IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.MP(M) No. 113 of 2021
Reserved on: 22nd January, 2021.
Date of Decision: 04th February, 2021.

Rajeev ...Petitioner.

Versus

State of H.P. ...Respondent.

Coram:
The Hon'ble Mr. Justice Anoop Chitkara, Vacation Judge.

Whether approved for reporting?[1] ***YES.***

For the petitioner: **Mr. Manoj Pathak, Advocate.**

For the respondent: **Mr. Narender Guleria & Mr. Vikas Rathore, Addl. A.Gs. with Mr. Bhupender Thakur, Gaurav Sharma & Ms. Divya Sood, Dy. A.Gs.**

THROUGH VIDEO CONFERENCE

FIR No.	Dated	Police Station	Sections
195/2019	14.11.2019	Theog, District Shimla	376, 363 IPC & 4 of POCSO Act

Anoop Chitkara, Vacation Judge.

A boy aged 19 years, who is in custody for taking a girl aged around 13 years, to a hotel where he committed coitus with her, has come up before this Court seeking regular bail on the ground that because since she had created a Facebook account in her name, would make anyone believe her to be aged 18 years and more, and this is what he also thought about her age.

2. Earlier, the petitioner had filed a petition under Section 439 CrPC before this Court. However, vide order dated 27.10.2020, the same was dismissed as withdrawn

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[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

with liberty to file afresh. Now he has filed this petition before this Court under Section 439 of the Code of Criminal Procedure, 1973 (CrPC).

3. In Para 9 of the bail application, the petitioner declares having no criminal history. The status report also does not mention any criminal past of the accused.

4. The allegations against the petitioner which led to the registration of the FIR, mentioned above, are that on 14.11.2019, the victim's father informed the Police that his daughter was missing from 13th November 2019, after her school hours, which led to the FIR mentioned above. The Police recovered the victim from Lachhi Colony at Theog. On 15.11.2019, Police took the victim to Civil Hospital, Theog, for medical examination, where the Doctor collected evidence for DNA matching. After that the Investigator recorded her statement under Section 161 CrPC, which led to Sections 366-A and 376 IPC insertion. The Police recovered bedding from the said hotel and, after that, produced her before Judicial Magistrate, who recorded her statement under Section 164 CrPC. The victim's birth date was 8th August 2006, which would make her thirteen years, three months, and six days on the incident's date. After the accused's arrest, the Police took him for a medical examination, and the Doctor obtained his genetic material. The investigator forwarded the evidence to FSL for DNA comparison. As per the laboratory, the DNA extracted from the bed-sheet matched with Rajeev, and the female DNA obtained from the bed sheet was also matched with the victim's DNA. The Police filed a report under Section 173(2) CrPC on 24th June 2020.

5. Learned Additional Advocate General contends that the victim aged just 13 years, the offence is heinous, and bail is likely to send a wrong message to the society.

6. Mr. Manoj Pathak, learned counsel for the petitioner, placing reliance upon para 4 of the bail petition, without conceding and admitting anything, confining to the bail, argued that the victim had sent a friend request to the petitioner on Facebook, which led to their friendship. He argues that while making a Facebook profile, the mandatory age is 18 years. As such, she impliedly disclosed her age to be 18 years. He further contends that the petitioner is a first offender, and incarceration before the proof of guilt would cause grave injustice to the petitioner and family.

REASONING:

7. The victim's age is 13 years, 3 months, and 6 days. Given the restrictions on age imposed vide Indian Penal Code, 1860, and the Protection of Children from Sexual Offences Act, 2012, a child under 18 years of age cannot consent for sex. As such, consent is out of the question. The accused contended that they were not familiar with each other, and the victim sent a friend request on Facebook, which he accepted, and then they became friends. This argument, however, does not hold ground. As per the terms of Facebook service, a person needs to be at least 13 years of age (not 18) to create an account. The same is available on the following hyperlink: https://www.facebook.com/help/570785306433644. Hence, the petitioner's contention that since the victim has a Facebook account, she must be of at least 18 years of age is invalid because any person aged 13 years and above can create a Facebook account.

8. Even otherwise, people join social networking platforms like Facebook, Twitter, etc., intending to connect with friends and family and to expand the already existing social network from the comfort of one's four walls. According to a report titled *'Social Media for Youth and Civil Engagement in India'* published by UNDP, India has 290 million registered users of Facebook in all age groups. Out of this, 190 million users are youth in the age group 15-29 years. Interestingly, the millennials in the age group 15-29 years constitute 66% of total Facebook users, although they constitute only 27% of the total population. Therefore, most of the youth are present and active on such social media platforms. Hence, it is not unusual for youngsters to make new social connections by sending friend requests. It no way implies that children who create social media accounts do so to search for sexual partners, or they intend to receive such invitations. The use of social media in present times is a norm. People use social media for networking, knowledge, and entertainment and indeed not to get stalked or be exploited sexually and mentally. Just because the victim sent a friend request to the accused does not give him the right and liberty to establish sexual relations with her.

9. In the present case, the victim is a child in the first year of her teens. The fact that she sent the friend request on Facebook to the accused cannot lead to the presumption that she did it with intent to allure the accused to establish coitus.

10. Another argument made by the petitioner's Counsel that the prosecutrix had mentioned her age as 18 years on her Facebook profile is also immaterial. No screenshot or evidence of any kind has been annexed with the petition. Further, it is not uncommon for people to not reveal everything about their age and identity on social media as it is a public platform. If a child mentions the wrong age on Facebook, it does not become a gospel truth, and it certainly does not lead to a prima facie presumption that such person is not a child but a major of 18 years of age or above. Even if hypothetically for bail, the Court believes it to be correct, this argument does not hold much weight because when the petitioner saw the victim in person, he must have gathered that the victim is a child. A girl of 13 years and 3 months of age cannot be presumed and believed to have an adult's physical appearance. Hence, the said argument is not acceptable and is subject to the appreciation of evidence led in the trial.

11. Thus, the petitioner's argument is that the accused believed the victim to be of 18 years of age and committed the sexual act with her consent. However, since the victim was under 18 years of age and her consent is immaterial, prima facie amounts to statutory rape. The legislature has been clear regarding the said clause and states that a person will be held liable if he commits sexual intercourse with a girl less than 18 years of age, with or without her consent.

12. In **Ragunath Ramnath Zolekar v State of Maharashtra** (Cr. Appeal No. 388 of 2010), the Division Bench of Bombay High Court (Aurangabad Bench) vide judgment dated 04.02.2013 dealt with many issues, and mistake of age as a defence was one of them. In the said case, the defence while relying upon *B (A Minor) v. Director of Public Prosecutions (2002 Appeal Cases)*, argued that *mensrea* is a part of Section 375 and 376 IPC and unless and until the knowledge of the accused that the prosecutrix being below the age of 16 years is proved, the penal liability for the said act will not be attracted. However, the Hon'ble Bench rejected the said argument and went onto observe,

> We, therefore, hold relying on the judgment in case of B (A Minor) v. Director of Public Prosecutions (2002 Appeal Cases), that the phrase "*with knowledge that prosecutrix is below 16 years of age*" cannot be read as if present in clause sixth of Section 376 of the Indian Penal Code. If any such attempt is made, it shall amount to tinkering with the scheme of statute.

13. Learned Counsel for the petitioner referred to certain statements and memos from the police report, prepared under Section 173(2) CrPC. As per the status report, on 24th June 2020, the SHO had filed a Police report under Section 173 (2) CrPC. Despite that, the petitioner did not place the relevant documents of the same on the record to make out a case for bail. While considering the bail application, when the police report is yet to be filed, the Court may call for the Police file to look into the nature of allegations and evidence collected by the police; however, once the Police file report seeking prosecution of the accused, and its copy handed over to accused, it is not for the Court to call for the record. Thus, it is not for the Court to direct the State to produce the police report because the State represents society and the victim nor can base its findings on a document in the Counsel's brief and not on Court's file. It may be unfair to ask the State to hand over the documents that the opposite party wants to show to corroborate its arguments. Such a burden would be on the petitioner once the accused, under Section 207 CrPC, receives the copy of the documents filed in the police report under Section 173 (2) CrPC.

14. Given above, in the facts and circumstances peculiar to this case, at this stage, the petitioner fails to make out a case for bail. The petition is dismissed with liberty to file new if so advised.

15. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

16. I express my gratitude to my interns Adv **Sakshi Attri** and Adv **Apoorva Maheshwari** for their excellent perspective.

The petition is dismissed.

(Anoop Chitkara),
Vacation Judge.

February 04, 2021 (mamta).