age of majority. The applicant is aged 22 years and shouldering responsibility of his family.

Submission of the Parties:

6. Learned Advocate Mr. Vijal Desai for the Applicant has submitted that in the present case there are heavy charges under Section 376(N) of the Indian Penal Code and under the provisions of POCSO Act levelled against the present applicant. It is further submitted that simultaneously the victim and accused has made amicable settlement and to that effect affidavit of the victim and father of the victim is filed. At the time of incident, due to minor age of the victim marriage could not be performed, but ultimately they are likely to perform marriage between the victim girl and the accused person, if the present applicant enlarged on regular bail. He has family roots in the society and therefore, he is not likely to flee away from justice. That the charge-sheet is filed. That he will abide by whatever conditions imposed by the Hon'ble Court. There are no antecedents against the Applicant Accused. He has therefore prayed that discretion may kindly be exercised and grant bail to the Applicant Accused.

7. Per contra, learned APP Mr. Patel has vehemently opposed the regular bail application and argued that the applicant has committed serious offence under Section 376(N) of the Indian Penal Code and under the provisions of POCSO Act, therefore, discretion may not be exercised for granting regular bail looking to the nature and gravity of offence and involvement of the Applicant / Accused. That the charge sheet is filed. He further submitted that if the Hon'ble Court is inclined to grant bail then in such case strict conditions may be imposed to secure the presence of the Applicant Accused.

8. The affidavit dated 21.07.2020 filed by the victim which as translated into English, reads as under:

"I, the undersigned, Mittalben D/o Manharbhai Sursingbhai Mavi, age - 18 years, occupation - study, R/o - Mendra, Ta. - Devgadhbharia, Dist. - Dahod do solemnly affirm and state that -

(1) I reside at the above mentioned address. I have turned adult on 31/01/2020. I had love affair with Varunbhai Dilipbhai Kharad of our village Mendra for a long time. It was registered as I CR. No. 96/2018.

(2) As my family came to know about our relationship, I filed complaint in Devgadhi Bariya Police Station under family pressure at the relevant time.

(3) I belong to backward tribe community. My marriage has been fixed with Varunbhai Dilipbhai Kharad as per tradition of our community. We have made compromise before panch representatives of our village. There is no any further dispute between us and Varunbhai Dilipbhai Kharad.

(4) I stay at my father's house at present. It has been decided that my marriage will be solemnized with Varunbhai Dilipbhai Kharad as per our tradition after his release on bail.

(5) I was not adult when I had a love affair with Varunbhai Kharad. Therefore, I could not marry him. Varunbhai Kharad was arrested on 09/01/2020 on the basis of my complaint. I have turned adult on 31/01/2020 and Varunbhai Kharad was in jail at that time. Therefore, we could not marry at that time. Our marriage will be solemnized when Varunbhai Kharad will be released from jail.

We could not carry out any procedure due to lockdown from 25th March due to Coronavirus.

(6) I do not have any objection if Varunbhai Dilipbhai is released on bail and my complaint against him with aforementioned number is quashed.

I am not pressurized, intimidated, threatened or induced to execute this Affidavit. Aforesaid facts have been declared willingly. aforesaid facts are true and correct."

8.1 The affidavit dated 21.07.2020 filed by the father of the victim which as translated into English, reads as under:

"I, the undersigned, Manharbhai Sursinghbhai Mavi, Age 38 Years, Occupation: Service, Residing at: Mendra, Ta. Devgadhi Bariya, District: Dahod, do hereby state on solemn affirmation as under:

1) I reside at aforesaid address. My daughter's name is Mittalben. Recently, she attained majority on 31/01/2020. My daughter Mittalben had love affair with Varunbhai Dilipbhai Kharad of Mendra village.

2) My family came to know about the love affair of my daughter Mittalben and Varunbhai Kharad and my daughter had lodged the complaint at the relevant time with Devgadhi Bariya Police Station under family pressure, which was registered under I-C.R. No.96/2018 of Devgadhi Bariya.

3) We belong to tribal backward caste. The marriage of my daughter Mittalben and Varunbhai Kharad has been fixed as per rituals and customs of my community. Compromise has been taken place before the village panch and leaders. Now, there is no dispute between Varunbhai Dilipbhai Kharad and us.

4) Presently, my daughter Mittalben resides at my house. It is mutually decided that marriage of my daughter Mittalben will be solemnized with Varunbhai

Kharad as per customs of our community after release of Varunbhai Dilipbhai Kharad on bail.

5) My daughter Mittalben was not adult when she had love-affair with Varunbhai Kharad and therefore, her marriage could not be solemnized with him. Varunbhai Kharad was arrested on 09/01/2020 for the offence of the complaint lodged by my daughter. My daughter attained majority on 31/01/2020 and Varunbhai Kharad was in jail at that time, therefore, marriage could not be taken place. Their marriage would be done once Varunbhai Kharad released from jail.

We could not commence any proceedings due to lock-down in context with Corona Virus from 25th March.

6) Therefore, I do not have any objection if Varunbhai Dilipbhai Kharad is released on bail and aforesaid complaint of my daughter against him is quashed. I give my consent to quash the complaint lodged by my daughter Mittalben.

I am not pressurized, intimidated, threatened or induced to execute this Affidavit. Aforesaid facts have been declared willingly. Aforesaid facts are true and correct."

Merits of the Case:

9. This court has considered the following aspects:

(a) That in the present case it is an admitted fact that the Applicant accused has come for this Application after the charged sheet is filed.

(b) That no strong prima facie case is made out since in the last line of FIR - no rape is committed.

(c) Further as per catena of decisions of Hon'ble Supreme Court, there are mainly 3 factors which are required to be considered by this court i.e. prima facie case, availability of Applicant accused at the time of trial and tampering and hampering with the witnesses by the accused.

(d) That the learned Advocate for the Applicant has submitted that the Applicant Accused is not likely to flee away.

(e) That the Applicant Accused is in custody since 09.01.2020

(f) The law laid down by the Hon'ble Apex Court in the case of Sanjay Chandra v. C.B.I. Reported in (2012) 1 SCC 40, wherein it is held that bail is a rule and jail is an exception.

10. Pursuant to the FIR and the affidavit filed by the victim and father of the victim girl, it transpires that there is amicable settlement between the victim and accused, therefore, even if the accused is considered as prime accused, then also this Court has to consider two factors, ie. (I) Availability of the accused during the trial and (II) hampering and tampering the witnesses. There are no material aspects to deny the regular bail, and this Court is fully aware of the serious

offences under Section 376(N) of the IPC and under the POCSO Act. Moreover, especially under the provisions of the POCSO Act, the punishment is upto life imprisonment but in this special case, this Court has heard both the victim and the father of the victim to verify the amicable settlement amongst the parties. Moreover, the father of the victim has made submission before this Court on video conference that after enlargement of the present applicant on regular bail, he is ready to perform marriage of applicant with his daughter. The age of the boy was 21 years and the age of the victim girl was 16 years and 7 months at the respective time, further in humble view of this Court, in this particular case, no purpose would be served by denying bail, when the purpose of law as per great philosopher of England Bentham, maximum happiness to maximum number of persons. Therefore, when parties have chosen to live together peacefully forever by ensuing wedlock, my conscious does not permit me to send accused in jail before trial as pre-trial punishment, who is at the very young age of 21 years.

11. Learned APP has further drawn attention of this Court that parties concerned are aware that this is not a quashing petition but this is Regular Bail application. He has further submitted that there are chances of conviction for the offences committed under the POCSO Act, therefore, if the victim girl gets married to the present applicant, in that case, the applicant is required to be languishing in the jail. He has further submitted that these rural persons must know the consequences of proceedings at the appropriate Special Court of (POCSO). Thereafter, also again this Court had asked such questions to the concerned Parties and learned advocates and parties but they have consistently submitted before this Court on video conference that both the parties have arrived at an amicable settlement and after release of the applicant on regular bail, they will perform marriage of victim girl and the present applicant, because the victim and the accused were in love affairs but at the respective time the victim girl was minor aged 16 years and 7 months, so they could not perform the marriage and due to family pressure they have given the complaint under the provisions of IPC and the POCSO Act.

12. Having heard the learned Advocates for the parties and taking all such aspects into consideration and perusing the record produced in this case as well as taking into consideration the peculiar facts of the case, nature of allegations, gravity of accusation, availability of the Applicant Accused at the time of Trial etc., this Court is of the view that the applicant whose age is 21 years only (young age), who has committed alleged offences upon the victim who was aged 16 years and 7 months at the time of incident, as alleged in the FIR, and on the basis of the amicable settlement between the parties, this Court is of the view that this is a fit case to enlarge the applicant on regular bail on strict conditions and heavy surety. Accordingly, the present Application deserves to be allowed and accordingly stands allowed. The Applicant Accused - VARUNBHAI DILIPBHAI KHARAD is ordered to be released on bail in connection with C.R. No. I -96 of 2018 registered with Devgadbaria Police Station, District Dahod on executing a

personal bond of Rs.25,000/- with one surety of the like amount to the satisfaction of the trial Court, subject to the following conditions that he shall:

(a) not directly or indirectly make any inducement, threat or promise to any person acquainted with the fact of the case so as to dissuade him from disclosing such facts to the Court or any Police Officer or tamper with the evidence.

(b) maintain law and order and not to indulge in any criminal activities.

(c) furnish the documentary proof of complete, correct and present address of his residence to the Investigating Officer and to the Trial Court at the time of executing the bond and shall not change his residence without prior permission of the trial Court.

(d) provide his contact numbers as well as the contact numbers of the sureties before the Trial Court. In case of change in such numbers inform in writing immediately to the trial Court.

(e) file an affidavit stating his immovable properties whether self acquired or ancestral with description, location and present value of such properties before the Trial Court, if any.

(f) not leave India without prior permission of the Trial Court

(g) surrender passport, if any, to the Trial Court within a week. If he does not possess passport, he shall file an Affidavit to that effect.

(h) shall mark presence every fortnight in a month (twice in a month) till the commencement of the trial.

(i) shall maintain all the rules and regulations framed by the Municipality regarding contemporary status of corona virus/Covid-19, State Government or by any competent authority, including social distancing.

13. This Court has considered the above aspects in the totality of special facts and circumstances and therefore, these observations may not be treated as precedent in all cases.

14. Bail bond to be executed before the Trial Court having jurisdiction to try the case. It would be open for the Trial Court concerned to give time to furnish the solvency certificate if prayed for.

15. If breach of any of the above conditions is committed, the Trial Court concerned will be free to issue warrant or take appropriate action according to law. The Authorities will release the Applicant forthwith only if he is not required in connection with any other offence for the time being.

16. Rule is made absolute. The Registry is directed to communicate this order by Fax / by E-mail to the concerned Court / Authority.