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* **IN THE HIGH COURT OF DELHI AT NEW DELHI****Date of decision: 25th July, 2023**+ **BAIL APPLN. 1396/2022****SHASHIM DAS**

..... Petitioner

Through: Mr. Mayank Kshirsagar, Mr. Akhilesh
Yadav & Ms. Sumrita Das, Advocates.

versus

STATE OF NCT OF DELHI AND ANR.

..... Respondents

Through: Mr. Aman Usman, APP for the State
with SI Ankur Kumar, P.S. Govind
Puri.**CORAM:****HON'BLE MR. JUSTICE AMIT SHARMA****JUDGMENT****AMIT SHARMA, J.**

1. The present application under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'CrPC') seeks bail in case FIR No. 340/2018 under Section 376 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO') registered at PS Govindpuri.



2. The present FIR was registered at the instance of the mother of the victim, who in her compliant stated as under:

- i. She resides in Govindpuri with her mother, brother, sister-in-law, niece and daughter. She stated that her husband had left her 6 years ago and now she lived with her parents in the same building on rent.
- ii. In the complaint. it was alleged that an uncle named Shashim Das, i.e., the applicant, who resides on the 2nd floor of the same building had committed some wrongs with her daughter, the victim.
- iii. It was alleged that the victim was bleeding with urine, on the evening of 04.10.2018 which was noticed by her grandmother. Thereafter she called her family doctor. After examination of the victim, the family doctor suggested that some wrong has been done to her and instructed her to call the police.
- iv. Thereafter, when the victim's mother enquired from the victim if anything had happened, she was fearful.
- v. It was further alleged in the complaint that on being asked whether her private parts had been touched by someone, the victim informed her mother that on 30.09.2018, she went to the applicant's house to play with his daughter, Priyanka. At first, they were watching television and thereafter, the applicant sent his daughter, Priyanka in a room to study and closed the door.
- vi. It was alleged that the applicant inserted his finger in the victim's 'private part' and threatened that if she would disclose the incident to her mother or anyone else, the same would not be good for her.



3. The MLC of the victim was conducted. In the MLC of the victim, it was stated that she gave a history of sexual assault by her neighbour, i.e., the applicant two days prior to the MLC. She gave a history of penetrative assault. The applicant was interrogated on 05.10.2018 and he is alleged to have admitted to his involvement in the alleged offences. Thereafter, he was arrested and has been in judicial custody since 06.10.2018. On 09.10.2018, the statements of the victim and her mother under Section 164 of the CrPC were recorded, wherein they repeated the allegations made in the FIR. The age of the victim was verified from her first attendant school. Her date of birth is stated to be 14.07.2012, which means that on the date of incident, she was nearly 06 years old. Upon completion of investigation, a chargesheet was filed on 07.12.2018 under Section 376 of the IPC and Section 6 of the POCSO Act and the matter was committed to the Court of the learned District and Sessions Judge, South-East District, Saket.

4. Learned counsel appearing on behalf of the applicant submitted that the allegations made in the FIR are false inasmuch as the same was registered only to settle a personal score with the applicant. It was submitted that the complainant's elder sister used to run a spa at Kotla Mubarakpur, New Delhi and it had come to the knowledge of the applicant that the complainant and her sister used the said spa for illegal activities and even misused the applicant's and his daughter's identity for the said purposes. It was submitted that a quarrel happened between the two families when the applicant warned the complainant against indulging in illegal activities and in order to falsely implicate the applicant, the present FIR was registered.



5. It was submitted that the case against the applicant is also not sustainable on account of the material contradictions between the statements of the victim and her mother recorded under Sections 161 and 164 of the CrPC and their testimonies recorded before the learned Trial Court. It was submitted that so far, the only evidence against the applicant are the statements given by the victim and her mother. It was submitted on behalf of the applicant that it is settled law that in cases where conviction is sought solely on the basis of the testimony of a witness, the said testimony should be of a 'sterling quality'. In view of the contradictions and improvisations made in the statements of the victim and her mother recorded at different stages of the case, it was submitted that they are unreliable witnesses.

6. Learned counsel for the applicant submitted that there are numerous contradictions in the deposition of the victim and her mother. It was submitted that in her statement under Section 161 of the CrPC, the victim has stated "*apni ungli niche (pointed to her private part) di thi*". It is submitted in her statement under Section 164 of the CrPC recorded before the learned metropolitan Magistrate, she stated "*unhone mera pant aur panty utar diya or mere susu kame vali jagah par apna finger rub kiya, unhone muje daraya aur kaha kisi aur ko bataya to mujhe ghar bula kar bahut marenge.*" It was submitted that in her statement before the Court, the victim stated "*fir mujhe bed par leta diya, fir apna pant nikala aur mera chhota aur bada pant nikala. Fir mujhe bed per leta diya. Fir apna pant nikala aur apna susu mere susu me daal diya*". It was submitted that in her cross-examination, the victim stated that the applicant's daughter, Priyanka was not at home on that day. It was further urged that at all the stages of the case, the victim gave different



versions of the incident and her testimony cannot be relied on. It was argued that even the medical report of the victim is contrary to her account of the alleged incident.

7. Learned counsel for the applicant further submitted that the FIR in the present case was registered on 05.10.2018, whereas the alleged incident took place on 30.09.2018. There is a delay of five days in registering the FIR which has not been satisfactorily explained by the victim and her mother in their statements recorded before the learned Trial Court.

8. Learned counsel appearing on behalf of the applicant draws the attention of this Court to the statement of PW-8, Dr. Garima Patel and submits that the MLC wherein it has been recorded that the hymen of the victim was torn cannot be relied upon. Learned counsel further relies upon the Medical Report of the victim which states that no injuries were found on the victim, which again contradicts the statements as the victim was bleeding for the last four days. Learned counsel for the applicant drew the attention of this Court to the MLC of the victim wherein it was stated "*Hymen-Vaginal orifice irregular- hymen tom- raw areas erythema 4 and 6 o'clock*". It was submitted that as per the medical jurisprudence, the position of the extent of hymenal tear during penetration that initial rupture of hymen from penetration is likely to occur in the posterior or lower midline position, whereas tearing of the hymen from digital penetration is laterally, usually at 3 or 9 O'Clock. According to the report of the Royal College of Physicians tears of the hymen are commonly at 5-7 O'Clock and that in most of the cases, injury to the posterior fourchette from the penile whereas digital penetration causes tears between 9 to 3 O' clock.



9. Learned counsel appearing on behalf of the applicant further relies upon relies upon cross-examination of the victim wherein she was confronted with a video recording of a conversation between her and the applicant's daughter. In the said conversation, the victim had admitted that the present applicant had done nothing wrong with her.

10. Learned Counsel appearing on behalf of the applicant placed reliance on the following judgments:

- i. Shiv Chandra v. State of NCT Of Delhi & Anr., Judgment dated 22.01.2022 in BAIL APPLN. 25 of 2021.
- ii. Rai Sandeep alias Deepu v. State (NCT of Delhi), (2012) 8 SCC 21.
- iii. Santosh Prasad alias Santosh Kumar v. State of Bihar, (2020) 3 SCC 443.
- iv. Ananda Chandra Majhi v. State of Odisha, Judgment dated 06.09.2021 of the Hon'ble High Court of Orissa in BLAPL No. 4893 of 2020.
- v. Anand Swaroop v. State (GNCTD), Judgement dated 10.12.2018 in BAIL APPLN. 272 of 2017.
- vi. Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130.
- vii. Dharmendra Bhati @ Kalu v. State, Judgment dated 02.08.2021 in BAIL APPLN. 2322 of 2021.
- viii. Manmeet Singh v. State NCT of Delhi & Anr., 2022 SCC OnLine Del 2052.
- ix. Mohit Kumar v. State NCT of Delhi, Judgment dated 28.04.2022 in BAIL APPLN. 457 of 2022.

11. *Per contra*, learned APP for the State opposed the present application for bail and submitted that the allegations against the present applicant are



serious in nature. The victim was six years old at the time of incident and her testimony recorded before the learned Trial Court, she has supported the case of the prosecution. It was further submitted that the contradictions pointed out by the learned counsel appearing on behalf of the applicant will be appreciated by the learned Trial Court after analyzing all the evidence placed on record by the prosecution at the stage of final arguments. Learned APP for the State further drew the attention of this Court to the MLC of the victim wherein it was stated that she gave a history of sexual assault by her neighbour, i.e., the applicant two days prior to the MLC. It was further submitted that at this stage, presumptions under Sections 29 and 30 of the POCSO Act also operate against the applicant. It was further submitted that so far as the delay in lodging the FIR is concerned, no questions were put to the witnesses with regard to the same during their cross-examination. It was submitted that the delay has been explained in the chargesheet and in the statement of mother of the victim.

12. It was further pointed out that the CD relied upon by the applicant is not admissible at this stage and it was further stated that the fact that the daughter of the present applicant confronted the victim about the present case itself becomes a ground to dismiss the bail application. It is further submitted that the judgments cited by learned counsel for the applicant do not apply to the facts and circumstances of the present case.

13. Heard learned counsel for the parties and perused the record.

14. The relevant provisions of the POCSO Act read as under:

"3. Penetrative sexual assault.—A person is said to commit "penetrative sexual assault" if— (a) he penetrates his penis, to any



extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis,

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5. Aggravated penetrative sexual assault.—

(m) whoever commits penetrative sexual assault on a child below twelve years;

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6. Punishment for aggravated penetrative sexual assault.—(1)

Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

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29. Presumption as to certain offences.—Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

15. The present applicant has been charged for commission of offence under Section 5 of POCSO punishable under Section 6 of the said Act. Therefore, the present case is covered by Section 29 of the POCSO which raises presumption of guilt against the accused, i.e., the applicant. The prosecution case with regard to sexual assault by the present applicant is



based on the statement of the victim who at the date of alleged incident was six years old. The victim's statement under Section 161 of the CrPC as well as under Section 164 of the CrPC had been consistent with regard to the act attributed to the present applicant. Learned counsel has vehemently argued that the improvement made by the victim in the testimony before the Court creates a doubt on the veracity of her statement. As per the learned counsel, the improvement is of a nature which renders the entire case of the prosecution as doubtful and therefore, the applicant deserves to be released on bail.

16. It is pertinent to note that apart from the statement made by the victim, the MLC also *prima facie* corroborates the case of the prosecution. Although, learned counsel for the applicant argued that the veracity of the medical evidence in light of the medical jurisprudence relied upon by him cannot be read in evidence, but that is yet to be established at the trial. Be that as it may, fact of the matter remains that there was a history of sexual assault as per the MLC. The said MLC records as under:

"vaginal orifice irregular - Hymen torn. Raw areas erythema 4 and 6 o clock"

The cross-examination of the victim and her mother also does not bring out any reasonable explanation as to why the victim who was aged six years at the time of the alleged incident, would falsely implicate the present applicant. A perusal of the cross-examination of the victim's mother further reflects that vague suggestions have been put to her with regard to some altercation but without any specific details of date, time or place. Similarly, there is nothing in the cross-examination to suggest as to why on the said



particular date, the complaint was made by the mother of the victim and not prior to that, at any point of time. The delay in filing of the complaint has been explained by the mother of the victim inasmuch as she has stated that the condition of the victim came to their knowledge only when her grandmother saw blood in her urine and when she complained of the pain.

17. Another peculiar aspect of the defence of the applicant is an alleged CD containing a conversation recorded by the applicant's daughter with the victim, wherein the latter is alleged to have stated that nothing wrong was done by the applicant. It is pertinent to note that once the victim was confronted with the said CD and was asked in her cross-examination as to why she said that the applicant had done nothing wrong with her, she replied "*Priyanka didi se katta hona muihe achha nahi lagta*". This aspect is significant and could be considered as one of the reasons as to why the victim kept quiet and did not complain about the alleged assault to her mother or grandmother. It is also further pertinent to note that this alleged conversation took place between the daughter of the applicant and the victim prior to her examination in the Court. The fact that the conversation was recorded demonstrates that it was a pre-meditated act to confront the victim before her deposition in Court. This clearly amounts to influencing the witness. It is settled law that the possibility of influencing the witnesses and tampering with evidence is a paramount consideration while deciding an application for bail.

18. The proposition of law in the judgments cited by the learned counsel for the applicant is not disputed but the facts of the present case are distinct. The applicant has not been able to, at this stage, to rebut the presumption of



guilt, as contained in Section 29 of POCSO and also the fact that there was an attempt to influence the witness.

19. In view of the facts and circumstances of the case, the present application is dismissed.

20. Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case pending before the learned Trial Court.

21. The application is dismissed and disposed of accordingly with all the pending application(s), if any.

22. Copy of the judgment be sent to the concerned Jail Superintendent for necessary information.

23. Judgment be uploaded on the website of this Court *forthwith*.

AMIT SHARMA
JUDGE

JULY 25, 2023/sn