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IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
BAIL APPLICATION NO.3203 OF 2019

Kadir Kabir Husen .. Applicant

Vs.

The State of Maharashtra .. Respondent

...

Mr. Mahesh Rajpopat with Mr. Akshit Kothari i/b Mr. Ramesh Mishra for the Applicant.

Ms. Veera Shinde, A.P.P. for the State.

Mr. Vijay Jadhav, PSI attached to Andheri Police Station is present in the court.

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**CORAM : SMT. BHARATI DANGRE, J.**

**DATED : 31<sup>ST</sup> MARCH, 2021.**

**P.C:-**

1. While hearing the Bail Application, where the Applicant is arraigned as an accused in C.R. No.320 of 2018 registered with Andheri Police Station by invoking Sections 354, 363 and 376 of the IPC and Sections 8 and 12 of POCSO Act, some strange things have surfaced, which surely calls for an introspection of

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all the stakeholders dealing with issues of women, particularly minor girls.

2. The FIR came to be lodged by the complainant, who happened to be a passer-by. On the date of incident i.e. on 25/06/2018 at 10.15 p.m. when he was stranded at a signal on his bike, he noticed an auto-rickshaw with black curtains on all sides and could overhear frantic cry of a girl. When inquired, the auto-rickshaw driver responded by saying that his vehicle is having passengers. As the cries of the girl still continued, it is the version of the complainant that, he pulled out the curtain of the auto-rickshaw and noticed that one man was forcing himself upon a girl. Noticing this, he asked the person to come out of the auto-rickshaw and when he refused, he pulled him out. At that time, the traffic police reached there and the said person was apprehended. The person, who is alleged to have been apprehended, is the present Applicant.

3. The statement of the victim girl, who was found in the auto-rickshaw, was also recorded on 26/06/2018, where she gave her age as 16 years and her address as resident of Platform No.1, Andheri Railway Station, Andheri. When the version of the victim girl is perused, she referred to the entire incident in great detail and has stated that she knew the auto-rickshaw driver for 5 to 6 months and another person, to whom she has referred to as the person who committed the sexual assault on her, is alleged to

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be the brother of the auto-rickshaw driver. She admitted that she was given beer to drink and some food was also served and she relished the food and drink and was in a drunken state. She stated that she distinctly remember that at 8.00 p.m. the auto-rickshaw driver forced himself upon her though she resisted, she lacked in her strength to resist him as she was drunk and, thereafter, his brother, who was waiting for his turn also committed forcible sexual intercourse with her. She remembered being driven in the auto-rickshaw at 9.00 p.m. with the curtain being drawn since it was raining and a person on a vehicle came when the auto-rickshaw halted at the signal, who rescued her from the auto-rickshaw.

4. Learned counsel for the Applicant has drawn my attention to the conduct of the victim girl, particularly when she refused to undergo the medical examination. The papers placed on record reveal that the girl was admitted in Dr. R.N. Cooper Municipal General Hospital on 02/07/2018 and came to be discharged on 10/07/2018. The papers revealed that she had an abortion and the final diagnosis at the time of discharge is reflected as “sexual assault with complete abortion”. The said papers also reveal the history of the victim girl, which refer to the admission of the girl to the labour room and, at the time when she was brought on 26/06/2018, she refused to get admitted. However, the subsequent papers of her treatment dated 02/07/2018 upon sonography being performed, revealed a pregnancy failure of

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corresponding gestational age of 7 weeks and 4 days. On the basis of the said document, the submission of learned counsel is to the effect that there is no proof collated by the prosecution to establish that the girl was a minor and, secondly, it is the version of the Applicant that the girl was into flesh trade and, whatever had happened was with her consent and she being in her full conscious state.

5. In the entire material collected by the prosecution, not a single document is included to establish that the girl is of 16 years, particularly when the case of the Applicant is that she is more than 18 years. The Investigating Officer did not bother to conduct any ossification test.

6. When learned A.P.P. is asked about the victim and her present status, on instructions from the Investigating Officer, who is present in the court, learned A.P.P. states that she is still continue to dwell on Platform No.1 of Andheri Railway Station. It is surprising, rather shocking to note that a girl, who had met with a sexual assault and ravage is left on a railway platform in such a manner. There are legislations, which mandate the State in consonance with the imperative mandate contained in the Directive Principles of State Policy, to ensure that the youth is not exploited. It appears that the Investigating Officer of the present offence is not aware of any of the provisions of the law, which would have ensured the girl to be taken to some

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rehabilitation home or correction home and particularly, when it is the case of the prosecution that the girl is a minor, the assistance of the Juvenile Justice Board should have been taken, but nothing has been done.

7. Learned counsel for the Applicant is perfectly justified in submitting that in the absence of the appropriate material collected against the Applicant to base its case of committing rape on the victim girl, he remains incarcerated for more than 33 months. Since the Investigating Officer is present in the court, it is expected that at least now, some corrective steps be taken to trace the victim girl and take necessary steps as regards the said girl. Further, it is also necessary to subject her to ossification test, if no document is available with her as proof of her age. The medical papers also revealed that the DNA analysis of the foetus, which was aborted, was also done. Learned A.P.P. should also throw some light on the report of the DNA analysis. In any case, till the said picture becomes clear, the Applicant must wait.

8. Re-notify for 15/04/2021.

**SMT. BHARATI DANGRE, J.**