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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.M.C. 3239/2014**

ANURADHA (MINOR) THRU GUARDIAN Petitioner
Represented by **Mr. Vikramjeet Singh Ranga,**
Adv.
versus

STATE & ANR Respondent
Represented by **Mr. Kewal Singh Ahuja, APP**
with **SI Parmindra Kumar, PS**
Pahar Ganj, Delhi.
Mr. Brijballabh Tiwari with
Mr. Anish Shrestha, Adv. for
R-2.
R-2 in custody.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER
27.07.2016

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Crl.M.A. 11282/2016

Exemption allowed subject to just exceptions.

CRL.M.C. 3239/2014 & Crl.M.A. 11281/2016

1. Vide order dated 6th June, 2014, learned Additional Sessions Judge granted regular bail to respondent No.2 in case FIR No.68/2014 under Section 376 IPC and Sections 3 and 4 Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act') registered at PS Pahar Ganj immediately after the charge sheet was filed on 11th March, 2014. The order of learned Additional Sessions Judge reads as under:-

"06.06.2014

Present: Sh. R.K. Tanwar, Addl. PP for the State.
Sh. Brij Ballabh Tiwari, Advocat, counsel for

accused.

Sh. Vikramjit Ranga, Advocate, counsel for complainant.

File is taken up today on the bail application of accused Vikas.

Ld. Counsel requests to release the accused on bail on the ground that accused is in custody since 13.02.2014 and charge-sheet has already been filed. It is submitted that prosecution has set up a case against the accused that accused had committed sexual intercourse with the victim without her consent when he saw that victim was going to bathroom in odd hours at about 1 AM, accordingly accused entered the bathroom and committed rape.

It is submitted that matter was sent for further investigation vide order dated 27.03.2014 and thereafter police has collected the CDRs of both the parties and from the CDRs, it is established that victim was talking with the accused continuously on 13.02.2014 from 0:31:47 hours to 1:04:56 hours, which shows that the victim and accused were in some intimacy, if there was any sexual intercourse, it cannot be against the wishes or will of the victim. It is further submitted that from the CDRs, it is further revealed that victim used to talk with the accused previously also. Counsel also produces the text message sent by the victim on 12.02.2014 at about 5.31 AM wherein she recited 'kay huw janu'. Ld. Counsel submits that this prima-facie shows that the victim has not revealed all true facts during investigation and the possibility that she had made a statement against the accused under some pressure cannot be ruled out.

Per contra, Ld. Addl. PP opposes the bail application on the ground that since the victim was minor, her consent, if any was not relevant. It is further submitted that since the sexual intercourse had taken place, accused has committed the offence of rape under Section 4 of POCSO Act and considering the gravity of offence, accused should not be released on bail.

On being asked about the said CDRs, Ld. Addl. PP submits that from the CDR, it appears that victim and accused were in touch with each other and police has not made any specific investigation in this regard and no attempt was made to seek clarification from the victim why she was talking with the accused in odd hours.

Considering the submissions of counsel for both the parties and facts and circumstances of the case, accused Vikas is admitted on bail on furnishing a personal bond in the sum of ₹20,000/- with one surety in the like amount with condition that he shall not leave Delhi without the prior permission of the Court; he shall not send any message; he shall not make call to the victim; he shall not meet the victim directly or indirectly.

Application stands disposed of.”

2. Challenging the said order, the prosecutrix who is a minor filed the present petition through her guardian before this Court seeking cancellation of the bail on the ground that discretion exercised by the learned Additional Sessions Judge is contrary to the express provisions of law.
3. Learned counsel for the petitioner refers to Section 437 Cr.P.C. and states that no bail could have been granted as respondent No.2 had allegedly committed the offence punishable for imprisonment for life. Further offence punishable under Section 4 POCSO Act entails a minimum punishment for a period of seven years and the maximum punishment provided is life imprisonment. He further contends that learned Additional Sessions Judge also failed to note the age of the prosecutrix, her MLC and the crime scene investigation report.
4. Learned counsel for respondent No.2 on the other hand contends that in view of the fact that prosecutrix and respondent no.2 were in constant

touch with each other and very friendly as per the messages, the learned Additional Sessions Judge committed no error in granting bail to respondent No.2.

5. Heard learned counsels for the parties and learned APP for the State.

6. The legal position with regard to cancellation of bail was noted by the Supreme Court in the decision reported as (2001) 6 SCC 338 Puran Vs. Rambilas & Anr. as under:-

“10. Mr Lalit next submitted that once bail has been granted it should not be cancelled unless there is evidence that the conditions of bail are being infringed. In support of this submission he relies upon the authority in the case of Dolat Ram v.State of Haryana [(1995) 1 SCC 349: 1995 SCC (Cri) 237]. In this case it has been held that rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted have to be considered and dealt with on different basis. It has been held that very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted. It has been held that generally speaking the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. It is, however, to be noted that this Court has clarified that these instances are merely illustrative and not exhaustive. One such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of this nature and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the society. Therefore, an arbitrary and wrong exercise of discretion by the trial court has to be corrected.

11. Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in *Gurcharan Singh v. State (Delhi Admn.)* [(1978) 1 SCC 118 : 1978 SCC (Cri) 41 : AIR 1978 SC 179] . In that case the Court observed as under: (SCC p. 124, para 16)

“If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that court. The State may as well approach the High Court being the superior court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-à-vis the High Court.”

12. It must be mentioned that in support of the above submission Mr Lalit had also relied upon the authorities in the cases of *Subhendu Mishra v. Subrat Kumar Mishra* [2000 SCC (Cri) 1508 : 1999 Cri LJ 4063] , *State (Delhi Admn.) v. Sanjay Gandhi* [(1978) 2 SCC 411 : 1978 SCC (Cri) 223] and *Bhagirathsinh v. State of Gujarat* [(1984) 1 SCC 284 : 1984 SCC (Cri) 63] . These need not be dealt with separately as they are of no assistance in a case of this nature where bail has been cancelled for very cogent and correct reasons.

13. Our view is supported by the principles laid down in the case of *Gurcharan Singh v. State (Delhi Admn.)* [(1978) 1 SCC

118 : 1978 SCC (Cri) 41 : AIR 1978 SC 179] . In this case it has been held by this Court that under Section 439(2), the approach should be whether the order granting bail was vitiated by any serious infirmity for which it was right and proper for the High Court, in the interest of justice, to interfere.

14. Mr Lalit next submitted that a third party cannot move a petition for cancellation of the bail. He submitted that in this case the prosecution has not moved for cancellation of the bail. He pointed out that the father of the deceased had moved for cancellation of the bail. He relied upon the cases of Simranjit Singh Mann v. Union of India [(1992) 4 SCC 653 : 1993 SCC (Cri) 22: AIR 1993 SC 280] and Janata Dal v. H.S. Chowdhary [(1991) 3 SCC 756 : 1991 SCC (Cri) 933] . Both these cases dealt with petitions under Article 32 of the Constitution of India whereunder a total stranger challenged the conviction and sentence of the accused. This Court held that neither under the provisions of the Criminal Procedure Code nor under any other statute is a third-party stranger permitted to question the correctness of the conviction and sentence imposed by the court after a regular trial. It was held that the petitioner, who was a total stranger, had no locus standi to challenge the conviction and the sentence awarded to the convicts in a petition under Article 32. The principle laid down in these cases has no application to the facts of the present case. In this case the application for cancellation of bail is not by a total stranger but it is by the father of the deceased. In this behalf the ratio laid down in the case of R. Rathinam v. State by DSP [(2000) 2 SCC 391 : 2000 SCC (Cri) 958] needs to be seen. In this case bail had been granted to certain persons. A group of practising advocates presented petitions before the Chief Justice of the High Court seeking initiation of suo motu proceedings for cancellation of bail. The Chief Justice placed the petitions before a Division Bench. The Division Bench refused to exercise the suo motu powers on the ground that the petition submitted by the advocates was not maintainable. This Court held that the frame of sub-section (2) of Section 439 indicates that it is a power conferred on the courts mentioned therein. It was held that there was nothing to indicate

that the said power can be exercised only if the State or investigating agency or a Public Prosecutor moves a petition. It was held that the power so vested in the High Court can be invoked either by the State or by any aggrieved party. It was held that the said power could also be exercised suo motu by the High Court. It was held that, therefore, any member of the public, whether he belongs to any particular profession or otherwise could move the High Court to remind it of the need to exercise its power suo motu. It was held that there was no barrier either in Section 439 of the Criminal Procedure Code or in any other law which inhibits a person from moving the High Court to have such powers exercised suo motu. It was held that if the High Court considered that there was no need to cancel the bail then it could dismiss the petition. It was held that it was always open to the High Court to cancel the bail if it felt that there were sufficient reasons for doing so.”

7. No doubt what weighed with the learned Additional Sessions Judge was the calls and messages between the prosecutrix and respondent No.2 however some material facts were ignored by learned Additional Sessions Judge like age of the prosecutrix at the time of incident was 13 years and thus even if she was friendly with respondent No.2, her consent was immaterial. Further the MLC of prosecutrix reveals that hymen was broken and there was vaginal bleeding. Contusions were present on medial part of bilateral legs, right breast and right forearm which shows that force was used against her.
8. In a case of this kind where allegations are very serious duly corroborated by medical evidence, the learned Sessions Judge certainly committed illegality in granting regular bail to the respondent especially when the prosecutrix was not even examined as a witness during trial.
9. The bail order was passed on June 06, 2014 and the present petition is

pending before this Court for the last two years. Learned APP for the State points out that during this period out of 16 witnesses, 10 witnesses have already been examined of which the prosecutrix and her mother are the material witnesses. The only material witness remaining to be examined is father of the prosecutrix whose examination-in-chief has been recorded and he is under cross-examination.

10. Though it is a fit case for cancellation of bail, however considering the fact that more than 2 years have passed when after the bail was granted to respondent No.2 and the Trial is at the stage of conclusion, it would not be appropriate for this Court to cancel the bail of respondent No.2. There is no allegation of misconduct or threatening of witnesses by respondent No.2 during this period except when he failed to appear before this Court and was taken into custody. Consequently, it is directed that respondent No.2 be released on bail on his furnishing a personal bond in the sum of ₹25000/- with two sureties of the like amount, subject to the satisfaction of learned Trial Court.

11. It is hoped and expected that learned Trial Court will conclude the trial expeditiously and preferably within six months.

12. Petition and application are disposed of.

13. Order dasti.

MUKTA GUPTA, J.

JULY 27, 2016
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