

2012 SCC OnLine Gau 204 : (2012) 115 AIC 764 : (2012) 78 ACC
(Sum 19) 6 : 2013 Cri LJ (NOC 205) 71

In the High Court of Gauhati
(BEFORE B.D. AGARWAL, J.)

Wajed Ali, S/o Nabibor Rahman@ Nabu, R/o Vill-
Nagarjhar (Helapakuri) P.S.-Barpeta, District-
Barpeta, Assam ... Petitioner;

Versus

The State of Assam ... Respondent.

Anticipatory Bail Application No. 1962 of 2012

Decided on June 5, 2012

Advocates who appeared in this case:

For the Petitioner ... Mr. HRA Choudhury, Mr. M Choudhury, Mr. AT Sarkar, Mr. A Islam, Advocates

For the Respondents ... Mr. B.B. Gogoi, learned Addl. Public Prosecutor.

Mr. J Ahmed, Advocate for the informant.

The Order of the Court was delivered by

B.D. AGARWAL, J.:—Apparently, the allegations made in the FIR in this case are very common but it has raised a legal issue about the procedure to be followed by the Judicial Magistrates for recording statements of victim girls, who are allegedly minor and juvenile and victim of kidnapping, sexual abuse and child marriage.

2. By this application under Section 438 Code of Criminal Procedure, 1973, the accused Wajid Ali is seeking the privilege of pre-arrest bail apprehending his arrest in connection with Barpeta Police Station Case No. 428 of 2012, (GR No. 767 of 2012) under Sections 366(A)/342/34 IPC.

3. Heard the arguments of Mr. HRA Choudhury, learned Senior Counsel for the petitioner and that of Mr. BB Gogoi, learned Additional Public Prosecutor for the State of Assam. At the same time, Mr. J Ahmed, learned counsel for the informant appeared objecting the bail prayer. The informant has also filed a written objection, accompanied by a school certificate as well as a birth certificate from the Health department showing that victim girl was born on 19.9.1999.

4. I have also perused the Case Diary and the documents annexed with the bail application as well as the relevant case record.

5. The FIR was lodged by one Sri Nazrul Alam Sikdar on 10.4.2012 alleging that on 7.4.2012, his 12 years old daughter was kidnapped by

the petitioner Wajid Ali and she might have been sold out with bad elements. Along with the petitioner, his father and few other persons have been named as accused persons. However, only the prime accused is before me, seeking pre-arrest bail.

6. The petitioner's case is that the victim is an adult girl of 19 years and as a result of their affair, the victim girl has married the petitioner and they are living together as husband and wife. Documents of Marriage Certificate of the Quazi of East Barpeta district as well as age certificate issued by medical officer (Ayurvedic), Mandia P.H.C. have also been enclosed with the bail application.

7. *Per Contra*, Mr. Ahmed, learned counsel for the informant submitted that the victim is less than 13 years old and as such, she has been enticed away by the petitioner. According to the learned counsel, taking away a minor boy or girl from the custody of his or her guardians would amount to kidnapping and since the informant's daughter was only 13 years old, the petitioner do not deserve the privilege of anticipatory bail.

8. The learned Addl. Public Prosecutor also supports the version of the informant with regard to the juvenile age of the victim girl in view of the birth certificate available in the case diary, which has been issued by the Department of Health Services on 25.5.2012. The learned Addl. P.P. also submitted that, apparently, the victim is 13 years old girl and in no way the victim girl can be stated to be within the age of discretion.

9. I also find from the case diary that the victim girl was medically examined at Fakiruddin Ali Ahmed Medical College Hospital, Barpeta on 26.5.2012 and as per the ossification test, the victim is in the age group of 18 to 20 years. The ossification test was carried out by Dr. F Aktar and on that basis Dr. Bharati Das has issued the medico-legal case report.

10. The alleged offence of kidnapping took place on 7.4.2012 and after successfully avoiding arrest for more than a month; the accused Wajid Ali filed this bail application 16.5.2012. While granting interim bail on 18.5.2012 this court directed the petitioner to produce the victim girl before the I.O. As per the direction of this Court, the accused appeared before the I.O. with the victim girl. Their statements u/s 161 Cr.P.C. were recorded on 23.5.2012. Thereafter the victim girl was taken to the F.A.A. Medical College Hospital on 26.5.2012. There is no satisfactory explanation in the case diary as to why there was delay of 3 days in the medical examination of the victim girl. The IO also did not make sincere efforts to apprehend the accused until he obtained interim bail after 6 weeks of FIR. Hence, there appears to strong ground for the learned counsel to accuse the I.O. of biased investigation.

11. With regard to the medical opinion, it would be just and proper to reproduce essential findings of the doctors, which are as below:

Height-158 cm, Weight-37 kg, Chest girth at nipple level-70 cm, Abdominal girth at naval level-58 cm, Hymen-torn-Vagina-admits two fingers. Ex-ray of right wrist; right elbow; right shoulder and pelvis-epiphyseal unions are completed; Ex-ray of right wrist joint; right elbow joint and right shoulder joint-epiphyseal unions are not completed.

12. Apparently, the medical opinion is in direct conflict with the age certificate given by the school authority and the Health department of the Government. I am of the view that since wrist, elbow and shoulder joints had not fused completely, it is difficult to accept the medical opinion regarding adult age of the girl. Strangely, the doctor also did not mention about the number of the teeth in her report. Even otherwise undeveloped physical features of the victim girl also suggest that the victim is a minor one. I would also like to add here that there is interpolation in the medical report inasmuch as the victim girl had initially disclosed being 13 years old before the doctor, which was subsequently corrected to 18 years. The medical report is also not above suspicion in as much as the doctor did not put any question to the victim girl as to when she had attained menarche. In this way, the medico legal report cannot be taken as the final determination of the age of the victim girl at this stage.

13. The age certificate of an Ayurvedic doctor, furnished by the petitioner in the Court, certifying that the victim is approximately 19 years old is also unacceptable inasmuch it has been issued without any clinical and radiological examination. It is altogether a different aspect as to whether an Ayurvedic doctor can issue any age certificate and that too whether such certificate can be handed over to an accused personally. These aspects will certainly be examined by the concerned authority. If the medical officer has issued the age certificate in violation of the government guidelines and Circulars, the Government is expected to take appropriate disciplinary action against the concerned doctor.

14. In the objection by the informant, it has been stated that he solemnized marriage on 30.5.1995 and the victim girl is his 2nd child. The first child was born on 25.11.1996. The age of the victim girl, disclosed by the father, is corroborated by the age certificate issued by the Health Department, Government of Assam and School Certificate as well as the victim's own statement before the I.O. Hence, I have no hesitation to hold that *prima-facie* the victim girl is a juvenile/minor and far below the age of discretion to elope with any boy.

15. Having seen the statements of the accused and the victim girl, recorded by the I.O. on 23.5.2012, it appears to me that the

statements were recorded in a perfunctory manner. The accused was not confronted by the I.O. as to how he came in contact with the victim girl and where they had registered their marriage. Similarly the victim girl was also not questioned about her schooling, age, siblings, education, health etc. Despite the victim girl stating before the I.O. that she was 13 years old, no application was made by the I.O. to the Court to keep her in an observation home till the investigation is over. At the same time, the I.O. has not recorded the statement of the Quazi as to on what basis he had registered the marriage of a minor girl.

16. Now the immediate concern of the Court is as to whether the procedure adopted by the learned Judicial Magistrate in recording the statement of the victim girl can be approved by the High Court.

17. The statement under Section 164 Cr.P.C. has been recorded by Sri Abdul Hakim, learned Addl. CJM, Barpeta, wherein the victim girl has disclosed her age being 19 years and has also stated that she had eloped with the accused voluntarily after dating with him for about two years. I have already noted earlier that as per the FIR and age certificate the victim is *prima-facie* a girl of less than 13 years of age. Despite that the Addl. CJM did not pause for a moment to record the age of the victim being 19 years. The learned Magistrate did not put a single question to the victim of his own to ascertain as to on what basis she was claiming herself to be an adult girl.

18. At this stage, I would like to put on record that crimes against women are increasing and atleast unabated. Majority of such crimes are in the nature of kidnapping/abduction of minor girls and their sexual exploitation. Large numbers of bail applications are related to kidnapping of minor girls. It has also been noticed by me that investigation in such cases are being carried out in stereo-type manner. It has also been noticed that statements of such victims are also not recorded scientifically and without any application of judicial mind to ascertain as to whether such adolescent children are giving true statements.

19. Section 164 Cr.P.C. provides recording of statements of witnesses and accused persons by Judicial Magistrates. Even though confessional statements of the accused persons are not recorded on oath, high degree of evidentiary value is attached with such statements. Contrary to that, statements of witnesses are recorded on oath and, as such, their statements are virtually considered sacrosanct statements and receive due consideration of the Courts during trial. It is because when statements are given on oath the witnesses are well aware that giving false statements may attract legal punishment for committing perjury. In view of this legal sanctity to the statements of the witnesses recorded under Section 164 Cr.P.C. due care should be given and adequate precautions should be taken by the Judicial

Magistrates. Hence, I am of the view that the spirit of recording confessional statements should also be followed, while recording statement of victims of kidnapping and sexual assault and more particularly if the victims appear to be minor.

20. A confessional statement of an accused is irrelevant if the court is of the view that it has been made by any inducement, threat or promise and hit by Sec 24 of the Evidence Act. The probative value of a confessional statement depends, *inter alia*, upon the circumstances in which it has been made. One of the essential modes to obtain a true and voluntary statement is to give sufficient time for reflection to the accused. The relevance and importance of 'reflection' has been succinctly laid down by the Hon'ble Supreme Court of India in the case of *Shivappa v. State of Karnataka*; (1995) 2 SCC 76 in the following words:

"6. From the plain language of Section 164 CrPC and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused under Section 164 CrPC, it is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164 CrPC. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of Section 164 CrPC and the rules framed by the High Court is imperative and its non-compliance goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence....."

"7. The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer

and hssse must apply his judicial mind to ascertain and satisfy his conscience that the statement the accused makes is not on account of any extraneous influence on him. That indeed is the essence of a 'voluntary' statement within the meaning of the provisions of Section 164 CrPC and the rules framed by the High Court for the guidance of the subordinate courts. Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the court that sits in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with."

21. In the case of *Rabindra Kumar Paul v. Republic of India*; reported in (2011) 2 SCC 490, the Hon'ble Supreme Court has also held that the Magistrate, recording a confessional statement, should ensure that during the reflection time the accused was completely out of police influence and that any self indictable statement is not given on account of extraneous influence upon him. In my considered opinion the same principle is equally applicable in case of recording of statements of victims of sexual offence and more particularly if such victims are minor girls.

22. In my considered opinion the aforesaid measures should also be applied *mutatis-mutandis* or in spirit, while recording statements of children victims. This class of victims is emotionally get hold of by the accused persons and they can not come out of the psychological pressure of the accused and stress of the incident, at the time of giving statements. Hence, it is necessary to record the statements of victims, who are lured away at young age or sexually abused with due care and after giving sufficient time for reflection.

23. It has been observed by the Court that in most of the cases, the victim girls are accompanied by the accused persons or their relatives while producing them before the I.Os and Judicial Magistrates. By the time, the victim girls are formally recovered by the I.O. and their statements under Section 164 Cr.P.C. are obtained, the victims already remain in the custody of the accused persons for a considerable period and consequently develop a harmonious relation with them. As a result, the victim girls are likely to give such statements which go in favour of the accused. Either such favourable statements are given emotionally or under influence of the accused persons.

24. The facts of the instant case are a glaring example of the view taken by me. Although the victim is apparently a girl of 13 years she has stated before the Judicial Magistrate that she was 19 years old and that she had affair with the accused since last two years. If this statement is also taken at its face value, the accused No. 1/petitioner

had started enticing the victim girl when she had not attained the age of majority. If the victim is a girl of 13 years, as claimed by her father, she was allured for marriage by the petitioner at the age of 11 years. Ordinarily, girls do not attain puberty at the age of 11 years and as such, the victim girl was not mature enough to establish affair or physical relationship or knowing the ill-effects of such relationship. Under Section 361 of the Penal Code, 1860, if a girl below the age of 16 years of age is enticed away, it amounts to kidnapping from her lawful guardianship. Hence, the statement of the victim girl that she had eloped with the accused voluntarily is not legally acceptable.

25. Having taken judicial notice of rampant kidnapping of minor girls and filing of large number of bail applications, seeking regular or anticipatory bail, it is desirable that the Judicial Magistrates should be pro-active, while recording statements of victims of kidnapping, sexual assault and child marriage. In other words, the Judicial Officers need to be sensitized and well informed about the ill-consequences of the aforesaid offences. At this stage, it may be pointed out that the Government of India is taking steps to amend the panel law to raise the age of consent for sexual intercourse from 16 years to 18 years. Hence, the officers should keep in mind that approving of kidnapping, sex and marriage, before legally permissible age, not only affects the health of the girls but it also ruins their career and shatters their dreams of life. Hence, it is desirable that Judicial Magistrates should give sufficient time for reflection to the victim girls before recording their statements under Section 164 Cr.P.C. and shall also ensure that such statements are not given under duress, influence, promise or threat from any corner. The time for reflection would depend upon the age of the victim, the period of enticement, the period spent with the accused etc.

26. With the aforesaid directions, the anticipatory bail application stands rejected. The accused/petitioner is directed to surrender before learned Chief Judicial Magistrate, Barpeta, within 5 (five) days and also produce the victim girl once again in the Court. On her production, the learned CJM, Barpeta shall get the victim girl medically examined by a new team of three doctors of a medical college. The learned CJM is further directed to keep the victim girl in an Observation Home for at least five days to neutralize the effect of her company with the accused and thereafter record her statement afresh under Section 164 Cr.P.C. Till a fresh finding is arrived at by the learned CJM about the age of the victim girl, the accused shall also be remanded to custody.

27. The Registry is directed to forward a copy of this order to the Commissioner and Secretary, Health and Family Welfare Department, Government of Assam along with a photocopy of the age certificate issued by the Medical Officer (Ayurvedic), Mandia PHC and the medical certificates issued by the doctors of F.A.A. Medical College Hospital,

Barpeta for taking administrative/disciplinary action against the concerned medical officers and Quazi, after following the principles of natural justice.

28. A copy of this order shall also be endorsed to the Director General of Police, Assam, who may issue appropriate guidelines to the police officers for investigating FIRs of kidnapping of minor girls in scientific manner.

29. The Registry is further directed to place a copy of this order to Hon'ble the Chief Justice with a request to circulate a copy of this order to all the Judicial Magistrates within the jurisdiction of the Gauhati High Court.

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